

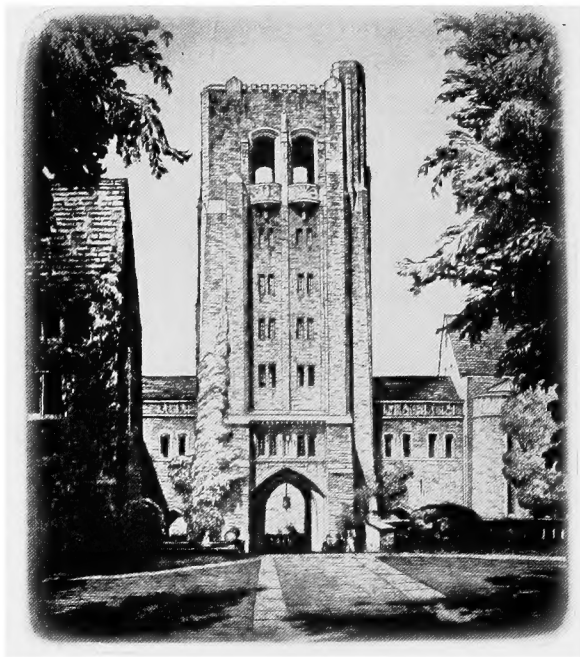
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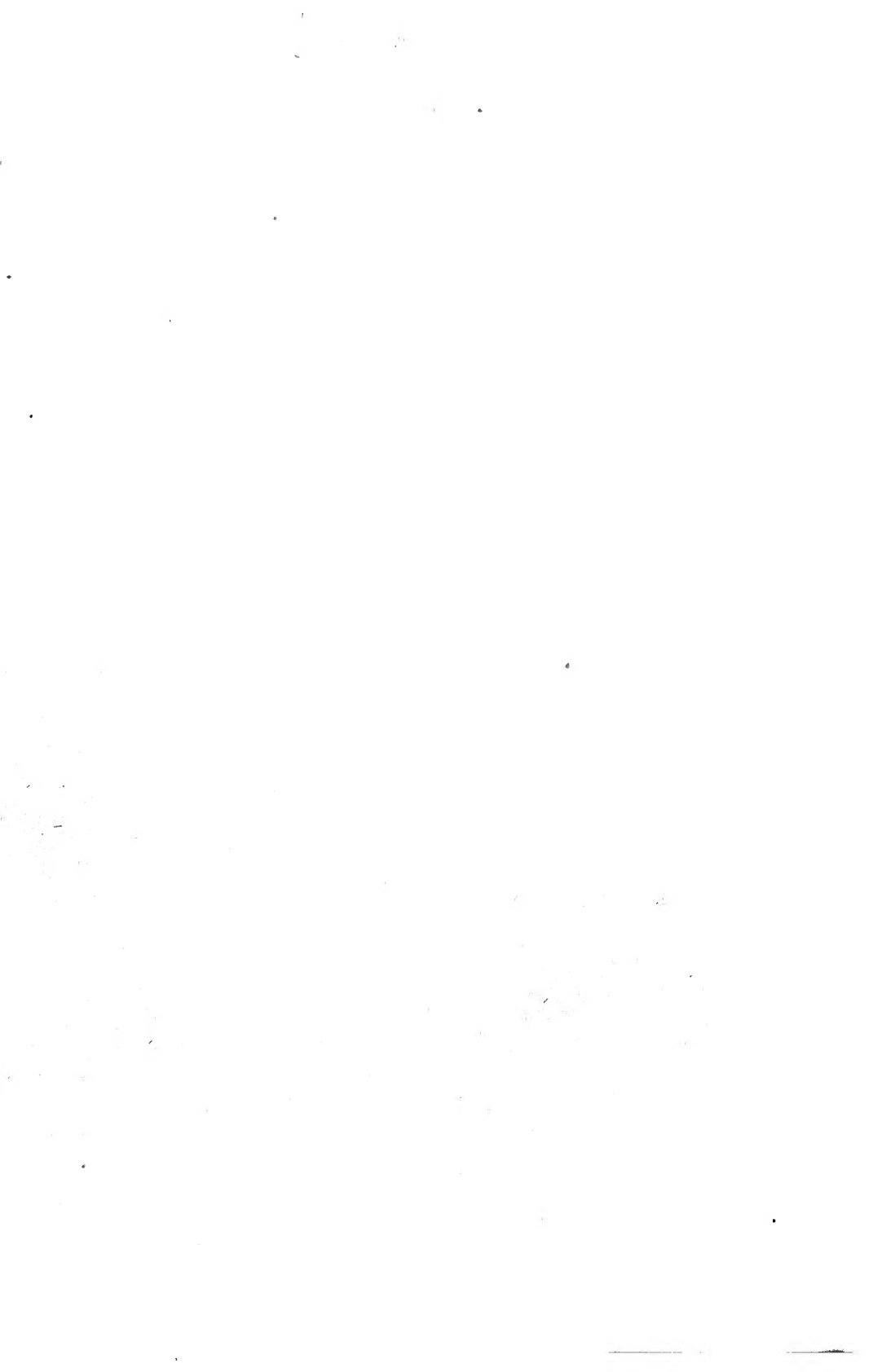


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DIGEST OF CASES
DETERMINED IN THE
SUPREME COURT OF CANADA.



DIGEST OF CASES

DETERMINED IN THE

SUPREME COURT OF CANADA

ON APPEAL FROM DOMINION, PROVINCIAL AND TERRITORIAL COURTS,
AND UPON REFERRED QUESTIONS FROM THE ORGANIZA-
TION OF THE COURT IN 1875 TO 20TH OCTOBER, 1903.

Comprising all cases reported in volumes 1 to 33 of the official reports, inclusively, the cases specially reported in Cassels's Digest (2nd ed.), and a number of cases, hitherto unreported, decided during the same period.

COMPILED BY

LOUIS WILLIAM COUTLÉE, K.C. (Que.), B.C.L. (McGill),
SOMETIME AN OFFICIAL LAW REPORTER OF THE COURT.

TORONTO, CANADA.
THE CARSWELL COMPANY, LIMITED.
1904.

B 9878

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PREFACE.

This digest has been compiled with a view to supplying a more comprehensive and classified index to the jurisprudence of the Supreme Court of Canada, in concise form, than has hitherto been within reach of the profession and other persons interested in following the decisions of the highest appellate tribunal in Canada. The decisions digested in Mr. Cassels's work have been, as a rule, incorporated as found in the head-notes of the official reports, and the cases that were specially reported by Mr. Cassels have been digested in more convenient shape. The remainder of the officially reported cases, with numerous unreported decisions, have been brought down to the date of the first judgments on appeals heard during the last Autumn Sessions of the court, 20th October, 1903, and some important notes added since that date. Many useful additions have been made to the official head-notes based upon careful re-consideration of the reasons for judgments, and, in some instances, new syllabi have been constructed, errors and omissions have been corrected where necessary, and it is hoped that the present work as revised, condensed and re-framed, will afford greater facility for consultation and shew more clearly the principles involved in the decisions of the court than any work of the kind heretofore published.

References to the decisions of the courts appealed from are given in all cases reported in the courts below, and the decisions of the Judicial Committee of the Privy Council, in cases reviewed on appeal from the Supreme Court of Canada, have been inserted wherever it was possible to do so.

In the Appendices, A and B lists appear of cases judicially noticed and the dispositions made in Supreme Court cases on appeal to the Privy Council.

In order to bring the work within convenient size without limiting its usefulness, copious cross-references have been inserted in the nature of further analytical index of the subjects, which should meet all ordinary needs of the profession in getting at the side-lights and having ready reference to the jurisprudence established since the organization of the court.

The names of the eminent jurists of whom the Supreme Court of Canada has been constituted since its organization, in 1875, will be found at page vii. A tabular statement of the business of the court is given at page xi.

It is suggested that in citations from this work a convenient abbreviated reference would be "Cout. Dig." (without mentioning it as a second edition, which it, in fact, is not), and that the column paginations should be treated as pages.

Ottawa, 17th December, 1903.

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CHIEF JUSTICES, JUDGES AND PRINCIPAL OFFICERS
OF THE SUPREME COURT OF CANADA, SINCE ITS
ORGANIZATION, IN 1875.

Chief Justices.

- Hon. Sir William Buel Richards, Knight, appointed 8th October, 1875, resigned 10th January, 1879, died 26th January, 1889.
Hon. Sir William Johnstone Ritchie, Knight, appointed 11th January, 1879, died 12th September, 1892.
Right Hon. Sir Samuel Henry Strong, Knight, appointed 13th December, 1892, resigned 18th November, 1902.
Hon. Sir Henri Elzéar Taschereau, Knight, appointed 21st November, 1902.

Judges.

- Hon. Sir William Johnstone Ritchie, Knight, appointed 8th October, 1875, afterwards Chief Justice.
Right Hon. Sir Samuel Henry Strong, Knight, appointed 8th October, 1875, afterwards Chief Justice.
Hon. Jean Thomas Taschereau, appointed 8th October, 1875, resigned 6th October, 1878, died 9th November, 1893.
Hon. Telesphore Fournier, appointed 8th October, 1875, resigned 12th September, 1895, died 10th May, 1896.
Hon. William Alexander Henry, appointed 8th October, 1875, died 5th May, 1888.
Hon. Sir Henri Elzéar Taschereau, Knight, appointed 7th October, 1878, afterwards Chief Justice.
Hon. John Wellington Gwynne, appointed 14th January, 1879, died 7th January, 1902.
Hon. Christopher Salmon Patterson, appointed 27th October, 1888, died 24th May, 1893.
Hon. Robert Sedgewick, appointed 18th February, 1893.
Hon. George Edwin King, appointed 21st September, 1893, died 8th May, 1901.
Hon. Désiré Girouard, appointed 28th September, 1895.
Hon. Sir Louis Henry Davies, K.C.M.G., appointed 25th September, 1901.
Hon. David Mills, appointed 8th February, 1902, died 8th May, 1903.
Hon. John Douglas Armour, appointed 21st November, 1902, died 11th July, 1903.
Hon. Wallace Nesbitt, appointed 16th May, 1903.
Hon. Albert Clements Killam, appointed 8th August, 1903.

Registrars.

Robert Cassels, Q.C., appointed 8th October, 1875, died 17th June, 1898.

Edward Robert Cameron, K.C., appointed 2nd July, 1898.

NOTE.—Charles Harding Masters, K.C., was acting Registrar from 15th June, 1897, until 2nd July, 1898, under General Order No. 97 of the Supreme Court of Canada, which became effete on the death of Robert Cassels, K.C., during the illness of whom the order was in force and effect.

Law Reporters.

George Duval, Q.C., appointed 20th January, 1876, died 6th June, 1895.

Archibald Sandwith Campbell, appointed Assistant Reporter, 3rd March, 1886, died 3rd September, 1886.

Charles Harding Masters, K.C., appointed Assistant Reporter, 1st October, 1886, appointed Chief Reporter, 2nd October, 1895.

Louis William Coutlée, K.C., appointed 2nd December, 1895.

Librarian.

Harris Harding Bligh, K.C., appointed 26th July, 1892.

Sheriffs.

William F. Powell, ex officio, under the Supreme Court Act, from the organization of the Court till his resignation of the office of Sheriff of the County of Carleton (Ont.), on 11th December, 1879.

John Sweetland, Sheriff of the County of Carleton, ex officio, from 11th December, 1879.

ABBREVIATIONS USED IN THIS DIGEST.

A.C. or App. Cas.....	Law Reports, House of Lords and Privy Council Appeal Cases.
Art.	Article.
B.C.	British Columbia.
B.N.A.	British North America.
c., ch., or cap.....	Chapter.
C.C.	Civil Code of Lower Canada.
C.C.P.	Code of Civil Procedure, Lower Canada (1867).
Cf.	Compare (<i>Conferre</i>).
C.J.	Chief Justice.
C.C.P.	Code of Civil Procedure (Lower Canada, 1867).
C.P.Q.	Code of Civil Procedure, Province of Quebec (1897).
C.P.R.	Canadian Pacific Railway
C.S.C.	Consolidated Statutes of Canada.
C.S.L.C.	Consolidated Statutes, Lower Canada.
C.S.M.	Consolidated Statutes of Manitoba.
C.S.U.C.	Consolidated Statutes, Upper Canada.
Can. or (C.).....	Canada (1840-1867).
Can. S.C.R.	Canada, Supreme Court Reports.
Cass. Dig.....	Cassels's Digest, Supreme Court Cases, 2nd edition (1893).
Cass. Sup. Ct. Prac.....	Cassels's Supreme Court Practice, 2nd edition, by Masters.
Ch.....	Chancery.
Ch. App.....	Law Reports, Chancery Appeals.
Ch. D.	Law Reports, Chancery Division.
Cout. Dig.....	Coutlée's Digest, Supreme Court Cases (1903).
(D.)	Dominion of Canada.
DeG.M. & G.....	DeGex, McNaughton & Gordon's Reports.
Div. Ct.....	Divisional Court.
Dor. Q.B.....	Dorion, Queen's Bench Reports (Quebec).
E. & I.....	House of Lords, English and Irish appeals.
ed.	Edition.
Ed. & Ord.....	Edits & Ordonnances (Lower Canada).
Ex. C.R.	Reports of the Exchequer Court of Canada.
F. & F.....	Foster & Finlayson's Reports.
Gr.	Grant's Chancery Reports.
G.T.R.	Grand Trunk Railway of Canada.
H.L.	House of Lords.
Imp.	Imperial.
J.	Justice.
JJ.	Justices.
K.B.	King's Bench.
L. C.....	Lower Canada.
L.C. Jur.	Lower Canada Jurist.
L.C.R.	Lower Canada Reports.
L.R.	Law Reports (English).

Man.	Manitoba.
Man. L.R.	Manitoba Law Reports.
Mer.	Merivale's Reports, Chancery.
M.L.R.	Montreal Law Reports (Queen's Bench and Superior Court).
Mun. Code Que.	Municipal Code, Quebec.
N.B.	New Brunswick.
N.B. Rep.	New Brunswick Reports.
N.W.	North-west.
N.W.T. or N.W. Ter.	North-west Territories of Canada.
N.W.T. Rep.	North-west Territories Reports (Canada).
N.S.	Nova Scotia.
N.S. Rep.	Nova Scotia Reports.
• O. or Ont.	Ontario.
Ont. App. R.	Ontario Appeal Reports.
Ont. P.R.	Ontario Practice Reports.
O.R.	Ontario Reports (Queen's Bench, Chancery and Common Pleas Divisions of the High Court of Justice for Ontario).
O. S.	Upper Canada Reports, old series.
P.D.	Probate, Divorce and Admiralty Division.
P.E.I.	Prince Edward Island.
Q., or Que.	Quebec.
Q.B.	Queen's Bench.
Q.L.R.	Quebec Law Reports.
Q.P.R.	Quebec Practice Reports.
Q.R.	Official Reports, Province of Quebec.
R. or Rep.	Reports (or Coke's Reports according to text).
R.L.	Revue Legale.
Rev. de Jur.	Revue de Jurisprudence (Quebec).
Rev. de Leg.	Revue de Legislation (Quebec).
Rev. Ord. N.W.T.	Revised Ordinances, North-West Territories (1888).
R.S.B.C.	Revised Statutes of British Columbia.
R.S.C.	Revised Statutes of Canada (1886).
R.S.M.	Revised Statutes of Manitoba.
R.S.N.B.	Revised Statutes of New Brunswick.
R.S.N.S.	Revised Statutes of Nova Scotia.
R.S.O.	Revised Statutes of Ontario.
R.S.Q.	Revised Statutes of Quebec.
s. and ss.	Section, sections.
s.s.	Sub-section.
S.C.	Superior Court.
ser.	Series.
Sim.	Simon's Reports, Chancery.
U. G.	Upper Canada.
U.C.C.P.	Upper Canada, Common Pleas Reports.
U.C.Q.B.	Upper Canada, Queen's Bench Reports.
Yuk.	Yukon Territory.

Statement of the disposition of all matters entered in the Supreme Court of Canada from its organization up to 6th October, 1903.

PROVINCE OR DIVISION FROM WHICH APPEALS OR REFERENCES WERE ENTERED.	OPINIONS.	REVERSED.	AFFIRMED.	MODIFIED.	QUASHED, SETTLED OR DISPOSED OF ON PRELIMINARY MOTIONS.	NUMBER OF DECISIONS IN EACH PROVINCE OR DIVISION.	STANDING FOR JUDGMENT.	MATTERS PENDING OR NOT PROSECUTED.	TOTALS BY PROVINCES OR DIVISIONS.
References by Gov. Gen. in- Council or by Parliament. Court of Exchequer and Dom. Arbitrators.	21					21			21
Ontario		25	67	2	7	101		6	110
Quebec		174	378	41	115	703		14	717
Nova Scotia		184	360	34	132	710		25	735
New Brunswick		98	159	13	20	290		17	307
Manitoba		60	82	13	22	177		5	182
P. E. Island		22	25	1	7	55	None.	4	59
British Columbia		7	12	1	4	24		5	24
N. W. Territories		24	40	6	10	80		3	89
Yukon		4	13	1	5	23		23	23
		3	5	1	6	15		4	19
Total in each class	21	601	1136	113	328	2199	None.	87	2286
Matters not prosecuted or pending						87			
Total						2286			

This table takes no note of cross-appeals, nor of motions, nor of applications incidental to procedure before the full court or a judge in chambers.

ADDITIONS AND CORRECTIONS

TO BE MADE BEFORE USING THIS BOOK.

"Neglecta prudens corrigit lector."

Page 45, lines 17, 18, 19, 20, for "280" read "279"; for "281" read "280"; for "282" read "281"; and for "283" read "282."

Page 90, line 32, for "action" read "order."

Page 91, at foot, add reference to report in court below "Q. R. 12 K. B. 445."

Page 102, after par. 251, add "Leave to appeal to Privy Council granted August, 1903."

Page 105, under the sub-title "JURISDICTION" add the following:
"282. *Criminal conviction—Affirmation by full court—Judges absent at hearing or judgment—Unanimous decision—Appeal to Supreme Court.*

"A criminal case reserved on points of law was argued before the Chief Justice and a Judge of the Court of Queen's Bench (Ont.), and on 4th February, 1878, the same Judges affirmed the conviction. The full court should be constituted of the Chief Justice and two puisne Judges. On appeal to the Supreme Court, under 38 Vict. c. 11, s. 49: *Held*, that, although the conviction had been affirmed by but two Judges, the decision was unanimous, and, therefore, not appealable. *Amer v. The Queen*, ii. 592." And in line 9, from bottom, for "282" read "283."

Page 117, line 15, for "Superior" read "Supreme."

Page 125, after first paragraph add "Leave to appeal to Privy Council, *in formâ pauperis*, granted August, 1902."

Page 135, after second paragraph for "INSTITUTION" read "CORPORATIONS."

Page 195, line 48, for "*Le*" read "*La*," and, at line 51, for "L. T." read "Times L. R."

Page 234, line 16, for "Const" read "Court."

Page 265, line 38, add "Judgment appealed from (Q. R. 8 Q. B. 128) reversed."

Page 266, after first paragraph add "Judgment appealed from (33 N. S. Rep. 77) affirmed."

Page 315, line 31, for "180" read "183."

Page 319, line 24, for "granted" read "refused."

Page 325, line 68, for "10 Q. L. R. 305" read "13 Q. L. R. 205."

Page 329, line 53, add "Judgment appealed from (35 N. B. Rep. 77), affirmed."

Page 364, line 40, after "Nova Scotia" add "(33 N. S. Rep. 156)."

Page 370, after first paragraph, add "See 9 B. C. Rep. 343."

Page 382, line 8, for "granted" read "refused."

Page 387, after paragraph 36, add "Costs are now allowed. See PRACTICE OF THE SUPREME COURT, No. 63, *note*."

Page 410, line 14, for "195" read "201."

Page 413, line 19, for "195" read "201."

Page 415, line 32, for "195" read "201."

Page 419, after paragraph 84, add reference to "Can. Gaz. vol. xli., p. 400," also to report "33 Can. S. C. R. 667."

Page 426, line 28, for "195" read "201."

Page 441, line 3, for "234" read "243."

Page 475, at foot add "AND *see* QUAKERS."

Page 544, line 21, for "Lunenburg" read "Louisburg."

Page 548, line 43, for "372" read "373."

Page 555, line 25, for "(ser.)" read "(4 ser.)"

Page 567, after first paragraph add "Leave to appeal to Privy Council, *in forma pauperis*, granted August, 1902."

Page 568, line 4, for "211" read "221."

? Page 571, line 46, for "*omnis*" read "*omnia*."

Page 583, after paragraph 181, add "Judgment appealed from (33 N. S. Rep. 77), affirmed."

Page 624, after first paragraph add "Appeal to Privy Council dismissed for non. pros."

Page 631, line 30, after "from" add "(Q. R. 12 K. B. 44)."

Page 649, after first paragraph add "Leave to appeal to Privy Council granted, November, 1903."

Page 651, line 31, after "Bench" add "Q. B. 9 Q. B. 367."

Page 678, lines 29 and 65, for "xxi." read "xxxi."

Page 743, line 34, for "211" read "221."

Page 802, after paragraph 2, add "See foot-note, col. 967, *post*."

Page 837, line 26, for "refused" read "was granted (33 Can. Gaz. 393), but subsequently, on compromise between the parties, the appeal was dismissed for want of prosecution."

Page 863, after title "MORTMAIN ACTS," add "See STATUTE OF MORTMAIN."

Page 872, line 54, for "295" read "365."

Page 910, line 35, for "236" read "245."

Page 1054, after first paragraph, add "Appeal to Privy Council dismissed for non. pros."

Page 1081, lines 53, 54, delete the word "Edward."

Page 1118, line 40, delete "v. Sullivan."

Page 1150, line 4 from bottom, add after "value," "Judgment appealed from (9 B. C. Rep. 82), reversed."

ANALYTICAL DIGEST OF CASES

IN THE

SUPREME COURT OF CANADA.

DECISIONS FROM THE ORGANIZATION OF THE COURT TO
OCTOBER, 1903; VOLUMES I. TO XXXIII, INCLUSIVELY.

ABANDONMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS—EXECUTION—INSURANCE, MARINE SURRENDER.

ABANDONMENT OF HYPOTHECATED LANDS.

Hypothecary action—Délaissement en justice—Action on personal covenant—Joint debt—Joint and several hypothec—Eviction as to part only.

See MORTGAGE, 50.

ABANDONMENT OF SEIZURE.

Writ of attachment—Seizure in execution—Action against sheriff—Estoppel.

See SHERIFF, 5.

ABATEMENT OF ACTION.

Péremption d'instance—Retrospective legislation—Arts. 1 & 279 C. P. Q.—Art. 454 C. C. P.

See LIMITATION OF ACTIONS, 13.

ABATEMENT OF APPEAL.

Election petition—Dissolution of Parliament—Abatement of proceedings—Return of deposits—Payment out of court below—Practice.

See ELECTION LAW, 1.

ACCESSION.

Title to Land—Description—Plan of subdivision—Change in street line—Troubles de droit—Eviction.

See TITLE TO LAND, 125.
S. C. D.—1

ACCESSORY.

Fraudulent appropriation—Unlawful receiving—Simultaneous acts.]—A fraudulent appropriation by a principal and a fraudulent receiving by an accessory may take place at the same time and by the same act. McIntosh v. The Queen, xxiii., 180.

ACCIDENT.

See INSURANCE ACCIDENT—NEGLIGENCE—VIS MAJOR.

ACCORD.

See CONTRACT.

ACCOUNT.

1. *Charges against succession—Débats de comptes—Sale of stock-in-trade—Onus probandi—Evidence.]—In a débats de comptes between the tutor to a minor child and the universal legatee who had possession of the minor's property items, \$5,466.63 (for stock of goods sold by L. R. to his son) and \$451.07 and \$90.76 for "cash received at the counter," were contested. In 1871, L. L. R., the minor's father, by his contract of marriage obtained from his father, L. R., immoveable property, en avancement d'hoirie. At the same time L. R. retired from business and left L. L. R. the whole of his stock-in-trade, valued at \$5,466.63. L. L. R. died in 1872, leaving one child, said minor. There was no evidence that the stock-in-trade had been sold by the father and purchased by the son, or that the father gave it to his son, but in making an inventory of the succession of L. L. R. he was charged with this amount of \$5,466.63: Held, reversing the judgment appealed from (2 Dor. Q. B. 74), that it was for the universal legatee to prove that there had been a sale of the stock-in-trade by L. R. to L. L. R., and there being no evidence of such a sale, she could not legally charge the minor child with that amount.—The other*

two items were allowed by the Court of Queen's Bench on the ground that, although they had been entered as cash received at the counter, there was evidence that they had been already entered in the ledger. The only evidence to support this fact was the affidavit of the book-keeper of L. R., since deceased, filed with the *reddition de comptes* before a notary, prior to action: *Held*, reversing the judgment appealed from (2 Dor. Q. B. 74), that the affidavit of the book-keeper was inadmissible as evidence, and, therefore, these two items could not be charged against the minor. *Gagnon v. Prince*, vii. 386. The Privy Council refused leave to appeal; 8 App. Cas. 103.

2. *Reddition de compte—Contradictory pleas—Unsworn account—Practice.*]—In an action *en reddition de compte* by an assignor against his assignee, the assignee by his plea answered that he was not bound to render an account, and at the same time alleged that he had already accounted for the moneys as garnishee in another suit, but he produced an unsworn account, and asked the court to declare the same to be a true and faithful account of his administration, and prayed for the dismissal of the plaintiff's action: *Held*, reversing the judgment appealed from (11 Q. L. R. 342) and restoring the judgment of the Court of Review at Quebec, that although the parties had joined issue and heard witnesses to prove certain items of the unsworn account produced, the plaintiff was first entitled to a judgment of the court ordering the defendant to produce a sworn account supported by vouchers, and therefore his action had been improperly dismissed. *L'Heureux v. Lamarche*, xii., 460.

3. *Taking accounts—Charge to jury—Inability to deal with accounts.*]—Counsel for plaintiff requested the judge to instruct the jury to take certain accounts into consideration. The jury stated that they were unable to deal with the accounts: *Held*, that the case could not be properly decided without taking accounts and that it could be more properly dealt with as an equity case. *Griffiths v. Boscowitz*, xviii., 718.

4. *Curator—Administration—Form of action—Indivisibility—Release—Specific performance—Mandate—Purchase of trust estate—Parties to suit—Art. 1484 C. C.—Art. 920 C. C. P.*]—Respondent, representing the institutes and substitutes under the will of the late J. D., brought an action against appellant, one of the institutes who acted as curator and administrator of the estate for a certain time, for an account of three particular sums, which plaintiff alleged defendant had received while curator: *Held*, reversing the judgment appealed from (18 R. L. 647), that an action did not lie against the appellant for these particular sums apart and distinct from an action for an account of his administration of the rest of the estate.—Plaintiff alleged that he represented S. D., one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of defendant £447 7s. 6½d., defendant having in an action of account settled by deed with S. D. for \$4,000 which he agreed to pay and for which plaintiff became surety: *Held*, that as the deed gave defendant a full and complete discharge of all accounts as curator or administrator of the estate, plaintiff could

not claim a further account of these particular sums.—Plaintiff also claimed to represent F. D. and E. D. two other institutes, in virtue of assignments to him by them on 21st January and 15th November, 1869, respectively. In 1865, after defendant had been sued in an action of account, by a deed of settlement, F. D. and E. D. agreed to accept as their shares in the estate \$4,000 each, and gave defendant a complete and full discharge: *Held*, affirming the judgment appealed from, that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement.—By the judgment appealed from (18 R. L. 647), defendant was condemned to account for his own share transferred to plaintiff in 1862, and also for C. D.'s share, another institute who in 1882 transferred his rights to plaintiff. The transfer by defendant was as co-legatee of such rights and interests as he had at the time of transfer, and he had at that time received the sixth of the sum for which he was asked to account: *Held*, reversing the court below, that plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in action to account as mandatory or *negotiorum gestor* of plaintiff. 2. That F. D. and E. D., having acquired an interest in C. Z. D.'s share after the transfer of their shares to plaintiff in 1869, plaintiff could not maintain his action without making them parties to the suit.—*Quære*, Were the transfers made by the institutes to plaintiff while curator, null and void under art. 1484, C. C.? *Dorion v. Dorion*, xx., 430.

5. *Partnership—Settled accounts—Releases—Setting aside releases and opening accounts.*]—One of two members of a firm not possessing business capacity the other managed and controlled all its affairs, presenting at intervals to his partner statements of account which the latter signed on being assured of their correctness. In 1891 mutual releases of all claims and demands against each other, based upon statements so submitted by the active partner, were executed by each. In an action against the active partner to set aside these releases and open up the accounts: *Held*, that all it was necessary to establish was, that in the accounts as settled there were such errors and mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed. *West v. Benjamin*, xxix., 282.

6. *Appeal—Débats de compte—Issues en reddition—Amount in controversy—Jurisdiction.*]—In an action *en reddition de compte*, where items in the account filed exceeding in the aggregate two thousand dollars have been contested, the Supreme Court of Canada has jurisdiction to entertain an appeal. *Bell v. Vipond*, xxxi., 175.

7. *Action for account—Agent's returns—Compromise—Subsequent discovery of error—Rectification—Prejudice.*]—P. was agent to manage the wharf property of W., and receive the rents and profits thereof, being paid by commission. When his agency terminated W. was unable to obtain an account from him and brought an action therefor which was compromised by P. paying \$375, giving \$125 cash and a note for the balance, and receiving an assignment of all debts

due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that, on one of the accounts assigned to him, \$100 had been paid and demanded credit on his note for that sum. This W. refused, and in an action on the note P. claimed that the error avoided the compromise and that the note was without consideration or, in the alternative, that the note should be rectified: *Held*, affirming the judgment of the Supreme Court of Nova Scotia, that as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by the compromise, W. was prevented from going fully into the accounts and perhaps establishing greater liability on the part of P., W. was entitled to recover the full amount of the note. *Peters v. Worrall*, xxxii., 52.

8. *Illegal possession—Ejectment—Injunction—Order for account—Jurisdiction of Court of Chancery—R. S. O. (1877) c. 40, s. 87—33 V. c. 23 (Ont.).*

See TITLE TO LAND, 99.

9. *Assignment of mortgage—Purchase of equity—Action for account.*

See MORTGAGE, 57.

10. *Reddition—Settlement—Reformation—Errors and omissions.*

See ACTION, 2.

11. *Sale of minor's property—Shares held "in trust"—Notice—Purchase for value.*

See TRUSTS, 7.

12. *Parties to suit—Chose in action—Indorsement of order for money—Absolute transfer—Res judicata.*

See PRACTICE AND PROCEDURE, 4.

13. *Administration by trustee—Claims in insolvency—Payments on secured claims—Release of hypothec—Security for advances—Prête-nom—Interest.*

See BANKS AND BANKING, 17.

14. *Reference to accountant by court—Adoption of report—Supplemental demand.*

See CONTRACT, 11.

15. *Administration—Discharge by minor—Débats de compte—Interest.*

See TUTORSHIP, 2.

16. *Action on bond—Collateral securities—Equitable plea—Reference to master—Trust by mortgagee—Neglect in collecting.*

See MORTGAGE, 1.

17. *Statement of account—Errors and omissions—Notice of acknowledgment.*

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18. *Will—Legacy—Bequest of partnership business—Acceptance by legatee—Right of legatee to an account.*

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19. *Partnership—Division of assets—Art. 1898 C. C.—Mandate—Debtor and creditor.*

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20. *Debtor and creditor—Security for debt—Security realized by creditor—Appropriation of proceeds—Res judicata.*

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21. *Trust funds—Abandonment by cestui que trust—Evidence.*

See TRUSTS, 18.

22. *Municipal corporation—Railway aid debentures—Sale of shares at discount—Trustee—Debtor and creditor—Division of county—Erection of new municipalities—Assessment—Action en reddition de comptes—Arts. 78, 164, 939, Mun. Code, Que.—24 Vict. c. 30 (Que.)—29 Vict. c. 50 (Que.).*

See ACTION, 4.

23. *Débats de compte—Issues on reddition—Amount in controversy.*

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25. *Partnership—Action pro socio—Procedure.*

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See TITLE TO LAND, 32.

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See TITLE TO LAND, 100.

3. *Description of lands—Falsa demonstratio—Water lots—After acquired title—Contribution to redeem.*

See MORTGAGE, 52.

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ACQUIESCENCE.

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1. ACCOUNT.

1. *Reddition de compte — Contradictory pleading — Practice — Right of action.*] — Where incompatible pleas have been filed and no sworn account regularly rendered in an action *en reddition de compte*, the point to be first decided is the plaintiff's right to have an account properly rendered. Judgment appealed from (11 Q. R. R. 342), reversed. *L'Heureux v. Lamarche*, xii, 460.

2. *Reddition de compte—Mandate—Settlement without vouchers—Réformation de compte — Errors and omissions.*] — If a mandator and a mandatory, labouring under no legal disability, come to an amicable settlement about the rendering of an account due by the mandatory without vouchers or any formality whatsoever, such a rendering of account is perfectly legal; and if subsequently the mandator discovers any errors or omissions in the account his recourse against his mandatory is by an action *en réformation de compte*, and not by an action asking for another complete account. Judgment appealed from (M. L. R. 3 Q. B. 167), affirmed. *Gulespie v. Stephens*, xiv, 709.

3. *Account—Dealings through third party—Lien on raft—Interest of plaintiff—Proceeds of sale of timber—Advances.*] — The plaintiff as owner in possession of a raft of timber, valued at \$30,000, being in want of money, applied to the defendant for a loan of \$3,000, which he obtained on transferring

the raft as security. The defendant disposed of the timber, but did not account for the proceeds. The plaintiff, admitting that the defendant was entitled to re-pay himself the advance of \$3,000, and expenses, prayed for an account, or, in default, \$30,000, the alleged value. The defendant pleaded that the raft was received, not from the plaintiff, but from one B., whose property it was, under whose instructions he had disposed of it, and to whom he had, before suit, accounted: *Held*, affirming both courts below, that the plaintiff was not entitled to the account for which he asked, the dealings of defendant having been with B., to whom alone he was accountable, and plaintiff having no real interest when his action was brought. *Fournier and Henry, JJ.*, dissented. *Doran v. Ross*, 23rd June, 1884; Cass Dig. (2 ed.) 829.

4. *Municipal corporation—By-law—Railway aid—Subscription for shares—Debentures—Division of county—Erection of new municipalities—Assessment—Sale of shares at discount — Action en reddition de comptes — Trustee — Debtor and creditor — Arts. 78, 164, 939, Mun. Code, Que. — 24 Vict. c. 30 (Que.)—39 Vict. c. 50 (Que.)*] — An action *en reddition de comptes* does not lie against a trustee invested with the administration of a fund, until such administration is complete and terminated. — The relation existing between a county corporation under the provisions of the municipal code of the Province of Quebec and the local municipalities of which it is composed, in relation to money by-laws, is not that of agent or trustee, but the county corporation is a creditor, and the several local municipalities are its debtors for the amount of the taxes to be assessed upon their rate-payers respectively. — Where local municipalities have been detached from a county, and erected into separate corporations, they remain in the same position, in regard to subsisting money by-laws, as they were before the division, and have no further rights or obligations than if they had never been separated therefrom, and they cannot either conjointly or individually institute actions against such county corporation to compel the rendering of special accounts of the administration of funds in which they have an interest, their proper method of securing statements being through the facilities provided by article 164, and other provisions of the municipal code. *Township of Ascott v. County of Compton; Village of Lennoxville v. County of Compton*, xxix., 228.

5. *Partition — Parties — Substitution — Transfer of shares—Release.*

See ACCOUNT, 4.

6. *Testamentary succession—Balance due by tutor—Executors—Action for account—Action for provisional possession—Parties to action.*

See PRACTICE, 1.

2. ASSUMPSIT AND COMMON COUNTS.

7. *Pledge—Lien—Art. 9175 C. C.—Intervention—Factor.*] — Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien

upon the goods themselves nor on the price received for them. *Dingwall v. McBean*, xxx., 441.

8. *Special assumpsit — Agreement with ship's husband — Breach.*

See CONTRACT, 194.

9. *Contract to saw logs — Rescission — Work and labour done — Recovery on common counts.*

See CONTRACT, 27.

10. *Parol agreement — Memo. in writing — Damages — Special count — Common counts.*

See EVIDENCE, 16.

11. *Bailees — Money sent by express — Condition precedent to action — Notice of claim for non-delivery — Special plea — "Never indebted."*

See No. 21 *infra*.

3. CONDUCTIO INDEBITI.

12. *Contract — Sale of patent — Future improvements — Money had and received.* — By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine for which he had applied and a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The latter received an assignment of the Canadian patent and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat and they refused to pay the balance, and in an action by M. to recover the same, they demanded by counterclaim a return of what had been paid on account: *Held*, reversing the judgment of the Court of Appeal, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement; and that as the evidence shewed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover. *Held*, further, Gwynne, J., dissenting, that as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked it for their own profit and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. *Bingham v. McMurray*, xxx., 159.

13. *Condictio indebiti — Title to land — Exposure to eviction — Sheriff — Vacating sale — Refund of price of adjudication — Substitution not yet open — Prior incumbrancer — Petition — Arts. 706, 710, 714, 715, C. C. P.]* — The provisions of article 715 of the Code of Civil Procedure of Lower Canada do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of a deed, nor does that article give a right to have such a sale vacated, and the amount paid refunded. The *actio condictio indebiti* for the recovery of the price paid by the purchaser of lands lies only in cases where there has been actual eviction. Mere exposure

to eviction is not sufficient ground for vacating a sheriff's sale. The procedure by petition provided by the Code of Civil Procedure for vacating sheriff's sales can only be invoked in cases where an action would lie. *Trust and Loan Co. v. Quintal* (2 Dor. Q. B. 190), followed. *Deschamps v. Bury*, xxix., 274.

14. *Condictio indebiti — Répétition de l'indu — Fictitious claims — Misrepresentation — Evidence — Onus probandi — Arts. 1047, 1048, 1140 C. C. — Railway subsidies — 54 Vict. c. 88 (Que.) — Insolvent company — Construction of railroad by new company — Payment of claims by crown — Transfer by payee.* — A company formed for the construction of a subsidized railway having failed, another company undertook to complete it, and the government of Quebec agreed to pay all the actual debts against the road out of the unearned subsidies. A., the contractor of the former company, presented a claim for \$175,000, which was approved of and paid, whereupon he paid over \$100,000 of the amount to P. for services performed in organizing the new company and obtaining payment of the claim. The government afterwards brought an action against P. to recover back the \$100,000 on the ground that A.'s claim was fictitious and was paid on false representations: *Held*, reversing the judgment of the Court of Queen's Bench, that the action must fail if it could not have been maintained against A., that the onus was on the Crown of proving A.'s claim to be fictitious, and that the Crown not only failed to satisfy such onus, but the evidence clearly established the claim to be a just and reasonable one. *Held*, further, that, in any case, the action could not be maintained, as it failed to ask for the cancellation of the order in council, the letter of credit and the payment made by the Crown thereunder. *Held*, further, that the payment to A., with the consent of the new company, was a discharge to the government *pro tanto* of the subsidy due to the company, and if wrongfully paid the latter only could recover it back. *Held*, also, that even if the Crown could have recovered the amount from A., it could not succeed against P., who, as the record shewed, had ample reason for believing that the company was indebted to A., as claimed. *Pacaud v. The Queen*, xxix., 637.

15. *Municipal taxes — Railways — By-laws — Voluntary payment — Action to recover back moneys paid to corporation.* — *Held*, per Strong C.J., that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality. Judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 246) affirmed. *Canadian Pacific Ry. Co. v. City of Quebec. Grand Trunk Ry. Co. v. City of Quebec*, xxx., 73.

16. *Money paid — Failure of consideration — Right to recover — Construction of contract.*

See CONTRACT, 240.

17. *Condictio indebiti — Payment of illegal tax — Error of law — Proof.*

See ASSESSMENT AND TAXES, 49.

18. *Unconstitutional act — Payment with departmental sanction — Recovery of money disbursed.*

See LIQUOR LAWS, 6.

19. *Stock jobbing — Margin payments — Money had and received.*

See BROKER, 2.

20. *Répétition de l'indu — Actio conductio indebiti — Error as to fact — Payment under threat of prosecution — Ratification — Trans-action.*

See MISTAKE, 3.

4. CONDITION PRECEDENT.

21. *Bailees — Common Carriers — Express company — Receipt for money parcel — Conditions precedent — Formal notice of claim — Pleading — Money had and received — Special pleas — "Never indebted."]* — Where an express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed: *Held*, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee. *Richardson v. The Canada West Farmers' Ins. Co.* (16 U. C. C. P. 430) distinguished. — In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" put in issue all material facts necessary to establish the plaintiff's right of action. *Northern Pacific Express Co. v. Martin*, xxvi., 135.

22. *Damages — Quasi-delit — Limitations — Arbitration — C. S. L. C. c. 51.]* — The mode of proceeding provided by C. S. L. C. c. 51, does not exclude the right of proceeding by action. (See 7 Q. L. R. 286; 15 R. L. 514). *Breakey v. Carter*, 12th May, 1885. Cass. Dig. (2 ed.) 463.

23. *Compensation — Defence — Taking advantage of one's own wrong.]* — In an action to recover an amount received by the defendant for the plaintiff, the defendant pleaded *inter alia* that the action was premature inasmuch as he had got the money irregularly from the treasurer of the Province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided: *Held*, affirming the judgment of the court below, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings. *Bury v. Murray*, xxiv., 77.

24. *Accident insurance — Condition in policy — Notice — Condition precedent — Action.]* — A policy contained a condition that written notice should be given within thirty days of accident, to the manager at Boston, or the agent whose name was endorsed thereon. Insured having died from an accident, the beneficiary brought action on the policy to which the company pleaded want of notice under the condition. The plaintiff's demurrer was allowed. *Held*, Gwynne, J., dissenting, that notice in conformity with the condition was a condition precedent to action, and that the demurrer must be overruled. *Employers' Liability Ass. Co. v. Taylor*, xxix., 104.

25. "Mortgage clause" — Fire insurance — Assignment of interest in property in-

sured — Arbitration — Award — Condition precedent.] — A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest at the time of the loss. — Where a condition in the policy provided that no action should be maintainable against the company for any claim under the policy until after an award should have been obtained in the manner therein provided fixing the amount of the claim: *Held*, that the making of such an award was a condition precedent to any right of action to recover a claim for loss under the policy. *Guerin v. Manchester Fire Assurance Company*, xxix., 139.

26. *Fire insurance — Condition in policy — Time limit for submitting particulars of loss — Condition precedent — Waiver — Authority of agent.]* — A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits." *Held*, following *Employers' Liability Ass. Corp. v. Taylor*, (29 Can. S. C. R. 104), that compliance with this provision was a condition precedent to an action on the policy. *The Atlas Assurance Company v. Brownell*, xxix., 537.

27. *Condition precedent — Allegation of performance — Burden of proof — Waiver — Insurance policy.]* — Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff. *Home Life Association v. Randall*, xxx., 97.

28. *Mines and minerals — Adverse claim — Form of plan and affidavit — Right of action — Condition precedent — Necessity of actual survey — Blank in jurat — R. S. B. C. (1897) c. 135, s. 37 — R. S. B. C. (1897) c. 3, s. 16 — 61 Vict. c. 33, s. 9 (B.C.) — B. C. Supreme Court Rule 415 of 1890.]* — The plan required to be filed in an action to adverse a mineral claim under the provisions of s. 37 of the "Mineral Act" of British Columbia, as amended by s. 9 of the "Mineral Act Amendment Act, 1898," need not be based on an actual survey of the location made by the provincial land surveyor who signs the plan. The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with his adverse action. *Paulson v. Beaman, et al.*, xxxii., 655.

29. *Condition precedent — Mutual insurance policy — Notice of loss — Filing of claim papers — Time allowed for payment — Suit prematurely instituted.*

See INSURANCE, FIRE, 40.

30. *Petition of right — Condition precedent — Certificate of engineer — Intercolonial railway contract — Claim for extras.*

See CONTRACT, 94.

31. *Condition precedent — Engineer's certificate — Want of diligence — Laches.*

See CONTRACT, 54.

32. *Contract for carriage of goods — Partial loss — Delivery — Notice — Condition precedent — Estoppel — Joint tort-feasors.*

See RAILWAYS, 3.

33. *Public works contract — Progress estimates—Engineer's certificate.*

See ACTION, 111.

34. *Contract for public works—Suspension of right of action—Agreement for arbitration.*

See CONTRACT, 62.

35. *Right of action—Condition precedent—Signification of transfer—Issue as to.*

See SIGNIFICATION, 1.

36. *Condition precedent — Arbitration — Award—Action for possession — Payment for improvements.*

See LESSOR AND LESSEE, 1.

37. *Accident insurance—Condition in policy —Notice—Condition precedent.*

See INSURANCE, ACCIDENT, 4.

38. *Award—R. S. O. (1887) c. 121—River improvements—Detention of saw logs on drive —Construction of statute.*

See ARBITRATION AND AWARD, 22.

39. *Contract — Construction of railway—Certificate of engineer—Condition precedent.*

See CONTRACT, 69.

40. *Contract by correspondence—Post letter —Time limit—Term for delivery—Breach of contract — Damages — Counterclaim—Condition precedent—Right of action.*

See CONTRACT, 217.

5. DAMAGES.

41. *Tort — Lease of pew — Disturbance in possession — Rights of pew-holder — Measure of damages.*—J., an elder and member of the congregation of St. Andrew's Church, Montreal, had been a pew-holder in St. Andrew's Church continuously from 1867 to 1872, inclusive. In 1869 and 1872 he occupied pew No. 68, and on payment of the rental of 1872 obtained a receipt in the following words: "Montreal, January 9th, 1872. \$66.50. Received from James Johnston the sum of sixty-six dollars and fifty cents, being rent of first-class pew No. 68, in St. Andrew's Church, Beaver Hall, for the year 1872. For the trustees, J. Clements." It appeared by the by-laws, custom, and usage of the church that pew-holders, being members of the congregation were entitled to have their pews re-let to them from year to year on payment of the annual rental. On the 7th December, 1872, the trustees notified J. that they would not let him a pew for the following year. J. thereupon tendered them the rental for the next year, in advance. On several occasions in 1873, and while still an elder and member of the congregation, he was disturbed in the possession of pew No. 68, by the respondents, the pew having been placarded "for strangers," strangers seated in it, his books and cushions removed, and so forth. For these torts he brought an action against respondents, claiming \$10,000 damages. *Held* (the Chief Justice and Strong, J., dissenting), that as J. continued an elder and member of the congregation and tendered

the rent of his pew in advance, he was entitled to a continuance of his lease for the year 1873; that the disturbance complained of gave him a right of action for tort, and that reasonable, but not vindictive, damages should be allowed. *Johnston v. Minister and Trustees of St. Andrew's Church*, i. 235. The Privy Council refused leave to appeal from this judgment and held that Her Majesty's prerogative to allow an appeal, preserved by 38 Vict. c. 11, s. 47, should not be exercised either because of the magnitude of the case or its effect upon other cases. (3 App. Cas. 159.)

42. *Maritime Court of Ontario — Jurisdiction — R. S. O. (1877) c. 128 — Negligence — Action in rem — Damages for death of servant — Lord Campbell's Act — Right of action.*—Petition against "The Garland," labelled under the Maritime Court Act (O.), claimed \$2,000 damages for the death of appellant's son and servant, caused by the negligence of its officers. The respondent intervened, and demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the court. *Held*, Fournier and Taschereau, J.J., dissenting, that the Maritime Court of Ontario has no jurisdiction apart from R. S. O. (1877) c. 128 re-enacting Lord Campbell's Act (9 & 10 Vict. c. 98), in an action for personal injury resulting in death, and therefore the appellant had no *locus standi*, not having brought her action as the personal representative of the child. *Per* Fournier, Taschereau, Henry, and Gwynne, J.J., reversing the judgment of the Maritime Court of Ontario that Vice-admiralty Courts in British possessions and the Maritime Court of Ontario have whatever jurisdiction the High Court of Admiralty has over "any claim for damages done by any ship, whether to person or to property." *Per* Fournier and Taschereau, J.J., dissenting, that apart from and independently of the Act, R. S. O. (1877) c. 128, the Maritime Court of Ontario has jurisdiction in a proceeding *in rem* against a foreign vessel for the recovery of damages for injuries resulting in death and that the appellant, either in the capacity of parent or of mistress, was entitled to claim damages for the loss of her son or servant. *Monaghan v. Horn, "The Garland,"* vii., 409.

43. *Malicious prosecution — Evidence — Favourable termination.*—Where a party pays under protest a penalty imposed upon him by a justice of the peace in proceedings taken against him under the provisions of c. 22, C. S. L. C., "An Act respecting Good Order in and near Places of Public Worship," and afterwards brings an action in damages against the person, whom he alleged had maliciously instigated such proceedings, and at the trial before a jury there is no evidence of the favourable termination of the prosecution against him, the court were equally divided as to the right of such party to maintain his action. Sir W. J. Ritchie, C.J., and Strong and Taschereau, J.J., were of opinion that the action could not be maintained under such circumstances. Fournier, Henry, and Gwynne, J.J., *contra*. The appeal was in consequence dismissed without costs. *Poitras v. Lebeau*, xiv., 742.

44. *Cause of action — Trade union — Combination in restraint of trade — Strikes*

—*Social pressure.*]—Workmen who, in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation or other illegal means, take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages. Judgment of the Court of Queen's Bench (Q. R. 6 Q. B. 65) affirmed. *Perreault v. Gauthier et al.*, xxviii., 241.

45. *Liquor laws—Municipal corporation—Discretion of members of council—Refusal to confirm certificate—Liability of corporation.*]—In an action against a municipal corporation for damages claimed on account of the council of the municipality having, as alleged, illegally refused to confirm a certificate to enable the plaintiff to obtain a license for the sale of liquors in his hotel: *Held*, affirming the judgment appealed from (Q. R. 8 Q. B. 276), that the municipal council had a discretion under the provisions of the "Quebec License Law," (R. S. Q. art. 839), to be exercised in the matter of the confirmation of such certificates for the exercise of which no action could lie, and further, that even if the members of the council had acted maliciously in refusing to confirm the certificate, there could be no right of action for damages against the corporation on that account. *Beach v. Township of Stanstead*, xxix., 736.

46. *Government railway—Injury to employee—Lord Campbell's Act—Art. 1056 C. C.—Exoneration from liability—R. S. C. c. 38, s. 50.*]—Art. 1056 C. C. embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act. *Robinson v. Canadian Pacific Railway Co.*, ([1892] A. C. 481) distinguished.—An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the government contributed annually \$6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant: *Held*, reversing the judgment of the Exchequer Court (6 Can. Ex. C. R. 276) that the rule of the association was answer to an action by his widow under art. 1056 C. C. to recover compensation for his death. *The Queen v. Grenier*, xxx., 42.

47. *Prescription—Arts. 2188, 2262, 2267 C. C.—Waiver—Failure to plead limitation—Defence supplied by the court of its own motion—Reservation of recourse for future damages—Judicial admission—Interruption of prescription—Novation—Costs.*]—The prescription of actions for personal injuries established by art. 2262 of the Civil Code of Lower Canada is not waived by failure of the defendant to plead the limitation, but the court must take judicial notice of such prescription as absolutely extinguishing the right of action.—The reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the

Civil Code.—When in an action of this nature there is but one cause of action damages must be assessed once for all. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effects of the original injury. *City of Montreal v. McGee*, xxx., 582.

48. *Indemnity for land expropriated—Widening streets—Montreal city charter—Recourse for damages—Expropriation—Arbitration and award.*]—The owner of land expropriated for the widening of streets in 1895 may maintain an action for damages to recover the value of the land so taken notwithstanding the provisions of 52 Vict. c. 79, as to expropriation, arbitration and award, and the amendment thereto by 59 Vict. c. 49, s. 17 passed after possession had been taken by the corporation. *Fairman v. City of Montreal*, xxxi., 210.

49. *Pledge—Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Compensation and set-off—Restitution of thing pledged—Arts. 1966, 1969, 1971, 1972, 1975, C. C.—Practice on appeal—Irregular procedure.*]—C. on behalf of J. C. & Co., a firm of contractors of which he was a member, deposited a sum of money with the City of Montreal as a guarantee of the good faith of J. C. & Co., in tendering to supply gas for illuminating and other purposes to the city and the general public within the city limits at certain fixed rates, lower than those previously charged by companies supplying such gas in Montreal, and for the due fulfilment of the firm's contract entered into according to the tender. After the construction of some works and laying of pipes in the public streets, J. C. & Co. transferred their rights and privileges under the contract to another company and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit which was refused by the city council which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by J. C. & Co. of their contract. After the transfer, however, the companies supplying gas in the city reduced the rates to a price below that mentioned in the tender so far as the city supply was affected, although the rates charged to citizens were higher than the price mentioned in the contract. *Held*, that the deposit so made was a pledge subject to the provisions of the sixteenth title of the Civil Code of Lower Canada and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor and the debtor was entitled to its restitution although the obligation for which the security had been given had not been executed.—On a cross-demand by the defendant for damages, to be set-off in compensation against the plaintiff's claim: *Held*, that, as the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city; and that the breach of contract in respect to supplying the public did not give the corporation any right of action for damages suffered by the citizens individually. *Held*, further, that prospective damages which might result from the occupation of the city streets by the pipes actually

laid and abandoned were too remote and uncertain to be set-off in compensation of the claim for the return of the deposit. *Finnie v. City of Montreal*, xxxii., 335.

50. *Navigable Waters—Obstruction of access—Damages—43 & 44 Vict. c. 43 (Q.)—Remedy.*

See RAILWAY, 68.

51. *Specific performance—Damages for non-performance—Conditions of bonus by-law—Prior agreement—Remedy of municipal corporation.*

See RAILWAYS, 89.

52. *Obstruction of beach privileges—Compensation for loss of riparian rights—Tort.*

See EXPROPRIATION, 21.

53. *Statutory redress—Damages—Negligence—Highway—Lowering grade—Excavations—51 Vict. c. 42, s. 190 (B.C.)*

See MUNICIPAL INSTITUTION, 162.

54. *Damages—Flooding lands—Repairs to roads—Mandamus—Municipal drains.*

See DAMAGE, 3.

55. *Nuisance—Damages—Use of street by railway company—North Shore Railway.*

See RAILWAYS, 71.

56. *Breach of contract—Lease of printing press—Damages—Power of attorney—Art. 120 (7) C. O. P.*

See CONTRACT, 13.

57. *Municipal corporation—Expropriation proceedings—Negligence—Interference with proprietary rights—Abandonment of proceedings—Damages—Servitudes established for public utility—Arts. 406, 417, 507, 1053 C. O.—Eminent domain.*

See SERVITUDE, 6.

58. *Action to compel completion of purchase—Settlement after judgment—Subsequent action for interim damages.*

See INSOLVENCY, 49.

59. *Damages—Evidence—Misdirection—New trial—60 Vict. c. 24, s. 370 (N.B.)*

See NEW TRIAL, 80.

60. *Personal injuries caused by negligence—Examination of plaintiff de bene esse—Death of plaintiff—Subsequent action under Lord Campbell's Act—Material issues—Evidence.*

See EVIDENCE, 19.

61. *Injuries to leased lands—Domain utile—Petitory action by lessor—Adding parties.*

See RAILWAYS, 152.

6. ESTOPPEL.

62. *Municipal work—Improper construction—Suit by a contractor.*

See ESTOPPEL, 3.

63. *Art. 19 C. O. P.—Suit by trustee—Deed by defendant—Estoppel—Prescription.*

See TRUSTS, 5.

64. *Bar to action—Sheriff—Trespass—Sale of goods by insolvent—Bona fides—Judgment of inferior tribunal—Estoppel—Res judicata—Fraudulent preferences—Pleading.*

See PLEADING, 29.

65. *Title to land—Action en bornage—Surveyor's report—Chose jugée.*

See RES JUDICATA, 8.

66. *Assessment and taxes—Appeal from assessment—Estoppel—Judgment confirming decision of municipal committee—Payment of taxes under protest—Res judicata.*

See ASSESSMENT AND TAXES, 1.

67. *Emphyteutic lease—Sale of lands—Description of boundaries—Conduct of parties—Acquisitive prescription—Right of action—Priority—Registry laws.*

See RAILWAYS, 152.

7. JUDGMENT.

68. *Order by foreign tribunal—Judgment—Winding-up order—Contributories—Calls—Declaration—Demurrer.*

See WINDING-UP ACT, 11.

69. *Bar to action—Foreign judgment—Estoppel—Judgment obtained after action begun—R. S. N. S. (5 ser.), c. 104, s. 12, s.s. 7.*

See JUDGMENT, 20.

70. *Action on judgment—Partnership—Judgment against firm—Liability of reputed partner—Bills and notes.*

See PARTNERSHIP, 40.

8. JURISDICTION.

71. *Jurisdiction—Mortgage of foreign lands—Action to set aside—Secret trust—Lex rei sitæ.]—A Canadian court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought. *Burns v. Davidson* (21 O. R. 547) approved and followed. *Purdum v. Pavey & Co.* xxvi., 412.*

72. *Appeal—Jurisdiction—Appealable amount—Monthly allowance—Future rights—"Other matters and things"—R. S. C. c. 135, s. 29 (b)—56 Vict. c. 29 (D.)—Established jurisprudence in court appealed from.*

See APPEAL, 78.

73. *Penalties—Plea of ultra vires of statute—Judgment on other grounds—Jurisdiction of Supreme Court of Canada.*

See APPEAL, 89.

74. *Domicile—Contract by correspondence—Indication of place of payment—Delivery of goods sold—Cause of action—Jurisdiction.*

See CONTRACT, 134.

9. HYPOTHECARY ACTIONS.

75. *Déclaration d'hypothèque—Surrender of lands — Personal condemnation — Art. 2075 C. C.] — In an action en déclaration d'hypothèque the defendant may, in default of his surrendering the property within the period fixed by the court, be personally condemned to pay the full amount of the sheriff's claim. Dubuc v. Kidston, xvi., 357.*

76. *Personal action on covenant — Sale of mortgaged property—Hypothecary action—Res inter alios acta.*

See SALE, 108.

10. LIMITATION OF ACTIONS.

77. *Mortgage — Bond — Covenant — Payment—Interruption of prescription.*

See LIMITATION OF ACTIONS, 1.

78. *Recovery of land—Joint interest—Life estate — Survivorship — Possession—Remainder.*

See TITLE TO LAND, 79.

79. *Suit by trustee—Deed by defendant—Estoppel—Art. 19 C. C. P.*

See TRUSTS, 5.

80. *Restoration of land grévé de substitution—Possession—Bad faith—Art. 2268 C. C.*

See SUBSTITUTION, 4.

81. *Limitation of action—Commencement of prescription—Torts—Liability of employee for act of contractor—Continuing damages—Public work.*

See PRESCRIPTION, 30.

82. *Municipal drains—Continuing trespass—Limitation of actions—Actions ex delictu—58 Vict. c. 4, s. 295 (N. S.)*

See LIMITATIONS OF ACTIONS, 12.

83. *Adverse possession — Acquisitive prescription—Estoppel by deed — Conduct of parties—Registry laws.*

See RAILWAYS, 152.

11. MARRIED WOMEN.

84. *Married woman — Community — Personal injuries—Right of action—Pleading—Exception à la forme — Arts. 14, 116, 119, C. C. P. (old text)—Appeal—Questions of procedure.]—The right of action for damages for personal injuries sustained by a married woman, *commune en biens*, belongs exclusively to her husband and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband.—Where it appears upon the face*

of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that the objection should be taken by exception à la forme.—Absolute want of legal right of action may be invoked by a defendant at any stage of a suit. Judgment of the Court of Queen's Bench, 3 Q. P. R. 1, overruled on the motifs, but affirmed in its result. McFarren v. Montreal Park and Island Ry. Co., xxx., 410.

85. *Husband and wife — Separate property of wife—Married Woman's Property Acts (N. S.)—Action by wife against husband.]—Under the Married Woman's Property Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband. Judgment appealed from (33 N. S. Rep. 1) reversed. Michaels v. Michaels, xxx., 547.*

12. NEGLIGENCE.

86. *Negligence—Risk voluntarily incurred — "Volenti non fit injuria."]—On the trial of an action for damages in consequence of an employee of a lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risks of shunting," and that the death of the deceased was caused by defendant's negligence in shunting, in giving the car too strong a push. Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skillful manner, and that the maxim "volenti non fit injuria" had no application. Smith v. Baker ([1891] A. C. 325) applied. The Canada Atlantic Ry. Co. v. Hurdman, xxv., 205.*

87. *Negligence—Joint tort-feasors—Joinder of defendants—B. C. Judicature Act—Motion for judgment—Findings of jury—New trial—Judgment by appellate court.*

See NAVIGATION, 2.

88. *Negligence of crown servant—Public work—Personal injuries—Prescription.*

See NEGLIGENCE, 206.

13. NOTICE.

89. *Notice—Suits against Government officials—"Employee" Intercolonial Railway—Expropriation—44 Vict. c. 25, s. 109.*

See CROWN, 64.

90. *Notice—Letter by solicitor—Pleading.*

See MUNICIPAL CORPORATION, 141.

91. *Right of action at common law—Arbitration—Municipal duty — Repair of drains — R. S. O. (1887) c. 184—Notice of action.*

See DRAINAGE, 2.

92. *False arrest—Notice—Public officer.*

See NOTICE, 30.

93. *Carriers—Express company — Receipt for money parcel—Notice of claim.*

See No. 21 ante.

14. NULLITY.

94. *Administration — Trustees — Agents — Nullity*—*Art. 1484 C. C.*—In an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of art. 1484 of the Civil Code. *Guertin v. Sansterre*, xxvii., 522.

95. *Setting aside voluntary conveyance — Pleading—Assignment for benefit of creditors.*

See ASSIGNMENT, 2.

15. PARTIES.

96. *Husband and wife—Community—Debtor and creditor—Liquidation of insolvent estate—Principal and agent—Deposit in bank —Right of action—Recovery of wife's property.*

See PRINCIPAL AND AGENT, 20.

97. *Parties—Promotion of joint stock company—Misrepresentation—Action by shareholders—Delay—Estoppel.*

See COMPANY LAW, 37.

98. *Insolvency—Setting aside chattel mortgage—Parties.*

See FRAUDULENT PREFERENCES, 3.

99. *Tierce-opposition — Setting aside judgment—Intervention—Locus standi—Prescription—Want of parties.*

See TITLE TO LAND, 131.

100. *Fictitious lease—Attornment by mortgagor—Distress for rent—Seizure in execution—Locus standi of third parties.*

See LANDLORD AND TENANT, 1.

101. *Suit in vice-admiralty — Salvage — Parties—Proceeding in rem.*

See SHIPPING, 5.

102. *Ejectment—Pleading — Husband and wife—Fraudulent conveyance.*

See EJECTMENT, 1.

103. *Accidental injury — Runaway team—Telephone pole—Third party—Costs.*

See NEGLIGENCE, 192.

104. *Parties—Principal and agent—Statutory board of commissioners — Contract — Waterworks.*

See MUNICIPAL CORPORATION, 65.

105. *Adding parties—Damages to leasehold property—Legal and beneficial estates.*

See RAILWAY., 152.

16. PARTNERSHIPS.

106. *Partnership—Division of assets—Art. 1898 C. C.—Mandate—Debtor and creditor—Account.*—Upon the dissolution of a partnership, where one of the partners has been

entrusted with the collection of moneys due as the mandatary of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or for money had and received. *Lefebvre v. Aubry*, xxvi., 602.

107. *Contract under seal — Undisclosed principal — Partnership — Amendment.*—P. sold mining areas and was paid part of the price. The purchaser signed an agreement under seal that he would organize a company to work the areas and give P. stock for the balance at the market price. H. organized a company which received a deed of the land and did some work but finally ceased operations. Only a small part of the stock was sold and none was given to P., who took action against the purchaser and H., claiming that the latter was a partner of the purchaser and that the agreement was signed on behalf of both. The purchaser did not defend the action. *Held*, that no action could lie against H. on the agreement under seal not signed by him even if it was for his benefit and a seal was not necessary.—The court refused to interfere with the discretion of the court below in refusing an amendment to the statement of claim. *Porter v. Pelton*, xxxiii., 449.

108. *Penal statute — Prohibited contract—Nullity—Railway director—Partnership with contractor—Action pro socio—“The Consolidated Railway Act, 1879.”*

See CONSTITUTIONAL LAW, 30.

17. PETITION OF RIGHT.

109. *Petition of right—Public work—Negligence of Crown servants — Liability as common carrier—Contract—Tolls.*—A petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work. An expressed or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides. In such a case the Crown cannot be held liable as a common carrier. *The Queen v. McFarlane*, vii., 216.

110. *Claim against Province of Canada—B. N. A. Act (1867) s. 111—Contract—Order-in-council—Petition of right.*—Prior to confederation T. was cutting timber under license from the Province of Canada on territory in dispute with New Brunswick. To utilize the timber he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and only released upon payment of fines. T. continued paying the fines for two or three years until he was obliged to abandon the business. After the two provinces had agreed upon the boundary, a commission was appointed to determine the state of accounts between them in respect to such territory. One member only reported finding New Brunswick indebted to Canada in \$20,000 and upwards, and in 1871 these figures were verified by the Dominion auditor. Both before and after confederation T. frequently urged the Government of Canada to collect this amount, and indemnify licensees who had suffered while

cutting timber owing to the dispute. Finally by order-in-council of the Dominion Government (to whom it was claimed the debt of New Brunswick was transferred by the B. N. A. Act) it was declared that a certain amount was due to T. which would be paid on the consent of the Governments of Ontario and Quebec. Such consent was obtained, and payments on account were made by the Dominion Government first to T. and afterwards to the suppliant to whom T. assigned. Suppliant proceeded by petition for the balance. The Crown demurred on the ground that the claim was not founded upon a contract, and was not properly a subject for petition of right. Fournier, J., overruled the demurrer (1 Ex. C. R. 356). *Held*, reversing the judgment appealed from, (Fournier and Henry, JJ., dissenting), that there being no previous indebtedness shewn to T. either from New Brunswick, the Province of Canada or the Dominion, the order-in-council did not create a debt between T. and the Dominion Government which could be enforced by petition of right. *The Queen v. Dunn*, xi., 385.

111. *Contract—Public works—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.*—A contract with the Crown for building locks and other works on a government canal provided for monthly payments to the contractors of 90 per cent. of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, that the work certified for had been executed to his satisfaction; the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent. of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient. *Held*, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be reopened and revised by a succeeding engineer. *Held*, also, that the contractors could proceed by action if payment on a monthly certificate was withheld, and were not obliged to await the final completion of the work before suing. *Murray v. The Queen*, xxvi., 203.

112. *Crown—Contract—Right of action—Public officer—Solicitor and client—R. S. C. cc. 114, 115—Inquiry as to public matters—Remuneration of commissioner—Quantum meruit.*—The judgment appealed from (7 Ex. C. R. 351) held that a person appointed under R. S. C. c. 115, as commissioner to make inquiry and report on conduct in office of an officer or servant of the Crown, could not recover for his services as such commissioner, there being no provision for such payment; that such service was not rendered in virtue of any contract but merely by virtue of

appointment under the statute and that such appointment partakes more of the character of a public office than of a mere employment under a contract express or implied. The Supreme Court affirmed the judgment appealed from, Strong, C.J., and Girouard, J., dissenting. *Tucker v. King*, xxxii., 722.

113. *Public work—Negligence of Crown officials—Right of action—Liability of the Crown—50 & 51 Vict. c. 16, ss. 16, 23, 58—Jurisdiction of the Exchequer Court—Prescription—Art. 2261 C. C.*—Lands in the vicinity of the Lachine Canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a syphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it. *Held*, reversing the judgment appealed from (7 Ex. C. R. 1), (Davies, J., dissenting), that the owner had a right of action and was entitled to recover damages for the injuries sustained and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisions of ss. 16, 23, and 58 of the Exchequer Court Act. *The Queen v. Filion*, (24 Can. S. C. R. 482) approved; *The City of Quebec v. The Queen*, (24 Can. S. C. R. 430) referred to.—The prescription established by art. 2261 of the Civil Code of Lower Canada applies to the damages claimed by appellant in his petition of right. *Letourneau v. The King*, xxxiii., 335.

114. *Public work—Contract binding on the Crown—Appropriation by Parliament—Unauthorized expenditure—Quantum meruit—Petition of right—31 Vict. c. 12, ss. 7, 15, 20.*

See CONTRACT, 91.

115. *Negligence—Tort—Public work—Carrier—Petition of right—Public servants.*

See RAILWAYS, 100.

116. *Petition of right—Contract for public work—Transfer without consent—Cancellation—Breach—Right to recover.*

See CONTRACT, 93.

117. *Petition of right—Allegation of performance—Condition precedent—Pleading—Amendment.*

See CONTRACT, 58.

18. PETITORY ACTIONS.

118. *Pétitoire—Demolition of completed works—Form of action—Mitoyenneté—Dénouciation de nouvel œuvre—Possessoire.*—Plaintiff prayed for the removal of a wall and demolition of works in connection therewith and also for £500 damages with interest and costs. *Held*, that demolition of completed works may properly be demanded in a petitory action for the recovery of property and that the present action is one in the nature of a petitory action and not an action *possessoire* or *en dénouciation de nouvel œuvre*. *Joyce v. Hart*, i., 320.

119. *Petitory conclusions—Removing trustee—Recovery of church property—Pleading—*

38 Vict. c. 72 (Q.)]—By deed on 23rd November, 1871, duly registered, plaintiff, defendant, and two others as trustees of the Presbyterian Church of Côte St. George, in connection with the Church of Scotland, became purchasers of the ground upon which a church was subsequently erected. At the time of action the trustees, with the exception of the plaintiff and defendant, were dead. A union of the Presbyterian Churches of Canada took place in June, 1875. To further this union and remove any obstructions which might arise out of the trusts by which the property of any of the churches was held, the "Union Act," (38 Vict. c. 72 (Q.)) was passed, which by s. 2, provided "that if any congregation in connection or communion with any of the said churches decide, at any meeting of the said congregation regularly convened, according to the rules of the said congregation, or the custom of the church with which it is in connection, and held in the two years after such union, by the majority of the votes of those who, according to the rules of the said congregation, or the custom of the church with which it is in connection, are entitled to vote at such meeting, not to form part of the said union, but on the contrary to separate itself therefrom, then and in such case, the property of the said congregation shall not be affected by this Act, nor by any of the provisions thereof." Plaintiff claimed that no meeting of the congregation had been regularly convened, or conducted according to its rules, or the custom of the church, and that consequently the property was affected by the statute, and should be held and administered for the benefit of the congregation in connection with the united church, i. e., "The Presbyterian Church in Canada." Plaintiff also alleged that defendant had ceased to be a trustee, and, acting with a minority of the congregation who refused to enter into the united church, had taken forcible possession of the church property and excluded therefrom the plaintiff and the congregation, for which he was trustee. Plaintiff as sole surviving and acting trustee, suing for himself in his said quality, and for the congregation, claimed the property and that defendant be ordered to quit and abandon the same, and be declared not to be a trustee of said property. Defendant admitted that he was not a trustee, but, while saying that he had no quality to defend the action, alleged that 3 regularly convened meetings had been held, within the 2 years, the effect of which was to take the church and property out the union and that, at these meetings, trustees were legally appointed to replace those deceased. The Superior Court dismissed the action on the sole ground that because the trust deed said nothing about survivors, but provided for a succession, there could be no action unless the succession was first filled up. The Queen's Bench affirmed this judgment, the majority presumably on the ground stated, Cross, J., alone giving as his reason that the meetings referred to were sufficient compliance with the law to take the property out of the union. *Held*, affirming the judgment appealed from, that the action being petitory, and defendant having pleaded and proved that he was not and had never pretended to be in possession of the property, plaintiff must fail; and that he was not entitled to a judgment declaring one not a trustee who did not pretend to be and admitted that he was not a trustee, Henry, J., dissenting. *Morrison v. McCuaig*, 19th June, 1883; Cass. Dig. (2 ed.) 642.

120. *Lease — Transfer of lease — Title to land — Alienation for rent — Emphyteusis — Bail à rente — Bail à longues années — Droit mobilier — Cumulative demand — Incompatible pleadings — Action pétitoire*—Arts. 567, 572, 1593 C. C.—Arts. 176, 177 (b) 1064, 1066 C. P. Q.—*Possessory action—Réintégration—Dénonciation de nouvel œuvre.*]—An instrument by which lands were leased for sixteen years at an annual rental, subject to renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. The leased premises were transferred by the lessee by deed of sale, and on disturbance an action, with both petitory and possessory conclusions, was brought by the transferee against an alleged trespasser, who pleaded title and possession in himself without taking objection to its cumulative form. *Held*, affirming the judgment appealed from, that under the circumstances the action should be treated as petitory only; that the contract under the instrument described was neither emphyteusis nor a *bail à rente* (lease in perpetuity), but merely an ordinary contract of lease which did not convey a title to the land nor real rights sufficient to confer upon the transferee the right of instituting a petitory action in his own name. *Held*, also, that the transfer by the deed of sale of such leased premises would not support the petitory action, as the lessee could not convey proprietary rights which he did not himself possess. *Price v. LeBlond*, xxx., 539.

121. *Petitory action — Deed to married woman — Authorization of husband—Title to land — Trespass.*]—*Quære*, Would a deed of land to a married woman without the authorization of her husband be sufficient to support a petitory action? *Chalifour v. Parent*, xxxi., 224.

122. *Action pétitoire — Title to lands — Mistake of title — Good faith — Common error — Demolition of works — Right of accession*—Arts. 412, 413, 429, et seq., 1047, 1241 C. C.

See BOUNDARY, 4.

123. *Municipal corporation — Construction of sidewalk—Trespass—Action en bornage—Petitory action — Amendment of pleadings—Practice.*

See No. 171, *infra*.

124. *Recovery of property under lease—Emphyteusis—Damages—Beneficial estate—Adding parties.*

See RAILWAYS, 152.

19. POSSESSORY ACTIONS.

125. *Trespass — Possession annale — Possessory action — Equivocal possession—Right of way.*]—In a possessory action by P. against H., the latter denied P.'s possession and pleaded that he was proprietor and had exercised a right of way over the lands in dispute, a roadway between their adjoining properties, for a number of years. At the trial defendant put in his title. The plaintiff proved possession for a year by closing up the

roadway with a fence and putting his cattle there, and that at times he allowed defendant and others to use the roadway to get to the river, but that when defendant took down the fence he immediately restored it, and that defendant then asked him to let him use it; that it was after defendant had again taken forcible possession that he instituted the present action. The courts below held that both parties had only proved an equivocal possession and dismissed the plaintiff's action, ordering that their rights should be tried *au pétitoire*. *Held*, Fournier, J., dissenting, that as plaintiff had proved possession *animo domini* for a year and a day, he should be reinstated and maintained in peaceable possession of the land, and defendant forbidden to trouble him by exercising a right of way over the land in question, reserving to the latter his recourse to revendicate *au pétitoire* any right he might have. *Pinsonneault v. Hebert*, xiii., 450.

126. *Action on disturbance—Possessory action—“Possession annale”—Arts. 946, and 948 C. C. P.—Nature of possession of unenclosed vacant lands—Boundary marks—Delivery of possession.*—In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and shewed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance. *Held*, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action. *Gauthier v. Masson*, xxvii., 575.

127. *Municipal corporation—Construction of sidewalk—Trespass—Action en bornage—Petitory action—Amendment of pleadings—Practice.*

See No. 171 *infra*.

20. PRINCIPAL AND AGENT.

128. *Sale of goods—Action by undisclosed principal—Contract by agent—Option to take bill of lading or reweigh—Deficient delivery—Pleading—Tender and payment into court—Acknowledgment of liability—Estoppel.*—Action for \$3,038.44, price of 810 tons, 5 cwt. of coal sold by their agents T., M. & Co., through a broker, as per following note. “Messrs. T., M. & Co.:—I have this day sold for your account, to arrive, to the V. Hudon Cotton Mills Co., the 810 tons, 5 cwt. . . . coal per bill of lading, per ‘Lake Ontario,’ at \$3.75 per ton of 2,240 lbs., duty paid, ex ship; ship to have prompt dispatch. Terms, net cash on delivery, or 30 days adding interest, buyers’ option. Brokerage payable by you, buyer to have privilege of taking bill of lading, or re-weighing at sellers’ expense.” Defendants pleaded that the contract was with T., M. & Co. personally, that plaintiffs had no action; that the cargo contained only 755 tons, 580

lbs. = \$2,868.72, which they had offered T., M. & Co., together with the price of 10 tons more to avoid litigation, in all \$2,890.72, which they brought into court, without acknowledging their liability to plaintiffs, and prayed dismissal of action as to any greater sum. *Held*, *per* Ritchie, C.J., and Taschereau and Gwynne, JJ., (Fournier and Henry, JJ., dissenting,) that it was unnecessary to decide the question as to whether the action could be brought by the undisclosed principal, for by their plea of tender and payment into court the defendants had acknowledged their liability to the plaintiffs, although such tender and deposit had been made “without acknowledging their liability.”—*Per* Strong, J. That the action by respondents (undisclosed principals) was maintainable.—*Per* Fournier and Henry JJ., (dissenting), that the action by respondents (undisclosed principals) was not maintainable, and that the appellants were not precluded from setting up this defence by their plea of tender and payment into court.—It was proved that defendants agreed to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons, 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency. *Held*, Fournier and Henry, JJ., dissenting, that defendants had no right to refuse payment for the cargo on grounds of deficiency in delivery, considering that the weighing was done by them in the absence of plaintiffs without notice to them, and at a time when defendants were bound by the option they had previously made of taking the coal in bulk. Judgment appealed from (2 Dor. Q. B. 356) affirmed. *V. Hudon Cotton Co. v. Canada Shipping Co.*, xiii., 401.

21. PROHIBITION.

129. *Mortgage debt—Collateral bond—Foreclosure—Sale of land—Suit for residue of debt—Prohibition.*

See MORTGAGE, 59.

22. REPLEVIN AND REVENDICATION.

130. *Replevin—Confusion of chattels—Common property—Trespass—Title to land—Possession—Unmarked logs.*—L. claiming lands under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years. In 1877 McD., setting up title under pretended authority of a town-meeting, entered upon and cut trees on the lands and put the logs, unmarked, on the ice outside and inside L.’s boom, mixing them with logs already cut by L., in such a way that they could not be distinguished. In an action of replevin by L.: *Held*, that L.’s possession of the lands was sufficient to entitle them to recover, in the present action against the wrongdoer, all the logs cut on the lands.—*Per* Strong, J. When a party wrongfully commingles his chattels with those of another, all the latter can require is, that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed. *McDonald v. Lane*, vii., 462.

131. *Revendication — Replevin — Criminal Code, s. 575—Confiscation of gaming instruments, moneys, etc.*—Moneys were seized in a gaming house, under a warrant issued under s. 575 of the Criminal Code, and confiscated by the judgment of a police magistrate sitting in the City of Montreal. In an action against the Attorney-General to recover the moneys so seized: *Held, per Strong, C.J.*, that a judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of vindication. *O'Neil v. Attorney-General of Canada*, xxvi., 122.

132. *Trust — Principal and agent — Advances to agent to buy goods—Trust goods mixed with those of agent—Replevin—[Equitable title.]*—If an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing them.—If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance.—Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin. *Carter v. Long & Bisby*, xxvi., 430.

133. *Deposit of bonds as collateral—Recovery back upon performance of conditions—Right of trustee to revindicate—Interest of plaintiff.*

See PRINCIPAL AND AGENT, 19.

23. RIGHT OF ACTION.

134. *Cheese factory supply agreement — Sale of personal rights—Prête-nom.—Warranty—Eviction—Restitution de deniers—Bulk price—Arts. 1510, 1517, 1518, C. C.]*—Respondent, owner of a cheese factory, made agreement with farmers by which the latter agreed to give the milk of their cows to no other cheese factory. He subsequently sold to appellant, the factory and *sous la simple garantie de ses fait et promesses*, whatever rights he might have under his agreement with the farmers, for the bulk sum of \$7,000. Appellant assigned to B. the factory and the same rights, but excluding warranty, for \$7,500. A company, subsequently formed to whom B. assigned the factory and rights, sued one of the farmers on original agreement for having sold milk to another cheese factory, but the action was dismissed on the ground that respondent could not validly assign personal rights he had against the farmers. Thereupon appellant brought action against respondent to recover the price paid for rights which he could not assign. It was proved that although the price mentioned in the deed and paid was a bulk sum for the factory and the rights, the parties at the time valued the rights under the agreement with the farmers at \$5,000, and that the action was taken for the benefit of present owners of the factory. *Held*, affirming the Court of Queen's Bench, Strong and Fournier, JJ., dissenting, that inasmuch as appellant, by the sale made to B., had received full benefit of all that he had bought from respondent and had no interest in the suit, he could not claim to be reimbursed a portion of the price paid.—*Per*

Taschereau, J. If any action lay, it could only have been to set the sale aside, the parties being restored to the *status quo ante* if it were maintained. *Demers v. Duhaime*, xvi., 366.

135. *Recovery of funds entrusted for investment—Condition precedent—Limitation of action—Evidence—Transfer—Prête-nom.—Judicial admission.]*—Money was entrusted to M. for the purpose of being invested in a land speculation, under special conditions, that were disregarded. A claim against M. therefor was transferred *sous seing privé* to J., who brought an action for the amounts so entrusted. Objection was made that the transfer had not been proved. *Held*, that as it appeared that the transfer had been admitted by M., the transferee, even if considered a *prête-nom*, had sufficient interest to bring the action. *Moodie v. Jones*, xix., 266.

136. *Chattel mortgage — Mortgagee in possession—Negligence—Sale under powers—Practice—Assignment for benefit of creditors—Revocation of.]*—Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.—Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124, and the assignor was notified of such refusal, and that the assignment had not been registered an action for damages was properly brought in the name of the assignor against a mortgagee of his stock-in-trade, who sold the goods in an improper manner. *Rennie v. Block*, xxvi., 356.

137. *Right of action — Conveyance subject to mortgage — Obligation to indemnify—Assignment of — Principal and surety—Implied contract.]* — The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same. *Maloney v. Campbell*, xxviii., 228.

138. *Cancellation of contract — Fraud — Misrepresentation—Life insurance—Wager policy — Endowment — 14 Geo. 3. c. 48. s. 1 (Imp.)—Return of premiums.]*—If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit and pays all the premiums himself, the policy is a wagering policy and void under 14 Geo. 3. c. 48. s. 1 (Imp.). The Act applies to an endowment as well as to an all life policy. Judgment of the Court of Appeal (2 Ont. L. R. 559) affirmed.—In an action by the company for cancellation of the policy under said Act a return of the premiums paid will not be made a condition of obtaining cancellation. Judgment of the Court of Appeal (2 Ont. L. R. 559) reversed. *Davies and Mills, JJ.*, dissenting. *Brophy v. North American Life Assurance Co.*, xxxii., 261.

139. *Assessment of damages — Reservation of recourse for future damages — Expropriation — Res judicata — Right of action.]*—A lessee of premises used as an ice-house recovered indemnity from the city for injuries suffered in consequence of the expro-

priation of part of the leased premises and, in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpired term of the lease: *Held*, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation and, therefore, the plaintiff's action was properly dismissed by the courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same cause. *The City of Montreal v. McGee* (30 Can. S. C. R. 582), and *The Chaudière Machine and Foundry Co. v. The Canada Atlantic Railway Co.* (33 Can. S. C. R. 11) followed. *Ancil v. City of Quebec*, xxxiii., 347.

140. *Leased lands — Emphyteusis — Injuries to property — Trespass — Recovery of lands — Recovery of damages — Legal and beneficial estates — Adding parties.*]—Where lands have been leased for a long term, amounting to an emphyteusis, the right of action *au pétitoire* for the recovery of the lands from a third party in adverse occupation lies in the lessor, and the action to recover damages for injuries caused to the leased lands lies in the lessee. Where the petitory action has been brought by the lessor with a demand for damages for injuries caused to the leased lands by the defendant, the lessee may be added, on application to amend, as a party plaintiff to the action for the purpose of recovering the damages. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

141. *Policy for benefit of creditors — Contract with insured—Right of action.*

See INSURANCE, FIRE, 17.

142. *Assignee in insolvency — Pleading — Issue—Onus of proof—Insolvent Act of 1875.*

See INSOLVENCY, 4.

143. *Assignment of interest—Collateral security — Insurable interest — Concealment—Right of action.*

See INSURANCE, MARINE, 36.

144. *Husband and wife—Liquidation of insolvent estate—Deposits in bank—Recovery by heirs to succession of deceased wife.*

See PRINCIPAL AND AGENT, 20.

145. *Subscription for shares—Promotion of joint stock company—Bonâ fide statement—Prospectus — Misrepresentation—Concealment —Deceit—Rescission—Specific performance—Damages—Waiver.*

See COMPANY LAW, 11.

146. *Recovery of land—Joint tenants—Survivorship—Life estate—Possession of tenant—Remainder—Statute of limitations.*

See TITLE TO LAND, 79.

147. *Curator to substitution—Money due by former curator—Intervention by plaintiff.*

See SUBSTITUTION, 1.

148. *Preventing waste — Devise subject to charge — Legacy to survivor—Contingent interest.*

See WILL, 28.

149. *Sale of goods — Security—Simulated hypothec—Right of action.*

See SALE, 32.

150. *Substitute — Right of action — Restoration of land grêvé de substitution—Conversion by institute—Damages—Revendication — Possession — Bad faith — Evidence—Prescription—Art. 2268 C. C.*

See SUBSTITUTION, 4.

151. *Judgment creditor — Shareholder — Transfer of shares—Evidence.*

See COMPANY LAW, 44.

160. *Provisions of will—Deferred distribution—Premature action.*

See WILL, 20.

161. *Money paid — Voluntary payment — Recovery for benefit of creditors—Insolvency of debtor—Action by assignee—Status.*

See PAYMENT, 3.

162. *Insurance policy—Contract—Mortgage clause—Right of action by mortgagee.*

See INSURANCE, FIRE, 54.

24. SCIRE FACIAS.

163. *Scire facias — Annulment of letters patent — Tender — Concealment of material facts — Transfer of Crown lands.*]—*Held*, Taschereau, J., dissenting, that it is not necessary that an action for the annulment of letters patent should be preceded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent. *The Queen v. Montminy*, xxix., 484.

25. SERVICE.

164. *Service — Judgment by default—Opposition to judgment — Reasons of—"Recusaire" joined with "rescindant"—Arts. 16, 89 et seq., 483, 489, C. C. P.—False return of service.*]—No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.—The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment, and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.—An opposition asking to have a judgment set aside, on

the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescisoire* has thus been improperly joined with the *rescindant*. *Turcotte v. Dansereau*, xxvii., 583.

26. SPECIFIC PERFORMANCE.

165. *For specific performance—Agreement to convey interest in mine—Dismissal of action—Subsequent suit—Agreement to transfer part of proceeds of sale of mine.*

See RES JUDICATA, 3.

27. SURETYSHIP.

166. *Warranty—Suretyship—Recourse of sureties inter se—Ratable contribution—Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts. 1156, 1959 C. C.]—Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—Where a creditor has released one of several sureties with a reservation of his recourse against the others, and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourses reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. *Macdonald v. Whitfield*; *Whitfield v. Merchants Bank of Canada*, xxvii., 94.*

167. *Suretyship—Promissory note—Qualified indorsement.]—D. indorsed two promissory notes, pour aval, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm. *Held*, that the action was not based upon the real contract between the parties, and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Held*, further, per Sedgewick, J., that neither the payee of the promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself. *Robertson v. Davis*, xxvii., 571.*

168. *Construction of statute—20 & 21 Vict. c. 54, s. 12 (Imp.)—Application—Criminal prosecution—Embezzlement of trust s. c. d.—2*

*funds—Suspension of civil remedy—Stifling prosecution—Partnership.]—The Imperial Act, 20 & 21 Vict. c. 54, s. 12, provides that "nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against this Act might have had if this Act had not been passed . . . ; and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated." *Held*, affirming the judgment of the Supreme Court of British Columbia, that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts. *Semble*, that the section only covered agreements or securities given by the defaulting trustee himself. *Quere*, Is the said Imperial Act in force in British Columbia? If in force it would not apply to a prosecution for an offence under R. S. C. c. 164 (The Larceny Act) c. 58.—An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 164, s. 58, which was not re-enacted by the Criminal Code, 1892. *Held*, that the alleged criminal act having been committed before the Code came into force, was not affected by its provisions and the covenant could not be enforced. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act. *Major v. McCraney*, xxix., 182.*

169. *Suretyship—Conditional warranty—Notice—Possession of goods—Art. 1959 C. C.]—T. wrote a letter agreeing to guarantee payment for goods consigned on *del credere* commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods and permitted others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guarantee. In an action by the creditor to recover the amount of the guarantee: *Held*, that the condition of the guarantee had not been complied with by the creditor, and that he could not hold the warrantor responsible. *Brown v. Torrance*, xxx., 311.*

28. TRESPASS.

170. *Trespass by individual corporators—Corporation suing members—R. S. N. S. (4th ser.) c. 23, s. 30—Pleading—Stay of proceedings.]—Defendants, while trustees of a school section, entered upon the school plot of their section, removed the school-house from its foundation and destroyed a portion of the stone wall. Subsequently their successors as trustees brought action for trespass *quare clausum fregit* and *de bonis asportatis* against them for injury to the school-house, the property of the section. The defendants pleaded justification, asserting that the acts were legally performed by them in their capacity of trustees. Sub-section 4 of s. 30, c. 23, R. S. N. S. (4 ser.), declares that the sites for*

school-houses shall be defined by the trustees, subject to the sanction of the three nearest commissioners residing out of the section. In this case the sanction of the three nearest commissioners was not obtained. On appeal from rule of Supreme Court of N. S., setting aside a verdict for plaintiffs: *Held*, reversing the court below, that under c. 23, R. S. N. S. (4 ser.), the defendants were not authorized to remove the school-house from its site in the manner mentioned; that defendants having subsequently abused their right to enter upon the lands of the corporation by an overt act of spoliation, the plaintiffs, who are a corporate body identical with the corporation which existed at the time of the trespass, can maintain trespass against the defendants for the injury done to the corporate property. That when an action is brought in the name of a corporation without due authority, it is not sufficient for the defendants to plead that the plaintiffs did not legally constitute the corporation, but in such a case defendants ought to apply to the summary jurisdiction of the court to stay proceedings. *Pictou School Trustees v. Cameron*, ii., 690.

171. *Municipal corporation — Construction of sidewalks — Trespass — Action en bornage — Petitory action — Amendment of pleadings — Practice — R. S. C. c. 135, s. 65.* — The plaintiff brought action to recover the value of a strip of land of which the defendant was illegally in possession. The courts below dismissed the action on the ground that the proper remedy was by action *en bornage* or *au pétitoire*. In order to cease litigation the Supreme Court of Canada, without directing any amendment of the pleadings, reversed the judgments of the courts below, directed that the record should be remitted to the trial court for the purpose of ascertaining the extent of the property affected by the trespass and ordered the restoration thereof to the plaintiff. *Burland v. City of Montreal*, xxxiii., 373.

172. *Trespass — Constructions on public property — Long user — Damages — Right to indemnity.*

See ESTOPPEL, 1.

173. *Trespass — Fishery officer — Riparian owner — Notice — C. S. N. B. cc. 89, 90.*

See FISHERIES, 3.

174. *Use and occupation — Tenants in common — Trespass — Mesne profits — Parties.*

See EJECTMENT, 2.

175. *Staking mineral claims — Placer mining — Hydraulic concessions — Annulment of prior lease — Volunteer plaintiff — Right of action — Status of adverse claimants — Trespass.*

See MINES AND MINERALS, 14.

176. *Railway embankment — Trespass — Nuisance — Continuing damages — Right of action.*

See NUISANCE, 7.

177. *Location of railway line — Fencing — Boundaries — Adverse possession — Tenant by sufferance — Riparian rights — Prescription.*

See RAILWAYS, 152.

29. TROVER.

178. *Trover — Delivery of cargo — Lien for freight — Storage — Charter party.*

See CARRIERS, 23.

30. WARRANTY.

179. *Warranty — Proceedings taken by warrantee before judgment on principal demand.* — It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby. But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences. *Archbald v. deLisle*; *Baker v. deLisle*; *Mowat v. deLisle*, xxv., 1.

180. *Action en garantie — Warranty — Délit.*

See WARRANTY, 3.

181. *Deed of lands — Possession — Vendor and purchaser — Acquisitive prescription — Tenant by sufferance — Estoppel.*

See RAILWAYS, 152.

31. OTHER CASES.

182. *Counsel fee — Right of action — Quantum meruit — Lex loci.*

See COUNSEL.

183. *Remedy at law — Bonus by-law — Mandamus.*

See MUNICIPAL CORPORATION, 37.

184. *Ejectment — Suit by devisee of mortgaged land — Statutory title — Title under foreclosure.*

See TITLE TO LANDS, 65.

185. *Confessoria servitutis — Demolition of works — Art. 557 C. C. — Damages.*

See SERVITUDE, 1.

186. *Personal injuries — Death of plaintiff — New cause of action — Abatement.*

See APPEAL, 1.

187. *Promissory note — Identity of payee — Incorrect designation — Evidence.*

See BILLS AND NOTES, 17.

188. *Damage — "Reasonable expenses" — R. S. N. S. (4 ser.) c. 29, s. 12 — Contract — Wrongful dismissal — Remedy — Mandamus.*

See MUNICIPAL CORPORATION, 158.

189. *Sale of land — Collection of price on delivery of deed — New agreement with agent—Right of action.*

See CONTRACT, 128.

190. *Tender by firm — Alteration of specification and conditions—Right of action by member of firm.*

See CONTRACT, 258.

191. *Contract sale—Contre lettre—Principal and agent—Construction of contract—Actio Mandata Contraria.*

See CONTRACT, 227.

192. *Premature action — Contract for sale of timber—Delivery—Time of payment.*

See CONTRACT, 212.

193. *Municipal corporation—Water commissioners—Statutory body—Powers—Contract—37 Vict. c. 79 (Ont.)—Right of action.*

See MUNICIPAL CORPORATION, 65.

194. *Pledge—Deposit with tender—Forfeiture—Breach of contract—Damages—Set-off—Restitution of thing pledged—Arts. 1966 et seq. C. C.—Right of action.*

See No. 49 ante.

ADJUSTMENT.

See INSURANCE, MARINE.

ADMINISTRATION.

1. *Administratrix purchasing estate—Assets sufficient to pay incumbrance—Parol agreement to sell land—Compensation for land expropriated—R. S. N. S. (4 ser.) c. 36, s. 40—Married woman.]—About 1837 Mc.M. devised his land to his wife for life with remainder to M. K. Administration with the will annexed was granted to the widow. At the testator's death the lands were mortgaged for £150. In a suit after testator's death, a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. Administratrix received personal assets of the testator sufficient to have paid off the mortgage, had she chosen so to apply them. The sum of £725 was lent to the administratrix by A. K. The administratrix then sold the property to the public authorities for £1,750, out of which she paid A. K. £400. From 1858 A. K., with the leave of the administratrix, occupied $\frac{3}{4}$ of an acre of the land, until ejected in 1873, under expropriation, the commissioner taking in all 3 acres $\frac{3}{10}$ ths of this property, the balance being in the occupation of M. K., and her husband (the appellants). These 3 acres $\frac{3}{10}$ ths were appraised at \$2,310, which was paid into court. A. K. claimed title to the whole land taken under parol agreement, that she should have it in satisfaction of £325, the residue unpaid of the loan, and obtained a rule nisi for the payment to her of the \$2,310, awarded as compensation. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to the appellants in the whole property, reserving a rental of \$80 a year and*

liberty to occupy two rooms in the dwelling house. On motion to make this rule absolute, affidavits were filed, including those of appellants. On the 18th January, 1875, the matter was referred to a master to take evidence and report thereon, subject to being modified by the court or a judge. The master reported that the appellants had the sole legal and equitable rights in the property. On motion to confirm that report, the court made an order apportioning the \$2,310 between A. K. and the appellants, the former being declared entitled to be paid \$1,015.61, and the latter, on filing the written consent of the widow, to the residue of the \$2,310. *Held*, on appeal, 1st. That the administratrix, having personal assets of the testator sufficient to discharge the mortgage, was bound in the due course of her administration to discharge said incumbrance, and that the parol agreement made by her with her daughter was null and void. 2ndly. That when the land is taken under authority similar to R. S. N. S. (4 ser.), c. 36, s. 40, et seq., the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land. *Kearney v. Kean*, iii., 332.

2. *Payment of claim against estate—Death of administrator—Administration de bonis non—Unadministered asset.]—If an administrator, on competent advice, pays a claim bona fide made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator de bonis non a right of action to recover it back. *Mayhew v. Stone*, xxvi., 58.*

3. *Building Societies — Participating Borrowers — Shareholders—C. S. L. C. c. 69—42 & 43 Vict. (D.) c. 32—Liquidation—Expiration of classes—Assessments on loans — Notice of—Interest and bonus—Usury laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and trustees—Sales to—Prête-nom—Art. 1484 C. C.*

See BUILDING SOCIETY, 3.

4. *Fraudulent conversion—Past due bonds—Securities transferable by delivery—Estoppel—Implied notice—Innocent holder for value—Commercial paper.*

See PLEDGE, 7.

5. *Nova Scotia Probate Act—R. S. N. S. (5 ser.) c. 100, and 51 Vict. (N.S.) c. 26—License to sell lands—Estoppel—Res judicata.*

See RES JUDICATA, 10.

AND see ACCOUNT—CURATOR—EXECUTORS AND ADMINISTRATORS — INSOLVENCY — PROBATE AND ADMINISTRATION—TRUST—WILL.

ADMIRALTY LAW.

1. *Collision — Negligence — Rule of the road—Steamer—Sailing vessel — Opinion of assessors—Delegation of judicial powers.]—In a case of collision, the marine protest by the captain of the schooner stated that the cause of the accident was that the steamer's wheel was put to port when it should have been put to starboard just before the collision. The action was twice tried, the first trial having been set aside on the ground that the*

judge by adopting the opinion of the assessors, had delegated his judicial functions (19 Ont. App. R. 298). The second trial resulted in a verdict for the plaintiff, which was affirmed by the Court of Appeal for Ontario. The Supreme Court of Canada affirmed the judgment of the Court of Appeal, sustaining the plaintiff's verdict, and dismissing the appeal with costs. *Collier v. Wright*, xxiv., 714.

2. *Collision—Rules of the road—Narrow channel—Rules of navigation—R. S. C. c. 79, s. 2, arts. 15, 16, 18, 19, 21, 22, and 23—“Crossing” ships—“Meeting” ships—“Passing” ships—Breach of rules—Presumption of fault—Contributory negligence—Moiety of damages—36 & 37 Vict. (Imp.), c. 85, s. 17—Manœuvres in “agony of collision.”*—If two vessels approach each other in the position of “passing” ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed, they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship.—If one of two “passing” ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding her helm when it was seen that the helm of the other was hard to port, and the vessels rapidly approaching; and, after signalling that she was going to port, in reversing her engines and thereby turning her bow to starboard, she is to blame for a collision which follows.—The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse, if necessary when approaching another ship, so as to involve the risk of a collision, is not to be considered as a fact contributing to a collision, provided the collision could have been avoided by the impinging vessel by reasonable care exerted up to the time of the collision.—Excusable manœuvres executed in “agony of collision” brought about by another vessel, cannot be imputed as contributory negligence on the part of the vessel collided with.—The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard (art. 21), does not override the general rules of navigation. *The Leverington*, (11 P. D. 117) followed. *The Cuba v. McMillan*, xxvi., 651.

3. *Collision—Appreciation of evidence—Findings of fact—Appeal—Proper navigation—Negligent lookout—Anchor light.*—In an action claiming compensation for loss of the fishing schooner “Carrie E. Sayward” by being run into and sunk while at anchor by the “Reliance” the decision mainly depended on whether or not the lights on the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the “Reliance.” *Held*, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not, therefore, be disturbed on appeal. *Santanderino v. Vanvert* (23 Can. S. C. R. 145), and *The Village of Granby v. Ménard* (31 Can. S. C. R. 14), followed. *Schr. Reliance v. Conwell*, xxxi., 653.

4. *Collision—Ship at anchor—Anchor light—Lookout—Weight of evidence—Credibility—Findings of trial judge—Negligence.*—The S. S. “Lake Ontario” was proceeding in charge of a pilot to her dock in Halifax harbour, N. S., on a blustery night in

January, 1900, came in collision with and sank appellant's coal barge “A. L. Taylor” lying at anchor north of George's Island. The S. S. had signalled by guns and whistles for a medical officer at the quarantine grounds before the collision and her officers and crew testified that they were alert, anxiously working the S. S. through anchored vessels in the darkness and blustery weather and came suddenly upon the “Taylor” and that no lights were seen on her. The barge caretaker, who was not on deck at the time, swore that a proper anchor light was burning on the barge, his statement being corroborated by the captain of a schooner lying close by and by several boatmen and labourers on the wharves. The trial judge accepted the evidence of the defence as correct and found that the collision and loss were wholly attributable to negligence of the “Taylor” in failing to have an anchor light and to keep a sharp lookout, and dismissed the action. On appeal the Supreme Court of Canada affirmed the decision at the trial (7 Ex. C. R. 403). *Dominion Coal Co. v. S. S. Lake Ontario*, xxxii., 507.

5. *Collision—Undue speed—Ship in default—Rule 16—Navigation during fog.*—The judgment appealed from (7 Ex. C. R. 390) decided that the “Pawnee” a steamship, was wholly to blame for colliding with the schooner “Roland” in a thick fog near the entrance of St. John Harbour, N. B., in July, 1901, and awarded damages to the owner of the schooner. It was held that on hearing fog signals sounded by the schooner, the S. S. should have stopped her engines as far as possible and navigated with caution till danger of collision was past and that, having neglected these precautions, she was wholly to blame. On appeal the Supreme Court (Girouard, J., dissenting), affirmed the principle of the trial court decision but reduced the damages and allowed no costs on the appeal. *S. S. “Pawnee” v. Roberts*, xxxii., 509.

6. *Admiralty law—Navigation—Narrow channels—“White law,” r. 24—Right of way—Meeting ships—Collision.*—Rule 24 of the “White law” governing navigation in United States waters provides “that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara, and St. Lawrence, when two steamers are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.” *Held*, that this rule has no reference to the general course of vessels navigating the waters mentioned but applies only to meeting vessels. Therefore, a steamer ascending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.—The “Shenandoah” with a tow was ascending the St. Clair River in a fog hugging the United States shore. The “Carmona” was coming down the river and they sighted each other when a few hundred yards apart. They simultaneously gave the port and starboard signals respectively and the port signal was repeated by the “Carmona.” The “Shenandoah” then gave the port signal and steered accordingly. The “Carmona,” thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the “Shenandoah” but on going ahead again collided with the vessel in tow.

Held, reversing the judgment of the local judge (8 Ex. C. R. 1), that the "Shenandoah" was not in fault, and that as the local judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels was committed while in the agonies of collision, his judgment as to her should be affirmed. *Davidson v. Georgian Bay Navigation Co.; The Shenandoah and The Crete*, xxxiii., 1.

7. *Rescue of stranded vessel—Salvage—Special agreement—Action by agents—Parties.*
See SHIPPING, 5.

8. *Collision—Steamship—Defective steering apparatus—Negligence—Question of fact.*
See APPEAL, 227.

9. *Seal Fishery (North Pacific) Act, 1893, 56 & 57 Vict. c. 23 (Imp.), ss. 1, 5, and 4—Judicial notice of order in council thereunder—Protocol of examination of offending ship by Russian war vessel—Presence within prohibited zone—Bona fides—Statutory presumption of liability—Evidence—Question of fact.*
See EVIDENCE, 162.

ADVOCATE.

1. *Right of action for fees—Retainer—Refresher—Lex loci.*
See COUNSEL.

2. *Purchase of litigious rights—Champerty—Collusive judgment.*
See TITLE TO LAND, 131.

AND see BAR—SOLICITOR.

AFFIDAVIT.

1. *Manitoba Newspaper Act—Joint stock company—Corporate proprietor—Affidavit or affirmation—Commissioner—Presumption of authority—Persons having religious scruples.*—The Act respecting newspapers (50 Vict. c. 23 (Man.)), provides, that no person shall print or publish a newspaper until an affidavit or affirmation, containing such matter as the Act directs is deposited with the prothonotary of the court and that such affidavit or affirmation may be taken before a justice or commissioner. *Held*, that such affidavit or affirmation, if a corporation is proprietor of the newspaper, may be made by the managing director; that there is an option either to swear or affirm and the right to affirm is not confined to members of certain religious bodies or persons having religious scruples; and that if the affidavit or affirmation purport to have been taken before a commissioner his authority will be presumed. *Ashdown v. Manitoba "Free Press" Co.*, xx., 43.

2. *Mines and minerals—Adverse claim—Form of affidavit—Right of action—Condition precedent—Blank in jurat—R. S. B. C. (1897) c. 135, s. 37—R. S. B. C. (1897) c. 3, s. 16—61 Vict. c. 33, s. 9 (B.C.)—B. C. Supreme Court Rule 415 of 1890.*—The jurat to an affidavit filed pursuant to s. 37 of the

B. C. "Mineral Act" did not mention the date upon which the affidavit had been sworn. *Held*, that the absence of the date was not a fatal defect, and that, even if it could be so considered at common law, such a defect would be cured by the "British Columbia Oaths Act" and the British Columbia Supreme Court Rule 415 of 1890. *Paulson v. Beaman, et al.*, xxxii., 655.

3. *Nova Scotia Bills of Sale Act—Registration—Defective jurat.*

See BILL OF SALE, 1.

3. *Bona fides—Statutory form—Attesting witness.*

See BILL OF SALE, 2.

5. *Chattel mortgage—Compliance with statutory form—R. S. N. S. [5 ser.] c. 92, s. 4.*

See CHATTEL MORTGAGE, 5.

6. *Controverted election—Status of petitioner—Certified copy of voters' list—Imprint of Queen's Printer—Evidence—Form of petition—Jurat on affidavit of verification—Preliminary objections.*

See ELECTION LAW, 2.

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See AFFIDAVIT.

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Charter party—Contract—Negligence—Stowage—Fragile goods—Bill of lading—Notice—Acts 1674, 1675, 1676, 2383, 2390, 2409, 2413, 2424, 2427, C. C.—Fault of servants.

See CARRIERS, 4.

AND see CHARTER PARTY; SHIPPING.

AGENCY.

1. *Insurance agent—Duty towards company—Acting for rival company—Divided interests—Dismissal.*—Acting as the agent of a rival insurance company is a breach of an insurance agent's agreement, "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interests of" his employer, and is sufficient justification for his dismissal. Judgment of the Court of Appeal for Ontario (22 Ont. App. R. 408), affirmed. *Eastmure v. Canada Accident Assurance Co.*, xxv., 691.

2. *Bona fides—Chattel mortgage—Compliance with statutory forms.*

See CHATTEL MORTGAGE, 6.

3. *Agent of creditor—Obtaining payment from debtor—False representation—Fraud—Ratification—Indictable offence.*

See DEBTOR AND CREDITOR, 17.

4. *Sale of goods—Sale through brokers—Authority of brokers—Acquiescence.*

See PRINCIPAL AND AGENT, 8.

5. *Railway company—Carriage of goods—Connecting lines—Authority of agent.*

See CONTRACT, 17.

6. *Insurance company—General manager—Medical examiner—Agreement with—Authority of manager.*

See CONTRACT, 18.

7. *Insurance company—Authority—Waiver.*

See PRINCIPAL AND AGENT, 26.

8. *Supreme Court agents—"Agent's book"—S. C. Rule 16.*

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And see PRINCIPAL AND AGENT—CONTRACT.

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1. *Bonds held as collateral—Performance of condition—Right to recover possession—Revendication by trustee.*

See PRINCIPAL AND AGENT, 19.

2. *Waiver of distress—Landlord's agreement—Guarantee on hired furniture.*

See LANDLORD AND TENANT, 8.

3. *Sale of land—Vendor and purchaser—Agreement to sell—Title under will—Restriction—Part performance—Special legislation—Compliance with terms of.*

See SPECIFIC PERFORMANCE, 5.

4. *Charge upon lands—Mortgage—Statute of Frauds—Registration.*

See MORTGAGE, 25.

5. *Vendor and purchaser—Agreement for sale of lands—Assignment by vendee—Principal and surety—Deviation from terms of agreement—Giving time—Creditor depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.*

See PRINCIPAL AND SURETY, 4.

6. *Municipal corporation—By-law—Assessment—Local improvements—Agreement with owners of property—Construction of subway—Benefit to land.*

See MUNICIPAL CORPORATION, 28.

AND see CONTRACT.

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Setting aside award—Art. 1346 C. C. P.

See ARBITRATIONS, 52.

ALIAS DICTUS.

Indictment for murder—Names of deceased—Evidence—Variance.

See CRIMINAL LAW, 9.

ALIMENTARY ALLOWANCE.

1. *Appeal—Jurisdiction—Future rights—Alimentary allowance—R. S. C. c. 135, s. 29, s.-s. 2; 54 & 55 Vict. c. 25, s. 3; 56 Vict. c. 29, s. 2.]—Actions or proceedings respecting disputes as to mere personal alimentary pensions or allowances do not constitute controversies wherein rights in future may be bound within the meaning of the second subsection of the twenty-ninth section of "The Supreme and Exchequer Courts Act" as amended, which allows appeals to the Supreme Court of Canada from judgments rendered in the Province of Quebec in cases where the controversy relates to "annual rents or other matters or things where rights in future might be bound." *Macfarlane v. Leclaire*, (15 Moo. P. C. 181), distinguished; *Sauvageau v. Gauthier*, L. R. 5 P. C. 494), followed. *La Banque du Peuple v. Trotter*, xxviii., 422.*

2. *Appeal—Jurisdiction—Appealable amount—Future rights—Alimentary allowance—"Other matters and things."*

See APPEAL, 74.

3. *Will—Construction of—Donation—Partition per stirpes or per capita—Usufruct—Accretion between legatees.*

See SUBSTITUTION, 5.

4. *Appeal—Jurisdiction—Appealable amount—Monthly allowance—Future rights.*

See APPEAL, 78.

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See TITLE TO LAND.

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Accretion to riparian lands—Gradual and imperceptible additions—Right of access—Statutory extinction of right of way—Public works.

See TITLE TO LAND, 32.

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See APPEAL—PLEADING—PRACTICE.

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Annual rents—Rentes foncières—R. S. C. c. 135, s. 29 (b)—Jurisdiction—Future rights.

See APPEAL, 44.

APPEALS TO THE SUPREME COURT.

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1. ABATEMENT OF APPEAL.

1. *Abatement of appeal—Death of plaintiff — Actio personalis moritur cum persona — Lord Campbell's Act—C. S. N. B. c. 86.*—P.'s action against a railway conductor for injuries received in attempting to board a train and alleged to have been caused by the negligence of the conductor in not bringing the train to a standstill, was nonsuit, and, on motion to the full court, the nonsuit was set aside and a new trial ordered. Between verdict and judgment ordering new trial, P. died, and a suggestion of his death was entered on the record. On appeal from the order of the full court: *Held*, that under Lord Campbell's Act, or the equivalent statute in New Brunswick, an entirely new cause of action arose on the death of P., and the original action was entirely gone and could not be revived. There being no cause before the court, the appeal was quashed without costs. *White v. Parker*, xvi., 699.

2. APPEAL BOND.

2. *Prosecution — Form of bond — Objections — Application in chambers to dismiss —*

Waiver.—The bond for security for costs of appeal to the Supreme Court should provide for the prosecution of the appeal. Objections to the form of the bond should be taken by application in chambers to dismiss the appeal, and if not so made objections will be held to have been waived. *Whitman v. Union Bank of Halifax*, xvi., 410.

3. *Security Bond — Parties interested — Quashing appeal.*—Where the bond for security of costs of appeal has not been given to the parties really interested in the appeal and before the court, the appeal will not lie. *Scammell v. James*, xvi., 593.

4. *Security for costs — Condition precedent to appeal.*—Except in cases specially provided for, no appeal can be heard by the Supreme Court unless security for costs has been given as provided by R. S. C. c. 135, s. 46. *In re Cahan*, xxi., 100.

5. *Security for costs — Appeal to Supreme Court — Amount of bond.*—Per Osler, J.—The court has no discretion to increase the amount of security on an appeal to the Supreme Court of Canada, fixed by R. S. C. c. 135, s. 46, at \$500, because of the number of respondents. *Archer v. Severn*, xii., Ont. P. R. 472.

6. *Bond on appeal — Separate issues — Number of respondents.*—Upon application to file bond of security for costs of an appeal to the Supreme Court of Canada, several respondents who had appeared separately in the Superior Court and in the Court of Appeal, urged that they were respectively entitled to separate security bonds for each of four appellants, i.e., four bonds of \$500 each. *Held, per Hall, J.*, that leave to appeal should be granted on the furnishing of a single bond for \$500. *Archer v. Severn* (12 Ont. P. R. 472) followed. *Bonsack Machine Co. v. Falk*, Q. R. 9 Q. B. 355.

3. APPLICATION OF STATUTES.

7. *Jurisdiction — Right to appeal under 38 Vict. c. 11, ss. 26, 80—Judgments prior to establishment of Supreme Court of Canada.*—The Supreme Court of Canada cannot entertain appeals from judgments signed, entered or pronounced prior to 11th January, 1876, when its judicial functions took effect by proclamation under s. 80 of the Supreme and Exchequer Courts Act, and no court proposed to be appealed from, nor any judge thereof, can, under s. 26 of the Act, grant leave to appeal from any such judgment. *Taylor v. The Queen*, i., 65.

8. *Right of appeal — 54 & 55 Vict. c. 25—Construction of.*—By 54 & 55 Vict. c. 25, s. 3 (D.), passed on 30th September, 1891, the Supreme Court of Canada can hear appeals from the Court of Review "where and so long as no appeal lies from the judgment of that court when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec is appealable to the Judicial Committee of the Privy Council." The judgment was delivered by the Superior Court on 17th November, 1891, and affirmed unanimously by the Court of Review, on 29th February, 1892, which latter judgment was by the law of Quebec appealable to the Judicial Committee. Plaintiff's

action was instituted on the 22nd November, 1890, and was standing for judgment in the Superior Court in June, 1891. On appeal from the Court of Review respondent moved to quash for the want of jurisdiction. *Held*, Taschereau and Gwynne, JJ., dissenting, that the right of appeal given by 54 & 55 Vict. c. 25, did not extend to cases standing for judgment in the Superior Court prior to the passing of that Act. *Couture v. Bouchard* (21 Can. S. C. R. 181), followed. — *Held*, per Fournier, J. That the statute is not applicable to cases already instituted or pending before the courts, no special words applicable to cases already instituted or to that effect being used. *Williams v. Irvine*, xxii., 108.

9. *Right to appeal in Ontario cases*—60 & 61 Vict. c. 34 — *Retrospective legislation — Pending cases.*]—The Act 60 and 61 Vict. c. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario, as therein specified, does not apply to a case in which the action was pending when the Act came into force, although the judgment directly appealed from may not have been pronounced until afterwards. *Hyde v. Lindsay*, xxix., 99.

10. *Construction of statute*—*Appellate jurisdiction—Court of Review*—Art. 43 C. P. Q.—54 & 55 Vict. c. 25, s. 3.

See No. 289 *infra*.

4. ARBITRATION AND AWARDS.

11. *Arbitration — Reference by consent*—R. S. O. (1877) c. 50, s. 189.]—Under R. S. O. (1877) c. 50, s. 189, an appeal will lie where that right has been reserved in a reference made to arbitration by consent of parties. *Bickford v. Canada Southern Ry. Co.*, xiv., 743.

12. *Expropriation of land — Arbitration — Award — Increase by Exchequer Court—Hearing of additional witnesses on appeal—Appreciation of evidence — Weight of evidence.*]—In expropriation of land for a railway, the award of the arbitrators was increased by the Exchequer Court from \$4,155 to \$10,824.25, after additional witnesses had been examined by the judge. *Held*, affirming the judgment appealed from (1 Ex. C. R. 291), that as it was supported by evidence, and there was no principle on which it was fairly open to blame, nor any oversight of material consideration, the judgment should not be disturbed, Gwynne, J., dissenting. *The Queen v. Charland*, xvi., 721.

13. *Expropriation — 35 Vict. c. 32, s. 7 (Que.) — Interference with award of arbitrators.*]—In a matter of expropriation the decision of a majority of arbitrators, men of more than ordinary business experience, upon a question merely of value should not be interfered with on appeal. *Lemoine v. City of Montreal*; *Allan v. City of Montreal*, xxiii., 390. (Leave to appeal was refused by Privy Council.)

14. *Jurisdiction — Award of arbitrators*—54 & 55 Vict. c. 6 (B.)—54 Vict. c. 2 (O.)—54 Vict. c. 4 (Q.)—In an award made under the provisions of the Acts 54 & 55 Vict.

c. 6, s. 6 (D.), 54 Vict. c. 2, s. 6 (O.), and 54 Vict. c. 4, s. 6 (Q.) there can be no appeal to the Supreme Court of Canada, unless the arbitrators in making the award set forth therein a statement that in rendering the award they have proceeded on their view of a disputed question of law. *Province of Ontario v. Province of Quebec and Dominion of Canada*; *In re Common School Fund and Lands*, xxx., 306.

15. *Award of arbitrators — Public works—Appeal from Exchequer Court*—42 Vict. c. 8, s. 38 (D.)—*Review of award—Damages.*

See ARBITRATION AND AWARD, 10.

16. *Interference with award — Increasing compensation—Expropriation of land.*

See ARBITRATION AND AWARD, 11.

5. CERTIORARI.

17. *Certiorari — Merchants' Shipping Act, 1854 — Distressed seaman — Recovery of expenses — "Owner for time being" — Proof of ownership and payment.*]—An appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute a rule nisi for a certiorari to bring up proceedings before a police magistrate under The Merchants' Shipping Act with a view to having the judgment thereon quashed. *The Queen v. The Sailing Ship Troop Company*, xxix., 662.

6. CONTROVERSY INVOLVED.

18. *Jurisdiction — Amount in dispute — Demande—Recovery—Right to appeal by defendant—Mitoyenneté.*]—The Supreme and Exchequer Courts Act, 38 Vict. c. 11, s. 17, enacted that no appeal should be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value in dispute did not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down a wall, remove all new works complained of in the wall, and pay £500 damages, with interest and costs. H. obtained judgment for \$100 damages against J., who was also condemned to remove the works complained of, or pay the value of *mitoyenneté*. *Held*, Strong, J., dissenting, that in determining the sum or value in dispute in cases of appeal by a defendant, the proper course was to look at the amount of the demand in the declaration, and not at the amount of the judgment, and that the court had jurisdiction to hear the appeal.—*Held*, per Strong, J., dissenting. That the amount in dispute was the sum awarded for damages and the value of the wall of which the demolition was ordered by the judgment appealed against, and that it was necessary to shew that the total recovery amounted to the sum or value fixed by the statute before an appeal could lie. *Joyce v. Hart*, i., 321. (Overruled by *Allen v. Pratt* (13 App. Cas. 780). See Nos. 19 and 24 *infra*.)

19. *Jurisdiction — Value of amount in controversy—Assessment of damages—Discretion of trial judge—Interference on appeal.*]—Where the right of appeal depends on the amount in controversy, the proper course in determining the amount in dispute is to look

at the amount, etc., claimed in the prayer of the declaration, and not at the amount for which judgment has been recovered. *Joyce v. Hart*. (1 Can. S. C. R. 321), and *Gingras v. Desilets* (Cass. Dig., 2 ed. 212) reviewed and approved. Taschereau, J., dissented.—2. In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice, and to make it apparent that there was error or partiality on the part of the judge, an appellate court should not interfere with the discretion exercised in determining the amount of damages. *Levi v. Reed*, vi., 482. (Overruled by *Monette v. Lefebvre* (16 Can. S. C. R. 387); followed in *Cossette v. Dun* (18 Can. S. C. R. 222). See Nos. 24 and 32 *infra*.)

20. *Jurisdiction—Amount in controversy—Demande—Interest barred at time of suit.*—Although the amount claimed by the declaration was made to exceed \$2,000 by including interest which had been barred by prescription an appeal will lie to the Supreme Court of Canada. *Ayotte v. Boucher*, ix., 460.

21. *Jurisdiction—Amount in dispute—Matter in controversy—Future rights—Hypothecary action*—42 Vict. c. 39, s. 8—*Church rules—Charge on lands.*—In an hypothecary action to enforce a lien for \$165, first instalment of a rate imposed on land for the erection of a Roman Catholic church, the judgment appealed from affirmed the decision of the trial court maintaining the plaintiff's action. *Held*, that the Supreme Court of Canada had no jurisdiction to hear an appeal, as the amount in dispute was less than \$2,000, and there was no question involved relating to a title to land or like matters where rights in future might be bound, even although the rate might be payable by instalments, some of which were not yet due. *Sauvageau v. Gauthier* (L. R. 5 P. C. 494), referred to. *Bank of Toronto v. Les Curé etc., de la Nativité de la Sainte Vierge*, xii., 25.

22. *Municipal road—Statute labour—Charge on land*—R. S. C. c. 135, s. 29 (b).—By *procès-verbal* of a municipal council a portion of a public road fronting the land of R. was ordered to be improved by raising and widening it. Upon his refusal to do the work the council had it performed, paid \$200 for it and subsequently sued R. for the cost. The Court of Queen's Bench affirmed a judgment in favour of the municipal council for that amount. *Held*, per Fournier, Henry, and Gwynne, J.J. (Strong and Taschereau, J.J. dissenting, and Ritchie, C.J., expressing no opinion on the point), that although the matter in controversy did not amount to \$2,000, yet, as it related to a charge on the appellant's land whereby his rights in future might be bound, the case was appealable. *Reburn v. Corporation de Ste. Anne du Bout de L'Isle*, xv., 92.

23. *Jurisdiction—Future rights—Supreme and Exchequer Courts Act*, s. 29, s-s. (b).—In an action for \$1,333.36, a balance of one of several money payments of \$2,000 each, one whereof defendants agreed to pay to plaintiff every year so long as certain security given by plaintiff for defendants remained in the hands of the government, defendants contended that the security had been released by the action of the government and they were therefore not liable to pay the amount sued for, or any further instalments. The Court of

Queen's Bench (appeal side) held that the security had not been released and gave judgment for the amount claimed. The defendants applied to one of the judges of that court and obtained leave to appeal, on the ground that if the judgment was well founded then future rights would be bound, and they had become liable for two other instalments of \$2,000 each, for which actions were pending. *Held*, that an appeal would not lie, because even if the future rights of the defendants were bound by the judgment such future rights had no relation to any of the matters or things enumerated in s-s. (b) of s. 29 of the Supreme and Exchequer Courts Act.—The words "where the rights in future might be bound" in this s-s. are governed and qualified by the preceding words and to make a case appealable when the amount in controversy is less than \$2,000, not only must future rights be bound by the judgment, but the future rights to be so bound must relate to "a fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to some title to lands or tenements, or to annual rents out of lands or tenements, or to some like matters and things." *Gilbert v. Gilman*, xvi., 189.

24. *Jurisdiction—Amount in controversy—R. S. C. c. 135, s. 29—Acquiescement—Issue on Appeal.*—Where the plaintiff has acquiesced in the judgment of the court of first instance by not appealing, the measure of value for determining his right of appeal under s. 29 of the Supreme and Exchequer Courts Act is the amount awarded by the judgment of the trial court, and not the amount claimed by his declaration. *Levi v. Reed* (6 Can. S. C. R. 482), overruled; *Allen v. Pratt* (13 App. Cases, 780), referred to as overruling *Joyce v. Hart* (1 Can. S. C. R. 321). *Monette v. Lefebvre*, xvi., 387.

25. *Jurisdiction—Quebec Judicial Deposit Act—Claims to money in court—Amount in controversy*—R. S. C. c. 135, s. 29.—An insurance company deposited \$3,000 in court, being amount of a life policy issued by the company, which by its terms had become payable, but to one-half of which sum rival claims were made. Appellants, as collateral heirs of the deceased, claimed the whole, and respondent, widow of deceased, claimed as *commune en biens*, one-half; and, in her answer prayed that in so far as appellants' petition claimed any greater sum than one-half, it should be dismissed. The Superior Court awarded one half to appellants, and the other half to respondent. On appeal from the judgment of the Court of Queen's Bench affirming the Superior Court: *Held*, that the sum or value of the matter in controversy between the parties being only \$1,500, there was no appeal to the Supreme Court of Canada. (Fournier, J., *dubitante*). *Labelle v. Barbeau*, xvi., 390.

26. *Jurisdiction—Future rights—Supreme and Exchequer Courts Act*, s. 29—*Municipal taxes—Special assessments.*—Appeal in an action to recover \$361.90, special assessment for a drain along the property of the defendants (see M. L. R. 2 S. C. 265). Motion to quash for want of jurisdiction, on the ground that the matter in controversy was under \$2,000, and did not come within any of the exceptions in s. 29 of the Supreme and Exchequer Courts Act. *Held*, that the case came within the words "such like matter or things, where the rights in future might be bound," in paragraph (b) of s. 29, and was therefore

appealable. *Ecclesiastiques de St. Sulpice v. City of Montreal*, xvi., 399.

27. *Jurisdiction—Matter in dispute—Affidavit as to value—Bank shares—Actual value at time of action.*—The actual value of bank shares at the time of action must determine the amount in controversy in a dispute respecting them, and such value may be shewn by affidavit. *Muir v. Carter; Holmes v. Carter*, xvi., 473.

28. *Toll bridge—Ferry—Franchise—Interference—R. S. C. c. 135, s. 29 (b)—Future rights.*—By 38 Vict. c. 97 (Q.), plaintiffs were authorized to build and maintain a toll bridge, and if the said bridge should by accident or otherwise be destroyed, become unsafe or impassable, they were bound to rebuild it within 15 months next following, under penalty of forfeiture of the advantages granted; and during any time that the bridge should be unsafe or impassable they were bound to maintain a ferry across the river, for which they might recover the tolls. The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within 15 months. During reconstruction, although plaintiffs maintained a ferry across the river, defendant built a temporary bridge within the limits of plaintiff's franchise and allowed it to be used by parties crossing the river. In an action for damages, and demolition of the temporary bridge: *Held*, reversing the Court of Queen's Bench, that as rights in future might be bound, the case was appealable under R. S. C. c. 135, s. 29 (b). *Galarneau v. Guilbault*, xvi., 579.

29. *Jurisdiction—R. S. C. c. 135, s. 29 (b)—Future rights—Fee of office—Collateral matter—Action for penalties—Disqualification—R. S. Q. art. 429.*—To give the Supreme Court jurisdiction to hear an appeal from the Province of Quebec, by virtue of s. 29 (b) of the Supreme and Exchequer Courts Act, the matter relating to fee of office, where the rights in future might be bound, must be the matter really in controversy in the suit in which the appeal is sought and not something merely collateral thereto.—This clause will not give jurisdiction in a case in which the action was brought to recover penalties for bribery under the Quebec Election Act, and the effect of the judgment may be to disqualify appellant from holding office under the Crown for seven years. *Chagnon v. Normand*, xvi., 661.

30. *Trivial dispute—Action for small amount—Propriety of appeal.*—Although the court cannot refuse to hear an appeal in a case in which only twenty-two dollars is involved, yet the bringing of appeals for such trifling amounts is objectionable and should not be encouraged. *McDonald v. Gilbert*, xvi., 700.

31. *Jurisdiction—Amount in controversy—Partition and litation—Appellant's interest—R. S. C. c. 135, s. 29.*—In an action for the partition and litation of properties, that the proceeds might be divided according to the rights of the parties who had carried on business as partners, the judgment appealed from ordered the litation. On motion to quash the appeal on the ground that the matter in controversy was under \$2,000, the appellant in answer to the respondent's affidavit filed another affidavit shewing that the total value of the property was \$3,000, but, it being admitted that the respondent claimed but one-half interest in the property, it was: *Held*, that the

matter in controversy, and claimed by the respondent, not amounting to the sum or value of \$2,000, the appeal should be quashed with costs. *Hood v. Sangster*, xvi., 723.

32. *Jurisdiction—Amount in controversy—R. S. C. c. 135, s. 29—Damages—Discretion of trial judge.*—The plaintiff in an action for \$10,000 for damages obtained judgment in the Superior Court for \$2,000, defendant appealed and the judgment was reduced below \$2,000. *Held*, that an appeal would lie by the plaintiff to the Supreme Court, the value of the matter in controversy as regards him being the amount of the judgment of the Superior Court (Taschereau and Patterson, JJ., dissenting).—The amount of damages awarded by the trial judge in his discretion, should not be interfered with by a Court of Appeal, unless clearly unreasonable and unsupported by the evidence, or if there be some error in law or fact or partiality on the part of the judge. *Levi v. Keed* (6 Can. S. C. R. 482), and *Gingras v. Desilets* (Cass. Dig. (2 ed.) 212), followed. *Cossette v. Dun*, xviii., 222.

33. *Validity of by-law—Sup. & Ex. Courts Act, ss. 24 (g), 29 (a), 30 (b)—Constitutional law—Matter in controversy.*—Action for \$150, amount of business taxes, \$100 as compounders and \$50 as wholesale dealers, under municipal by-law. Defendants pleaded that by-law was illegal and *ultra vires* of the council, and the statute, 47 Vict. c. 84 (Que.), *ultra vires* of the Legislature. The Superior Court held both statute and by-law *intra vires*, the Court of Queen's Bench affirmed this judgment as to validity of statute, but set aside the tax of \$100 as not authorized. Plaintiff appealed to the Supreme Court, against that part of the judgment declaring the business tax of \$100 invalid. There was no cross-appeal. On motion to quash for want of jurisdiction; *Held*, that the appeal would not lie, s. 24 (g) of the Supreme and Exchequer Courts Act not being applicable, and the case not coming within s. 29 of the Act, the amount being under \$2,000, no future rights within the meaning of s. 29 being in controversy, nor any question as to the constitutionality of the Act of the legislature being raised. Strong, J., dissented on the ground that the judgment appealed from involved the question of the validity of the provincial Act. *City of Sherbrooke v. McManamy*, xviii., 594.

34. *Saisie gagerie—Jurisdiction—Action within competence of Circuit Court—Superior Court—Title to land—Question raised by pleadings—Sup. and Ex. Courts Acts, ss. 24, 28, and 29 (b)—Arts. 873 887 C. C. P.—Art. 1624 C. C.*—In an action in the Superior Court for arrears of rent with *saisie gagerie*, defendant pleaded that he had held the premises since the expiration of his lease under verbal agreement for sale. The Court of Queen's Bench, reversing the Court of Review, held that the action ought to have been instituted in the Circuit Court. *Held*, that as the case was originally instituted in the Superior Court and upon the face of the proceedings the right to possession of and property in real estate was involved, an appeal would lie, Strong, J., dissenting. *Blachford v. McBain*, xix., 42. See, also, 20 Can. S. C. R. 269.

35. *Jurisdiction—Bill of costs—Reference to taxing master—Matter of procedure.*—It

is doubtful if a decision affirming the master's ruling on taxation of a solicitor's bill of costs, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court. *O'Donohue v. Beatty*, xix., 356.

36. *Repealed by-law—Appeal as to costs—Jurisdiction—Sup. Court Act, s. 24—Practice.*—After judgment refusing to quash a by-law, it was repealed. On appeal to the Supreme Court of Canada from the judgment in question; *Held*, that as the only matter remaining in dispute was a mere question of costs, the court would not entertain the appeal. *Moir v. Village of Huntingdon*, xix., 363.

37. *Homologation of procès-verbal—Jurisdiction—Action to set aside procès-verbal—Supreme Court Act, ss. 24 (g), 29.*—The County of Verchères homologated a *procès-verbal* defining who were to be liable for rebuilding and maintenance of a bridge. The Municipality of Varennes took action and had the *procès-verbal* set aside for irregularities. *Held*, that the case was not appealable, under s. 29 or s. 24 (g) of the Supreme Court Act, no future rights within the meaning of the former section being in question, and the appeal not being from a rule or order of a court quashing or refusing to quash a by-law of a municipal corporation. *County of Verchères v. Village of Varennes*, xix., 365.

38. *Jurisdiction—Matter in controversy—Order to construct drain—Question of damages reserved—Future rights—Title to lands—Servitude—Supreme Court Act, s. 29 (b).*—Defendants were condemned to complete certain drains, within a time fixed, in a lane separating defendant's and plaintiff's properties, to prevent water from entering plaintiff's house on a lower level. The question of damages were reserved. *Held*, that the case was not appealable, there being no controversy as to \$2,000 or over, and no title to lands or future rights in question within the meaning of s. 29 (b) of the Supreme Court Act.—The words "title to lands" in this sub-section are only applicable to a case where a title to the property or a right to the title may be in question.—The fact that a question of the right of servitude arises would not give jurisdiction.—*Wheeler v. Black*, (14 Can. S. C. R. 242) referred to; *Gilbert v. Gilman*, (16 Can. S. C. R. 189) approved. *Wineberg v. Hampson*, xix., 369.

39. *Jurisdiction—Matter in controversy—Subscription for joint stock shares—Action for call—Future rights—R. S. C. c. 135, s. 29, s.-s. (b).*—Suit for \$1,000, being a call of ten per cent. on 100 shares of \$100 each alleged to have been subscribed by B., in the capital stock of the company. During the suit, the company's business was ordered to be wound up under the Winding-up Act, and the liquidator authorized to continue the suit. The Superior Court found for plaintiff, but on appeal the Court of Queen's Bench dismissed the action. *Held*, Gwynne, J., dissenting, that no appeal would lie, the amount in controversy being under \$2,000 and no future rights bound as specified in the Supreme Court Act, s. 29, s.-s. b. *Gilbert v. Gilman*, (16 Can.

S. C. R. 189), followed. *Dominion Salvage & Wrecking Co. v. Brown*, xx., 203.

40. *Jurisdiction—Business tax—Action to set aside municipal by-law—Supreme Court Act, s. 24 (g).*—By a by-law passed in the absence of the mayor, a councillor elected to the chair presiding, an annual tax of \$800 was imposed on the Bell Tel. Co., and another of \$1,000 on the Quebec Gas Co. In actions by appellants to annul the by-law, the Court of Queen's Bench reversed the Superior Court and dismissed the actions holding the tax valid. *Held*, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question within the terms of s. 24 (g) of the Supreme Court Act providing for appeals in cases of municipal by-laws. *Varennes v. Verchères*, (19 C. S. C. R. 365); *Sherbrooke v. McManamy* (18 C. S. C. R. 594), followed. *Bell Telephone Co. v. City of Quebec; Quebec Gas Co. v. City of Quebec*, xx., 230.

41. *Amount in controversy—Jurisdiction—Disavowal—Parties—Issue on appeal.*—In an action brought in 1866 for \$800 and interest at 12½ per cent. against S. D. and W. D., amount of a promissory note signed by them, one copy of the summons was served at the domicile of S. D. at Three Rivers, the other defendant W. D. then residing in New York. On the return of the writ, respondent filed an appearance as attorney for both defendants and proceedings were suspended until 1874 when judgment was taken and in December, 1880, upon the issue of an *alias* writ of execution, appellant, having failed in an opposition to judgment, filed a petition in disavowal of respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by S. D., saying: "Be so good as to file an appearance in the case to which the inclosed has reference, etc.," and also prescription, ratification and insufficiency of the allegations of the petition in disavowal. The petition in disavowal was dismissed. On appeal to the Supreme Court of Canada respondent moved to quash on the ground that the matter in controversy did not amount to \$2,000. *Held*, that as the judgment obtained against the appellant, in March, 1874, on the appearance filed by respondent, exceeded \$2,000, the judgment on the petition for disavowal was appealable. *Held*, also, that where a petition in disavowal has been served on all parties to the suit and is only contested by the attorney, whose authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal. *Dawson v. Dumont*, xx., 709.

42. *Jurisdiction—Fraudulent conveyance—Deed of land—Action by creditor—Amount in controversy—R. S. C. c. 135, s. 29.*—In December, 1889, Ferland, a trader, sold to G., one of respondents, real estate in Montreal, mortgaged for \$7,000, or \$8,000, with a right of *reméré* for one year. In January, 1890, Ferland made an assignment, and Flatt, *et al.* creditors for \$1,880, brought action against G. to have the deed of the property (valued at over \$11,000) set aside as made in fraud of creditors. G. pleaded that he was willing to return the property upon payment of \$1,000 advanced to F., and the courts below dismissed the action. *Held*, that as appellants' claim

was under \$2,000 and they did not represent Ferland's other creditors, the amount in controversy was insufficient to make the case appealable. *Flatt v. Ferland*, xxi., 32.

43. *Jurisdiction—Road repair—Municipal by-law—Rights in future—Supreme Court Act, s. 29 (b).*—Action by the corporation for \$262.14 paid out for macadam work on a road fronting appellants' lands, the work of macadamizing and keeping it in repair being imposed by by-law. Appellants pleaded nullity of the by-law. *Held*, Gwynne, J., dissenting, that appellants' obligation to keep the road in repair under the by-law not being a charge affecting "future rights" within the meaning of R. S. C. c. 135, s. 29 (b), the case was not appealable. *County of Verchères v. Village of Varennes*, (19 Can. S. C. R. 365), followed, *Reburn v. Paroisse de Ste. Anne*, (15 Can. S. C. R. 92), distinguished. *Dubois v. Village of Ste. Rose*, xxi., 65.

44. *Jurisdiction—Monthly allowance of \$200—Amount in controversy—"Future rights"—"Annual rents"—Rentes foncières*—R. S. C. c. 135, s. 29 (b)—54 *Vict. c. 96 (Que.)*—R. claimed under a will and an Act of the Legislature of Quebec, from L., testamentary executrix of the estate, \$200, an instalment of the monthly allowance L. was authorized to pay to each of testator's daughters out of the revenues of his estate. *Held*, that the amount in controversy being only \$200, and there being no "future rights" which might be bound within the meaning of those words in s. 29 (b) of the Supreme Court Act, the case was not appealable.—Annual rents in R. S. C. c. 135 s. 29 (b), mean "ground rents" (*rentes foncières*) and not an annuity or any other like charges or obligations. *Rodier v. Lapierre*, xxi., 69.

45. *Jurisdiction—Supreme Court Amending Act, 1891—Judgment of Court of Review—Case standing over for judgment—Amount in dispute—Arts. 1178 & 1178 (a), C. C. P.*—Action by respondent for \$2,006 was heard and taken *en délibéré* by the Court of Review on 30th Sept., 1891, date of assent to 54-55 *Vict. c. 25*, s. 3, giving an appeal from the Court of Review to the Supreme Court of Canada. Judgment was rendered a month later. *Held*, *per Strong, Fournier and Taschereau, JJ.*, that the plaintiff's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the day, when the case was taken *en délibéré*, and therefore the case was not appealable. *Hurtubise v. Desmarceau* (19 Can. S. C. R. 562), followed. *Per Gwynne and Patterson, JJ.*, that the case did not come within 54-55 *Vict. c. 25*, s. 3, inasmuch as the judgment, being for less than £500 sterling was not a judgment of right appealable to the Privy Council. *Couture v. Bouchard*, xxi., 281.

46. *Matter in controversy—Bornage—Injunction—Jurisdiction—R. S. C. c. 135, s. 29 (b).*—In a case between adjoining proprietors of lands, an encroachment was complained of, and it appeared that the limits had not been legally determined by *bornage*, the judgment appealed from (*M. L. R.*, 7 Q. B. 196), held that injunction would not lie, the proper remedy being an action *en bornage*. *Held*, that as the matter in controversy did not put in issue any title to land, the case was not appealable to the Supreme Court of

Canada. *Emerald Phosphate Co. v. Anglo-Continental Guano Works*, xxi., 422.

47. *Jurisdiction—Amount in controversy—Opposition to seizure for less than \$2,000—Objection taken by court—Costs.*—Contestation on opposition by respondent to a seizure of lands by appellant on a judgment for \$640. The opposition alleged that respondent was a creditor of defendant for \$31,000, and asked that seizure be annulled on the ground that by agreement of 17th Oct., 1876, no property of the defendant should be sold without the respondent's consent. Defendant was a building society, and respondent alleged that appellant as a director had become a party to and bound by the agreement. The opposition was maintained by the Superior Court, and by the majority of the Court of Queen's Bench. *Held*, that the appeal did not come within any of the cases mentioned in 42 *Vict. c. 39*, s. 8, providing for appeals from the Province of Quebec. The demand was for \$640; the opposition was not for any particular sum and did not ask for the payment of the debt of \$31,000, but attacked only the seizure for \$640 and sought to interfere with the execution of a judgment for that sum; the amount in dispute therefore was this \$640, and the question of jurisdiction was governed by this amount and not by the value of property seized, although such value exceeded the sum of \$2,000. Henry, J., dissented.—Appeal quashed for want of jurisdiction, but without costs, the objection having been raised by the court. *Champoux v. Lapierre*, Cass. Dig. (2 ed.), 426; Cass. Prac. (2 ed.), 40, 81.

48. *Amount in controversy—Matter in issue—Jurisdiction—Opposition to seizure—Affidavit as to value.*—The appellant was allowed to shew by affidavit that the amount in dispute was over \$2,000. *McCorkill v. Knight*, 31st Jan., 1879; Cass. S. Ct. Prac. (2 ed.), 40.

49. *Jurisdiction—Seizure of lands—Opposition afin de distraire—Amount in dispute—Supreme Court Act (1879), s. 8—Costs.*—The appellants, having recovered judgments for \$528.83, with interest and \$231, with interest and costs, issued execution upon the last judgment, under which lands were seized. Respondents contested the seizure by opposition *afin de distraire*, alleging title to the land seized, acquired for the price of \$2,000, and prayed that they might be declared owners, and the seizure set aside. Appellants contested this opposition, impugning the alleged sale and the title of respondents to the land in question. On appeal from the judgment of the Court of Queen's Bench, reversing the Superior Court on this contestation. *Held*, that the opposition having been filed in a suit in which the amount in dispute was less than \$2,000, the appeal would not lie. *Macfarlane v. Leclair* (15 *Moo. P. C. C.* 181), referred to; also *Champoux v. Lapierre*, Cass. Dig. (2 ed.), 426; Cass. S. C. Prac. (2 ed.), 40, 81.—Appeal quashed for want of jurisdiction, but without costs, a motion to quash not having been made at the earliest convenient moment. *Gendron v. McDougall*, Cass. Dig. (2 ed.), 429; Cass. S. C. Prac. (2 ed.), 40, 81.

50. *Jurisdiction—Superior Court—Evocation from Circuit Court—Limited contract—Rights in future—42 Vict. c. 39, s. 8 (D.).*—D. entered into an agreement with the defendant and others, whereby they agreed to

furnish for 20 years all the milk of their cows to D., to be manufactured into cheese, at a percentage rate, at his factory of which the plaintiff subsequently became proprietor and vested with all the rights of D. The defendant, among others, contrary to the agreement, sold his milk to an opposition factory, whereupon the plaintiff sued for damages in the Circuit Court. The action was evoked on the ground that future rights were in question, and the Superior Court gave plaintiff \$8.51 damages for the breach of the agreement. The Court of Queen's Bench having reversed the judgment and dismissed the action, plaintiff applied to a judge of that court for leave to appeal to the Supreme Court, who refused on the ground that the future rights were limited, and that multiplied by their duration they would not reach the amount required for an appeal. On further application to Gwynne, J., of the Supreme Court, in chambers: *Held*, that the case was similar to one of a contract for payment of a sum by instalments to an amount of \$170.20 in all, and also that it did not come within the meaning of "rights in future," as used in s. 8 of the Supreme Court Amendment Act of 1879, and an appeal did not lie to the Supreme Court of Canada. *Beaubien v. Bernatchez*, Cass. Dig. (2 ed.), 433; Cass. S. C. Prac. (2 ed.), 43.

51. *Jurisdiction—Sup. Ct. Amendment Act, 1879, s. 8—Duty payable to the Crown—Future rights—Ex post facto legislation—Right of appeal.*—Motion to quash appeal from Queen's Bench (Que.), on ground that amount involved (\$222.80) was below \$2,000, and that the case did not come within any of the exceptions provided for in 42 Vict. c. 39, s. 8.—Two actions (combined at trial,) which constituted the case in appeal, were brought by D., an importer of crockery, against the collector of customs at Montreal for the recovery of difference between 20 and 30 per cent. *ad valorem* duty on value of importations of "printed ware." The Tariff Act of 1879, 42 Vict. c. 15, sch. A, imposed 30 per cent. *ad valorem* duty on "earthenware, white granite or iron stoneware, and 'C. C.' or cream coloured ware," the only enumerated class under which the goods in question could come. At the end of the schedule all unenumerated goods and goods not declared free were subjected to a duty of 20 per cent. The collector insisted upon duty being paid by appellant under the class enumerated as above. D. claimed that they should not be classified, but came under the unenumerated class, and should only pay 20 per cent., paid the 30 per cent. and brought the actions to recover the difference. The importations in question were in spring and summer of 1883. Judgment was given (Jan., 1884), in favour of defendant, and the Queen's Bench dismissed an appeal in May, 1885. In 1884 (47 Vict. c. 30, s. 2, schedule), Parliament amended the Tariff Act as to earthenware as follows: "Earthenware, decorated, printed or spanged, and all earthenware, not elsewhere specified, 30 per cent. *ad valorem*," thus distinctly covering D.'s description of his own importations and declaring such goods subject to 30 per cent., and making it relate back to March, 1884. The collector contended that if before the Act of 1884 the matter in question was a proper subject of appeal, 42 Vict. c. 39 s. 8, by reason of its relation to a duty or revenue payable to the Crown in respect of which the decision appealed from might affect appellant's future rights, it ceased to be such a case by virtue of the Act of 1884, because

that amending Act declared distinctly that from March, 1884, and for the future, the particular class of goods in question was to be subject to a 30 per cent. duty, and that therefore, appellant's future rights could not be affected. *Held*, 1. That there might have been importations of the same class of goods by D. subsequent to those in question in the appeal and before the amendment of 1884 effected a change, in respect of which the decision in the present cases would bind appellant, and that, therefore, the case in that respect at least would still come within the meaning of 42 Vict. c. 39, s. 8, that is to say, being in respect of a duty payable to the Crown, the decision of which might affect the then future rights of appellant. 2. That there might be a dispute still as to whether the amending Act of 1884 expressly covered the same class of goods as were in question in this case, in order to decide which the evidence and merits would require to be discussed, and that this should not be discussed on a motion to quash. 3. That if the appellant had a right to appeal, such right could only be taken away by express and clear words, and there was nothing to shew that such right was taken away.—Motion refused, with \$25 costs. *Darling v. Ryan*, Cass. Dig. (2 ed.), 435; Cass. S. C. Prac. (2 ed.), 43.

52. *Jurisdiction—Award by Drainage Referee—54 Vict. c. 51 (Ont.)—R. S. C. c. 135, s. 24—Costs.*—A judgment of the Court of Appeal for Ontario, affirming the decision or award of a referee under the provisions of "The Drainage Trials Act, 1891" (Ont.), is not appealable to the Supreme Court of Canada under sub-section (f) of section 24, or any other provision of "The Supreme and Exchequer Courts Act." (Gwynne, J., dissented from the judgment of the majority of the court).—Memo. The question as to jurisdiction having been taken by the court, the appeal was dismissed without costs. *Township of Harwich v. Township of Raleigh*, 18th May, 1895.

53. *Appeal—Amount in controversy—R. S. C. c. 135—54 & 55 Vict. c. 25—Costs.*—C. brought an action against E., claiming: 1. That a certain building contract should be rescinded; 2. \$1,000 damages; 3. \$545 for value of bricks in possession of E., but belonging to C. The judgment of the Superior Court dismissed C.'s claim for \$1,000 but granted the other conclusions. On appeal to the Court of Queen's Bench by E., the action was dismissed in 1893. C. then appealed to the Supreme Court. *Held*, that the building for which the contract had been entered into having been completed, there remained but the question of costs and the claim for \$545 in dispute between the parties and that amount was not sufficient to give jurisdiction to the Supreme Court under R. S. C. c. 135, s. 29. *Cowen v. Evans*, xxii., 328.

54. *Jurisdiction—Right to appeal—54 & 55 Vict. c. 25, s. 3, s.s. 4—Amount in dispute—R. S. C. c. 135, s. 29.*—The statute 54 & 55 Vict. c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different" does not apply to cases in which the Superior Court has rendered judgment, or to cases argued and standing for judgment (*en délibéré*) before that court, when the act came into force (30th September, 1891). *Williams v. Irvine* (22

Can. S. C. R. 108) followed. — In actions for damages claiming more than \$2,000, the Court of Queen's Bench for Lower Canada on appeal in one case gave plaintiff judgment for \$800, reversing the judgment of the Superior Court which had dismissed the actions, and in the other cases, on appeal by the defendants, affirmed the judgments of the Superior Court giving damages for an amount less than \$2,000. *Held*, following *Monette v. Lefebvre* (16 Can. S. C. R. 387), that no appeal would lie to the Supreme Court in these cases by the defendants from the judgment of the Court of Queen's Bench under s. 29 of c. 135 R. S. C. Gwynne, J., dissented. *Coven v. Evans*; *Mitchell v. Trenholme*; *Mills v. Limoges*. xxii., 331.

55. *Jurisdiction—Amount in dispute—R. S. C. c. 135, s. 29—54 & 55 Vict. c. 25, s. 3, s.-s. 4 (D.)* — Prior to the passing of the Act, 54 & 55 Vict. c. 25, amending the Supreme and Exchequer Courts Act, and declaring that, where the right of appeal depended upon the amount in controversy, the amount in dispute should be deemed to be that demanded by the action, and not the amount recovered, if they were different, the Superior Court, at Montreal, dismissed an action for \$5,000 damages by a judgment which was reversed on appeal, and the entry of judgment for \$600 in favour of the plaintiff was ordered by the Court of Queen's Bench. The defendant then appealed to the Supreme Court of Canada. On motion to quash for want of jurisdiction: *Held*, following *Coven v. Evans*; *Mitchell v. Trenholme*, and *Mills v. Limoges* (22 Can. S. C. R. 331), that the Supreme Court of Canada had no jurisdiction to entertain the appeal. *Montreal Street Railway Co. v. Carrière*, 11th October, 1893. (See footnote at page 335 of Vol. 22, Can. Sup. Ct. Reps.)

56. *Opposition afin de conserver on proceeds of a judgment for \$1,129—Amount in dispute—Right to appeal R. S. C. c. 135, s. 29.* — K. (plaintiff) contested an opposition *afin de conserver* for \$24,000 filed by L. on the proceeds of a sale of property upon the execution by K. against H. & Co. of a judgment obtained by K. against H. & Co. for \$1,129. The Superior Court dismissed L.'s opposition but on appeal the Court of Queen's Bench (appeal side) maintained the opposition and ordered that L. be collocated *au marc la livre* on the sum of \$930, being the amount of the proceeds of the sale. *Held*, that the pecuniary interest of K. appealing from the judgment of the Court of Queen's Bench (appeal side) being under \$2,000 the case was not appealable under R. S. C. c. 135, s. 29. *Gendron v. McDougall* (Cass. Dig., 2 ed. 429), followed.—*Held*, also, that s. 3 of 54 & 55 Vict. c. 25, providing for an appeal where the amount demanded is \$2,000 or over has no application to the present case. *Kinghorn v. Larue*, xxii., 347.

57. *Actio negatoria servitutis — Amount in controversy—Future rights—R. S. C. c. 135, s. 29 (b)—56 Vict. c. 29, s. 1.* — In an action *négoire* the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed \$30 damages. *Held*, that under 56 Vict. c. 29, s. 1, amending R. S. C. c. 135, s. 29 (b), the case was appealable, the question in controversy relating to matters where the rights in future might be bound. *Wineberg v. Hampson* (19 Can. S. C. R. 369) distinguished. *Chamberland v. Fortier*, xxiii., 371.

58. *Bond in appeal—School mistress—Fee of office—Future rights—R. S. C. c. 135, s. 29 (b)—C. S. L. C. c. 15, s. 68—R. S. Q. art. 2073.* — B. Larivière, a school mistress, by her action claimed \$1,243 as fees due to her in virtue of s. 69, c. 15, C. S. L. C., which was collected by the School Commissioners of the city of Three Rivers, while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court, dismissed the action. On motion before the Supreme Court of Canada to allow a bond in appeal, which had been refused by a judge of the court below, the Registrar of the Supreme Court and a judge of that court, in Chambers, on the ground that the case was not appealable: *Held*, that the matter in controversy did not relate to any office or fee of office within the meaning of s. 29 (b) of the Supreme and Exchequer Courts Act, R. S. C. c. 135. 2. Even assuming it did, no rights in future would be bound, and the amount in dispute being less than \$2,000 the case was not appealable. 3. The words "where the rights in future might be bound" in s.-s. (b) of s. 29 govern all the preceding words "any fee of office, etc." *Chagnon v. Normand* (16 Can. S. C. R. 661); *Gilbert v. Gilman*, (16 Can. S. C. R. 189); *Bank of Toronto v. Les Curé, etc., de St. Vierge* (12 Can. S. C. R. 25), referred to. *Larivière v. School Commissions for Three Rivers*, xxiii., 723.

59. *Amount in controversy—Pecuniary interest—R. S. C. c. 135, s. 29—Contract of sale—Contre lettre—Principal and agent—Construction of contract.* — The plaintiff, who had acted as agent for the late J. B. S., brought an action for \$1,471.07 for a balance of account as *negotiorum gestor* of J. B. S., against the defendants, executors of J. B. S. The defendants, in addition to a general denial, pleaded compensation for \$3,416 and interest. The plaintiff replied that this sum was paid by a *dation en paiement* of certain immovables. The defendants answered that the transaction was not a giving in payment but a giving of a security. The Court of Queen's Bench, reversing the judgment of the Superior Court, held that the defendants had been paid by the *dation en paiement* of the immovables, and that the defendants owed a balance of \$1,154 to the plaintiff. *Held*, that the pecuniary interest of the defendants, affected by the judgment appealed from, was more than \$2,000 over and above the plaintiff's claim and therefore the case was appealable under R. S. C. c. 135, s. 29. *Hunt v. Taplin*, xxiv., 36.

60. *Right of appeal—Petition to quash by-law under art. 4,389 R. S. Q.—R. S. C. c. 135, s. 24 (g).* — Proceedings were commenced to quash a by-law passed by the corporation of the City of Sherbrooke under art. 4,389 R. S. Q. which gives the right to petition the Superior Court to annul a municipal by-law. The judgment appealed from, reversing the judgment of the Superior Court, held that the by-law was *intra vires*. On motion to quash an appeal to the Supreme Court of Canada: *Held*, that the proceedings being in the interest of the public, are equivalent to the motion or rule to quash of the English practice, and therefore the court had jurisdiction to entertain the appeal, under s.-s. (g) of s. 24, c. 135, R. S. C. *Sherbrooke v. McManamy* (18 Can. S. C. R. 594), and *Verchères v. Varennes*

(19 Can. S. C. R. 356), distinguished. *Webster v. City of Sherbrooke*, xxiv., 52.

61. *Supreme and Exchequer Courts Act*, R. S. C. c. 135, ss. 24 and 29—*Costs*.]—*Held*, that a judgment in an action by a ratepayer contesting the validity of a homologated valuation roll is not a judgment appealable to the Supreme Court of Canada under s. 24 (g) of the *Supreme and Exchequer Courts Act*, and does not relate to future rights within the meaning of s.s. (b) of s. 29, of the *Supreme and Exchequer Courts Act*. *Held*, also, that as the valuation roll sought to be set aside in this case had been duly homologated and not appealed against within the delay provided in art. 1061 (Mun. Code, Que.), the only matter in dispute between the parties was a mere question of costs, and therefore the court would not entertain the appeal. *Moir v. Corporation of the Village of Hunt-Ingdon* (19 Can. S. C. R. 363), followed; *Webster v. Sherbrooke* (24 Can. S. C. R. 52), distinguished. *McKay v. Township of Hinchinbrooke*, xxiv., 55.

62. *Amount in dispute*—54 & 55 Vict. c. 25, s. 3, s.s. 4.]—By virtue of s.s. 4 of s. 3 of c. 25 of 54 & 55 Vict., in determining the amount in dispute in cases in appeal to the Supreme Court of Canada, the proper course is to look at the amount demanded by the statement of claim, even though the actual amount in controversy in the court appealed from was for less than \$2,000. Thus where the plaintiff obtained a judgment in the court of original jurisdiction for less than \$2,000, and did not take a cross-appeal upon the defendants appealing to the intermediate Court of Appeal where such judgment was reversed, he was entitled to appeal to this court. *Levi v. Reid* (6 Can. S. C. R. 482), restored, affirmed, and followed, Gwynne, J., dissenting. *Laberge v. Equitable Life Ass. Soc.*, xxiv., 59.

63. *Jurisdiction — Future rights*—R. S. C. c. 135 s. 29 (b)—56 Vict. c. 29 (D.)]—By R. S. C. c. 135, s. 29 (b), amended by 56 Vict. c. 29 (D.), an appeal will lie to the Supreme Court of Canada from the judgments of the courts of highest resort in the Province of Quebec, in cases where the amount in controversy is less than \$2,000, if the matter relates to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound. *Held*, that the words "other matters or things" mean rights of property analogous to title to lands, etc., which are specifically mentioned, and not personal rights; that "title" means a vested right or title already acquired though the enjoyment may be postponed; and that the right of a married woman to an annuity provided by her marriage contract in case she should become a widow is not a right in future which should authorize an appeal in an action by her husband against her for *separation de corps* in which if judgment went against her the right to the annuity would be forfeited. *O'Dell v. Gregory*, xxiv., 661.

64. *Jurisdiction — Winding-up Act — Amount in controversy — Aggregate liability — Joint or separate liability — Contributories*.]—A decision of the Court of Appeal for Ontario reversed the order of the Master in Ordinary settling the respondents on the list of contributories under the Winding-up Act. Appeal lies to the Supreme Court of Canada, in proceedings under the Winding-

up Act, only where the amount involved is \$2,000 or over. In this case there were six persons placed on the list by the Master; one for \$1,000, and the others for \$900 each, and all were released from liability by the decision of the Court of Appeal from which this appeal was brought. The Supreme Court held that although the aggregate amount for which the respondents were sought to be made liable exceeded \$2,000, there was no jurisdiction under the Act to entertain the appeal, because the position was the same as if proceedings had been taken separately against each of the contributories. The appeal was quashed with costs. *Stephens v. Gerth; In re Ontario Express & Transportation Co.*, xxiv., 716.

65. *Appeal for costs — Jurisdiction — Action in warranty — Proceedings taken by warrantee before judgment on principal demand*.]—Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle, which the party appealing has an actual interest in having reviewed and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. *Archibald v. DeLisle; Baker v. DeLisle; Mowat v. DeLisle*, xxv., 1.

66. *By-law—Petition to quash—Appeal to Court of Queen's Bench*—40 Vict. c. 29 (Q.)—53 Vict. c. 70 (Q.)—*Judgment quashing—Appeal to Supreme Court*—R. S. C. c. 135, s. 24 (g).]—Section 439 of the Town Corporations Act (40 Vict. c. 29 (Q.)), not having been excluded from the charter of the City of Ste. Cunegonde (53 Vict. c. 70) is to be read as forming a part of it and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under s. 310 of said charter. — Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction, no appeal lies to the Supreme Court of Canada from its decision. *City of Ste. Cunegonde v. Gougeon*, xxv., 78.

67. *Mandamus—Judgment of Court of Review*.]—54 & 55 Vict. c. 25 (D.) does not authorize an appeal to the Supreme Court of Canada from a decision of the Court of Review in a case where the judgment of the Superior Court is reversed and there is an appeal to the Court of Queen's Bench. *Danjou v. Marquis* (3 Can. S. C. R. 251) and *McDonald v. Abbott* (3 Can. S. C. R. 278) followed. *Barrington v. City of Montreal*, xxv., 202.

68. *Amount in controversy—Pecuniary interest of appellant*—Arts. 746, 747 C. C. P.]—L. having proved a claim of \$920 against an insolvent estate contested a claim for which respondents had been collocated against the same estate amounting to \$2,044.66. The contestation having been decided in favour of respondent, L. appealed to the Supreme Court. *Held*, that to determine whether or not there was a sufficient amount in controversy to give jurisdiction to the Supreme Court the pecuniary interest of the appellant only could be taken into consideration, and his interest being under \$2,000 the appeal would not lie although the consequence of the appellant's contestation might result in bringing back to the insolvent estate a sum of over \$2,000. *Lachance v. Société de Prêts et de Placements de Québec*, xxvi., 200.

69. *Appeal from Court of Review—Appeal to Privy Council—Appealable amount—Addition of interest—C. C. P. Arts, 1115, 1178, 1178a—R. S. Q. Art. 2311—54 & 55 Vict. (D.), c. 25, s. 3, s.-s. 3—54 Vict. (Q.), c. 48 (Amending C. C. P. Art. 1115).—Under 54 & 55 Vict. (D.), c. 25, s. 3, s.-s. 3, there is no appeal to the Supreme Court of Canada from a decision of the Court of Review, which would not be appealable as of right to the Privy Council.—Article 2311, R. S. Q., which provides that “whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered if they are different” applies to appeals to the Privy Council.—Interest cannot be added to the sum demanded to raise it to the amount necessary to give a right of appeal. *Stanton v. Home Ins. Co.* (2 Legal News 314) approved. *Dufresne v. Guévremont*, xxvi., 216.*

70. *Appeal—Jurisdiction—Judicial proceedings—Opposition to judgment—Arts. 484-493 C. C. P.—R. S. C. c. 135, s. 29—Appealable amount—54 & 55 Vict. c. 25, s. 3, s.-s. 4—Retrospective legislation.*—An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a “judicial proceeding” within the meaning of s. 29 of “The Supreme and Exchequer Courts Act,” and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada if the amount of principal and interest due at the time of the filing of the opposition against the judgment sought to be annulled is of the sum or value of \$2,000. *Turcotte v. Danse-reau*, xxvi., 578.

71. *Jurisdiction—Expropriation of lands—Assessments—Local improvements—Future rights—Title to lands and tenements—R. S. C. c. 135, s. 29 (b); 56 Vict. c. 29, s. 1 (D.).*—A by-law was passed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriation therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion of the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The Court of Queen’s Bench affirmed a judgment dismissing the action. On an application for leave to appeal; *Held*, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words “and other matters or things where the rights in future might be bound,” contained in sub-sec. (b) of sec. 29, Supreme and Exchequer Courts Act, as amended by 56 Vict. c. 29 s. 1. *Stevenson v. City of Montreal*, xxvii., 187.

72. *Action en bornage—Future rights—Title to lands—R. S. C. c. 135, s. 29 (b)—54 & 55 Vict. c. 25, s. 3 (D.).—56 Vict. c. 29, s. 1 (D.).*—The parties executed a deed for the purpose of settling the boundary between contiguous lands, of which they were respectively

proprietors, and thereby named a provincial surveyor as their referee to run the line. The line thus run being disputed, M. brought an action to have this line declared the true boundary, and to revendicate a disputed strip of land lying upon his side of the line so run by the surveyor. *Held*, that under R. S. C. c. 135, s. 29, s.-s. (b), as amended by 56 Vict. c. 29, s. 1 (D.), an appeal would lie to the Supreme Court of Canada, first, on the ground that the question involved was one relating to a title to lands, and secondly, on the ground that it involved matters or things where rights in future might be bound. *Chamberland v. Fortier* (23 Can. S. C. R. 371) referred to and approved. *McGoey v. Leamy*, xxvii., 193.

73. *Court of Review—Appeal to Privy Council—Appealable amount—54 & 55 Vict. c. 25, s. 3, s.-s. 3 and 4 (D.).—C. S. L. C. c. 77, s. 25—Arts. 1115, 1178 C. C. P.—R. S. Q. Art. 2311.*—In appeals to the Supreme Court of Canada from the Court of Review (which, by 54 & 55 Vict. c. 25, s. 3, s.-s. 3, must be appealable to the Judicial Committee of the Privy Council), the amount by which the right to appeal is to be determined is that demanded and not that recovered, if they are different. *Dufresne v. Guévremont* (26 Can. S. C. R. 216) followed. *Citizens Light & Power Co. v. Parent*, xxvii., 316.

74. *Jurisdiction—Appealable amount—Future rights—“Other matters and things”—R. S. C. c. 135, s. 29 (b)—56 Vict. c. 29 (D.).*—The classes of matters which are made appealable to the Supreme Court of Canada under the provisions of s. 29, s.-s. (b) of “The Supreme and Exchequer Courts Act,” as amended by 56 Vict. c. 29, do not include future rights, and do not affect rights to or in real property, or rights analogous to interests in real property. *Rodier v. Lapierre* (21 Can. S. C. R. 69), and *O’Dell v. Gregory* (24 Can. S. C. R. 661) followed. *Raphael v. Maclaren*, xxvii., 319.

75. *Jurisdiction—Title to lands—Municipal law—By-law—Widening streets—Expropriation—R. S. C. c. 135, s. 29 (b)—54 & 55 Vict. c. 25, s. 3—56 Vict. c. 29, s. 1.*—In an action to quash a by-law passed for the expropriations of land, the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than \$2,000.—The judgment on the merits dismissed the appeal for the reasons stated in the judgment of the Court below. (See Q. R. 6 Q. B. 345). *Murray v. Westmount*, xxvii., 579.

76. *Jurisdiction—Judgment—Reference to court for opinion—54 Vict. c. 5 (B.C.).—R. S. C. c. 135, ss. 24 and 28.*—The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the Lieutenant-Governor in Council, under a provincial statute, authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court. *Union Colliery Co. of Brit. Col. v. Attorney-General of Brit. Col.*, xxvii., 637.

77. *Jurisdiction—Title to land—Petitory action—Encroachment—Constructions under mistake of title—Good faith—Common error—*

Demolition of works—Right of accession—Indemnity—Res judicata—Arts. 412, 413, 429 et seq., 1047, 1241 C. C.—An action to revendicate a strip of land upon which an encroachment was admitted to have taken place, by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls, and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act. *Delorme v. Cusson*, xxviii., 66.

78. *Action — Jurisdiction — Appealable amount — Monthly allowance — Future rights — "Other matters and things"*—*R. S. C. c. 135, s. 29 (b)*—56 *Vict. c. 29 (D)*.—*Established jurisprudence in court appealed from.*—In an action *en declaration de paternité* the plaintiff claimed an allowance of \$15 per month until the child (then a minor aged four years and nine months), should attain the age of ten years, and for an allowance of \$20 per month thereafter "until such time as the child should be able to support and provide for himself." The court below, following the decision in *Lizotte v. Descheneau* (6 *Legal News*, 107), held that under ordinary circumstances such an allowance would cease at the age of fourteen. *Held*, that the *demande* must be understood to be for allowances only up to the time the child should attain the age of fourteen years and no further, so that, apart from the contingent character of the claim, the *demande* was for less than the sum or value of two thousand dollars, and consequently the case was not appealable under the provisions of the twenty-ninth section of "The Supreme and Exchequer Courts Act," even if an amount or value of more than two thousand dollars might become involved under certain contingencies as a consequence of the judgment of the court below. *Rodier v. Lapierre* (21 *Can. S. C. R.* 69), followed.—*Held*, also, that the nature of the action and *demande* did not bring the case within the exception as to "future rights" mentioned in the section of the Act above referred to. *O'Dell v. Gregory* (24 *Can. S. C. R.* 661); *Raphael v. MacLaren* (27 *Can. S. C. R.* 319) followed. *Macdonald v. Galivan*, xxviii., 258.

79. *Jurisdiction — Amount in controversy—Affidavits — Evidence as to amount — The Exchequer Court Acts 50 & 51 Vict. c. 16, ss. 51-53 (D)*.—54 & 55 *Vict. c. 26, s. 8 (D)*.—*The Patent Act—R. S. C. c. 61, s. 36.*—On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, shewing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion. *Dreschel v. Auer Incandescent Light Mfg. Co.*, xxviii., 268.

80. *Jurisdiction—54 & 55 Vict. c. 25, s. 2—Prohibition — Railways — Expropriation — Arbitration.*—The provisions of the second section of the statute, 54 & 55 *Vict. c. 25*, giving the Supreme Court of Canada jurisdiction s. c. d.—3

to hear appeals in matters of prohibition, apply to such appeals from the Province of Quebec as well as to all other parts of Canada. *Shannon v. Montreal Park & Island Ry. Co.*, xxviii., 374.

81. *Jurisdiction — Amount in controversy—Opposition afin de distraire — Judicial proceeding — Demand in original action — R. S. C. c. 135, s. 29.*—An opposition *afin de distraire*, for the withdrawal of goods from seizure, is a "judicial proceeding" within the meaning of the twenty-ninth section of "The Supreme and Exchequer Courts Act," and on an appeal to the Supreme Court of Canada, from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure, and not the amount demanded by the plaintiff's action, or for which the execution issued. *Turcotte v. Dansereau* (26 *Can. S. C. R.* 578), and *McCorkill v. Knight* (3 *Can. S. C. R.* 233; *Cass Dig.* 2 ed. 694) followed; *Champoux v. Lapierre* (*Cass. Dig.* 2 ed. 426), and *Gendron v. McDougall* (*Cass. Dig.* 2 ed. 429), discussed and distinguished. *King v. Dupuis dit Gilbert*, xxviii., 388.

82. *Jurisdiction — Future rights—Alimentary allowance—R. S. C. c. 135 s. 29, s.-s. 2; 54 & 55 Vict. c. 25, s. 3—56 Vict. c. 29, s. 2.*—Actions or proceedings respecting disputes as to mere personal alimentary pensions or allowances do not constitute controversies where in rights in future may be bound within the meaning of the second sub-section of the twenty-ninth section of "The Supreme and Exchequer Courts Act," as amended, which allows appeals to the Supreme Court of Canada from judgments rendered in the Province of Quebec in cases where the controversy relates to "annual rents or other matters or things where rights in future might be bound." *Macfarlane v. Leclaire*, (15 *Moo. P. C.* 181), distinguished; *Sauvageau v. Gauthier*, (*L. R.* 5 *P. C.* 494), followed. *Banque du Peuple v. Trottier*, xxviii., 422.

83. *Assuming jurisdiction — Amount in controversy — 60 & 61 Vict. c. 34, s. 1, s.-s. (c).*—Where the jurisdiction of the Supreme Court of Canada to entertain an appeal is doubtful, the court may assume jurisdiction when it has been decided that the appeal on the merits must be dismissed. *Great Western Railway Company of Canada v. Braid* (1 *Moo. P. C. N. S.* 101), followed.—By 60 and 61 *Vict. c. 34, s. 1, s.-s. (c)*, no appeal lies from judgments of the Court of Appeal for Ontario unless the amount in controversy in the appeal exceeds \$1,000, and by sub-section (f), in case of difference, it is the amount demanded, and not that recovered which determines the amount in controversy. *Held*, per Taschereau, J., that to reconcile these two sub-sections, paragraph (f) should probably be read as if it meant the amount demanded upon the appeal. To read it as meaning the amount demanded in the action, which is the construction the court has put upon *R. S. C. c. 135, s. 29*, relating to appeals from the Province of Quebec, would seem to be contrary to the intention of parliament. *Laberge v. The Equitable Life Assurance Society* (24 *Can. S. C. R.* 59) distinguished. *Bain v. Anderson & Co., et al.*, xxviii., 481.

84. *Jurisdiction — Matter in controversy—Interest of second mortgagee—Surplus on sale of mortgaged lands — 60 & 61 Vict. c. 34, s.*

1 (D.)—*Statute, construction of — Practice.*]—While an action to set aside a second mortgage on lands for \$2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the proceeds of the sale amounting to \$270 to the defendant as subsequent incumbrancee. Judgment was afterwards rendered declaring the second mortgage void, and ordering the defendant to pay to the plaintiff, as assignee for the benefit of creditors, the amount of \$270 so received by him thereunder, and this judgment was affirmed on appeal. Upon an application to allow an appeal bond on further appeal to the Supreme Court of Canada, objections were taken for want of jurisdiction under the clauses of the Act 60 & 61 Vict. c. 34, but they were overruled by a judge of the Court of Appeal for Ontario, who held that an interest in real estate was in question and the appeal was accordingly proceeded with, and the appeal case and factums printed and delivered. On motion to quash for want of jurisdiction when the appeal was called for hearing; *Held*, that the case did not involve a question of title to real estate or any interest therein, but was merely a controversy in relation to an amount less than the sum or value of one thousand dollars, and that the Act 60 & 61 Vict. c. 34, prohibited an appeal to the Supreme Court of Canada. *Jermyn v. Tew*, xxviii., 497.

85. *Jurisdiction — Injunction—Ditches and watercourses—Title to land.*]—Proceedings to restrain the owner of land from constructing a ditch thereon under the Ditches and Watercourses Act to prevent injury to adjoining property do not involve any question of title to land or any interest therein within the meaning of 60 & 61 Vict. c. 34, s. 1, s.-s. (a) relating to appeals to the Supreme Court of Canada in Ontario cases. The fact that the adjoining land was to be taxed for benefit by construction of the ditch would not authorize an appeal under sub-section (d) as relating to the taking of a duty or fee nor as affecting future rights. *Waters v. Manigault*, xxx., 304.

86. *Jurisdiction — Amount in dispute — Question raised by plea—Incidental issue.*]—Issues raised merely by pleas cannot have the effect of increasing the amount in controversy so as to give the Supreme Court of Canada jurisdiction to hear an appeal. *Girouard, J., dubitante. Standard Life Ass. Co. v. Trudeau*, xxx., 308.

87. *Jurisdiction — Matter in controversy—R. S. C. c. 135, s. 29 (b)—Tutorship—Petition for cancellation of appointment—Arts. 249 et seq. C. C. — Tutelle proceedings.*]—The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children. *Noel v. Chevreuil*, xxx., 327.

88. *Jurisdiction — Servitude — Action concessoire — Execution of judgment therein — Localization of right of way—Opposition to writ of possession—Matter in controversy—Title to land—Future rights.*]—An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal. *O'Dell*

v. Gregory (24 Can. S. C. R. 661) followed; *Chamberland v. Fortier* (23 Can. S. C. R. 371), and *McGoey v. Leamy* (27 Can. S. C. R. 193) distinguished.—If the jurisdiction of the court is doubtful the appeal must be quashed. *Langevin v. Les Commissaires d'Ecole de St. Marc* (18 Can. S. C. R. 599) followed. *Cully v. Ferdaï*, xxx., 330.

89. *Jurisdiction — Action for penalties — Plea of ultra vires of statute—Judgment on other grounds—R. S. C. c. 135, s. 29 (a).*]—To an action claiming \$325 as penalties for an offence against the Pharmacy Act, the pleas were:—1. General denial. 2. That the Act was *ultra vires*. In the courts below the action was dismissed for want of proof of the alleged offence. *Held*, Strong, C.J., and Gwynne, J., dissenting, that an appeal would lie to the Supreme Court; that if the court should hold that there was error in the judgment which held the offence not proved the respondent would be entitled to a decision on his plea of *ultra vires* and the appeal would therefore lie under s. 29 (a) of the Supreme Court Act. *L'Association Pharmaceutique de Quebec v. Livernois*, xxx., 400.

90. *Jurisdiction — Action for séparation de corps — Money demand — Supreme Court Act.*]—In an action by a wife for *séparation de corps* for ill treatment the declaration concluded by demanding that the husband be condemned to deliver up to the wife her property valued at \$18,000. The judgment in the action decreed separation and ordered an account as to property. *Held*, that no appeal would lie to the Supreme Court from the decree for separation; *O'Dell v. Gregory* (24 Can. S. C. R. 661) followed; and the money demand in the declaration being only incidental to the main cause of action could not give the court jurisdiction to entertain the appeal. *Talbot v. Guilmartin*, xxx., 482.

91. *Jurisdiction — Amount in controversy—60 & 61 Vict. c. 34, s. 1, s.-s. (c) and (f)—Inoperative provisions—Prior enactment.*]—Section 1, s.-s. (f) of 60 and 61 Vict. c. 34, providing that in appeals from the Court of Appeal for Ontario "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different," is inoperative, being repugnant to s.-s. (c).—The fact that s.-s. (f) is placed last in point of order in the section does not require the court to construe it as indicating the latest mind of Parliament as the whole section came into force at the same time. *City of Ottawa v. Hunter*, xxxi., 7.

92. *Jurisdiction — Amount in dispute — R. S. C. c. 135, s. 29 (b).*]—In an action by the lessee of lands, leased for four years and nine months at a rental of \$250 per annum, to have the lease cancelled as being simulated as he was, at the time of the lease, owner of the property leased; *Held*, that no amount of \$2,000 or upwards was in dispute, and that as the appeal did not relate to any title to land or tenements nor to annual rents within the meaning of s. 29 (b) of R. S. C. c. 135, it could not be entertained by the Supreme Court of Canada. *Fréchette v. Simmoneau*, xxxi., 12.

93. *Jurisdiction — Withdrawal of defence raising constitutional question — Quebec*

Pharmacy Act.—Where a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal. *L'Association Pharmaceutique de Québec v. Livernois*, xxxi., 43.

94. *Jurisdiction—Débats de compte—Issues on reddition — Amount in controversy.*—In an action *en reddition de compte*, where items in the account filed exceeding in the aggregate \$2,000 have been contested, the Supreme Court of Canada has jurisdiction to entertain an appeal. *Bell v. Vipond*, xxxi., 175.

95. *Jurisdiction — Amount in controversy—Secretion of estate by insolvent—Contrainte per corps — Arts. 885, 888 C. P. Q.*—On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding \$2,000, the judgment appealed from condemned the appellant, under the provisions of art. 888 C. P. Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least \$6,000. *Held*, that there was no pecuniary amount in controversy and there could be no appeal to the Supreme Court of Canada. *Clement v. Banque Nationale*, xxxiii., 343.

96. *Jurisdiction — Matter in controversy—Right of appeal — Personal condemnation — Action possessoire.*—In a possessory action with conclusions for \$200 damages, the defendant admitted plaintiff's title and claimed the right of occupying the premises as her tenant. The judgment appealed from affirmed the trial court judgment, dismissing the possessory conclusions and adjudging \$200 for rent of the premises in question. *Held*, that the defendant had no right to appeal to the Supreme Court of Canada. *Davis v. Roy*, xxxiii., 345.

97. *Appeal on special questions — Issues on appeal — Powers of appellate court.*—*Per Armour, J.*—Where an appeal has been taken as to a part only of a judgment complained of the whole issues are before the appellate court and it has power to review them and render the judgment which ought to have been pronounced in the court below. *Ville de Maisonneuve v. Banque Provinciale*, xxxiii., 418.

98. *Amount in controversy — Determining value — Appellant's acquiescement in trial court judgment—Issue on appeal.*

See No. 24 ante.

99. *Appeals from Exchequer Court — Controversy less than \$500—Discretion of judge in chambers—Special leave.*

See No. 326 infra.

100. *Order of provincial judge—Motion to set aside—Opposition to seizure—Amount in controversy—Jurisdiction.*

See No. 320 infra.

101. *Execution for costs — Amount in dispute—Jurisdiction.*

See OPPOSITION, 3; PRACTICE OF SUPREME COURT, 249.

7. COURT APPEALED FROM.

102. *Court of last resort in P. E. Island—Jurisdiction — 38 Vict. c. 11, ss. 11, 17.*—An appeal lies direct to the Supreme Court of Canada from the Supreme Court of Judicature of the Province of Prince Edward Island, as being the highest court of final resort in that Province. *Kelly v. Sullivan*, i., 1.

103. *Supreme and Exchequer Courts Act, s. 68 — Appeals from Exchequer Court decisions.*—There is nothing in s. 68 of the Supreme and Exchequer Courts Act confining appeals from that court to a recourse against final judgments only, the word used being "decision" which is applicable as well to rules and orders not final as to final decisions. (*Per Strong, J.*, at p. 257.) *Danjou v. Marquis*, iii., 251.

104. *Certificate as to deposit—Security for costs—Supreme and Exchequer Courts Act—Rule 6—Court of Review (Que.)*—The deposit of \$500, in the court below, by appellant, without a certificate that it was so made to the satisfaction of the court appealed from, or one of its judges, is nugatory and ineffectual as security for the costs of the appeal. —*Per Taschereau, J.* The case should, under such circumstances, be sent back to the court below in order that a proper certificate might be obtained. —*Per Strong and Taschereau, JJ.* An appeal does not lie from the Court of Review (Que.) to the Supreme Court of Canada. *Henry, J., contra.* (*See Danjou v. Marquis* (3 Can. S. C. R. 251), No. 103, *ante*).—This appeal was quashed with costs, which included the general costs of respondent up to time motion made. The full fee of \$25 was taxed by the registrar on hearing of motion. This was increased by fiat of Fournier, J., to \$100. *Macdonald v. Abbott*, iii., 278.

[Appeals now lie from the Court of Review in cases where it affirms the trial court judgment, provided appeal as of right may be had to the Privy Council (54 & 55 Vict. c. 25, s. 3; 56 Vict. c. 29, s. 2.)]

105. *Jurisdiction — Original Court — Superior Court—Supreme and Exchequer Court Act, s. 17.*—An appeal will not lie to the Supreme Court of Canada in cases in which the court of original jurisdiction is not a Superior Court, and the Court of Wills and Probate for the County of Lunenburg, Nova Scotia, is not a Superior Court within the meaning of s. 17 of "The Supreme and Exchequer Court Act," before amendment by 52 Vict. c. 37, s. 2. *Beamish v. Kaulback*, iii., 704.

106. *Expropriation of land—Persona designata—Order by judge in chambers—Moneys deposited—R. S. C. c. 135, s. 28—R. S. C. c. 109, s. 8.*—The respondent petitioned for an order for payment to them of \$4,000 deposited by appellants for land taken for railway purposes and a judge of the Superior Court, in chambers, after formal answer and hearing of the parties granted the order under the Railway Act. The company appealed to the Court of Queen's Bench which affirmed the order. *Held*, that the order having been made by a judge sitting in chambers, and, further, acting under the statute as *persona designata*, the proceedings had not originated in a Superior Court within the meaning of s. 28 of the Supreme and Exchequer Courts Act, and the case was therefore not appealable. *Canadian*

Pacific Ry. Co. v. Little Seminary of Ste. Thérèse, xvi., 606.

107. *Decision of Court of Revision—Appeal to District Court—Judgment of Supreme Court of North-West Territories—Court of first instance—R. S. O. c. 135, s. 24—51 Vict. c. 37, s. 3 (D.)*—By N.-W. T. ordinance an appeal lies from the Court of Revision for adjudicating upon assessments for school rates to the district court of the school district; on such appeal being brought the clerk of the court issues a summons, making the ratepayer plaintiff and the school trustees defendants, which summons is returnable at the next sitting of the court, when the appeal is heard. The district court by 49 Vict. c. 25, became merged in the Supreme Court of the North-West Territories, on 25th October, 1888. *Held*, that an appeal will not lie from the judgment of the Supreme Court affirming a decision of the Court of Revision in such a case, as the proceedings did not originate in a Superior Court. *Angus v. Calgary School Trustees*, xvi., 716.

108. *Jurisdiction—Question of procedure—Judgment simultaneous with passing of Act—Existing adjudication—Supreme Court Amending Act, 1891—54 & 55 Vict. c. 25, s. 3—Appeal from Court of Review.*—By s. 3 of the Supreme Court Act of 1891, an appeal may lie from the Court of Review in cases which are, by the law of Quebec, appealable direct to the Privy Council. A judgment was delivered by the Court of Review in favour of respondent, on the day on which the Act came into force. *Held*, that appellants not having shewn that the judgment was delivered subsequent to the passing of the Act the court had no jurisdiction. *Quære*, Whether an appeal will lie from a judgment pronounced after the passing of the Act in an action pending before the change of the law. *Hurtubise v. Desmarceau*, xix., 562.

109. *Jurisdiction—Case originating in Circuit Court—Objection taken by the court—Costs.*—Appeal from the Court of Queen's Bench reversing the judgment of the Circuit Court, Three Rivers, setting aside a seizure for a tax of \$10 imposed by by-law of the City of Three Rivers on strangers and non-residents selling goods by samples. The case was settled and agreed to by both parties, who took no objection to the jurisdiction. *Held*, that an appeal will not lie to the Supreme Court of Canada in cases where the court of original jurisdiction, is the Circuit Court for the Province of Quebec. Appeal quashed without costs, the objection having been taken by the court. *Major v. City of Three Rivers*, 18 C. L. J. 122; Cass. Dig. (2 ed.) 422; Cass. Prac. (2 ed.) 27, 81.

[Followed in *The Mayor, etc., of Terrebonne v. The Sisters of the Providence Asylum*, No. 111, *infra*.]

110. *Jurisdiction—Prosecution before Justice of the Peace—Certiorari—Court of original jurisdiction—Costs—Objection taken by court.*—A conviction by J. P. for selling liquor contrary to the "Canada Temperance Act, 1878," and papers connected therewith were brought before the Court of Queen's Bench for Manitoba, by *certiorari*, and a rule *nisi* to quash the conviction was made absolute. *Held*, that an appeal would not lie, the cause not having arisen in a Superior Court of original jurisdiction.—The question of costs

was reserved. The court subsequently determined that the respondent should have the costs of appeal, although the objection had been taken by the court. *The Queen v. Nevins*, Cass. Dig. (2 ed.) 427; Cass. Prac. (2 ed.) 27, 81.

111. *Court of original jurisdiction—Circuit Court judgment—Future rights—Suit for land tax—Objection taken in factum—Costs—42 Vict. c. 39, s. 3 (D.)*—The action was brought in the Circuit Court, District of Terrebonne, for \$125 and interest for taxes imposed upon real estate. The respondents moved to quash appeal for want of jurisdiction, relying on s. 3 of the Supreme Court Amendment Act of 1879. Appellants contended that in Montreal and some other districts in the Province of Quebec, such an action, in which future rights would be bound, would be brought in the Superior Court, and only by virtue of a special statute was it brought in the Circuit Court in Terrebonne; that such statute was applicable to only some of the districts of the province, and that if the contention of the counsel for appellants was correct, the anomaly would arise that in such a case if the action were brought in one district there would be no appeal, while, if brought in another district, there would be an appeal and argued that, in this case, the Circuit Court must be considered as substituted for and in lieu of the Superior Court. *Held*, that the statute was clear, and in no case would an appeal lie in an action which originated in the Circuit Court. *Major v. Corporation of Three Rivers* (No. 109, *ante*), followed. Motion granted and appeal quashed with costs. The objection to the jurisdiction was taken by the respondents in the factum. *Le Maire, etc., de Terrebonne v. Sœurs de la Providence*, Cass. Dig. (2 ed.) 434; Cass. S. C. Prac. (2 ed.) 81.

112. *Public street—Encroachment on—Building "upon" or "close to" the line—Charter of Halifax, ss. 454, 455—Petition to remove obstruction—Judgment on—Variance.*—By s. 454 of the charter of the City of Halifax any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the city engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a judge thereof, may, on petition of the recorder, cause it to be removed. On appeal from the decision of the Supreme Court of Nova Scotia reversing the judgment of a judge under this section an objection was taken to the jurisdiction of the Supreme Court of Canada on the ground that the petition having been presented to a judge in chambers the matter did not originate in a Superior Court. *Held*, Taschereau, J., dissenting, that the court had jurisdiction. *Canadian Pacific Railway Co. v. Ste. Thérèse* (16 Can. S. C. R. 606), and *Virtue v. Hayes* (16 Can. S. C. R. 721) distinguished. *City of Halifax v. Reeves*, xxiii., 340.

113. *Court of Review—Jurisdiction—Mandamus—54 & 55 Vict. c. 25, s. 3 (D.)—Costs.*—B. applied for a mandamus to compel the corporation of the City of Montreal to carry out the provisions of one of its by-laws. The writ of mandamus was granted by the Superior Court, but on appeal, this judgment was reversed by the Court of Review, and the petition for mandamus dismissed. B. then instituted an appeal from the latter judgment to

the Supreme Court of Canada. On motion to quash the appeal: *Held*, that the case was not within the provisions of 54 & 55 Vict. c. 25, s. 3, allowing appeals from the Court of Review in certain cases, and that as the appeal was not from the judgment of the Court of Queen's Bench (appeal side), the court of highest resort in the province, there was no jurisdiction in the Supreme Court of Canada to entertain it. *Danjou v. Marquis* (3 Can. S. C. R. 251), and *McDonald v. Abbott* (3 Can. S. C. R. 278), followed.—As the point upon which the appeal was quashed had not been taken in the factum, nor by the motion, the appeal was quashed without costs. *Barrington v. City of Montreal*, xxv., 202.

114. *Jurisdiction*—52 Vict. c. 37, s. 2 (D.)—*Appointment of presiding officers*—*County Court Judges*—55 Vict. c. 48 (Ont.)—53 Vict. c. 47 (Ont.)—*Construction of statute—Appeal from assessment*—*Final judgment*.]—By 52 Vict. c. 37, s. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. c. 48, as amended by 58 Vict. c. 47, an appeal lies from rulings of Municipal Courts of Revision in matters of assessment to the County Court judges of the County Court district where the property has been assessed. On an appeal from a decision of the County Court judges under the Ontario statutes: *Held*, King, J., dissenting, that if the County Court judges constituted a "court of last resort" within the meaning of 52 Vict. c. 37, s. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act. — *Held*, per Gwynne, J., that as no binding effect is given to the decision of the County Court judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vict. c. 37, s. 2.—*Quære*, Is the decision of the County Court judges a "final judgment" within the meaning of 52 Vict. c. 37, s. 2? *City of Toronto v. Toronto Railway Co.*, xxvii., 640.

115. *Jurisdiction*—*Case originating in County Court—Transfer to High Court*.]—There is no appeal to the Supreme Court of Canada in a case in which the action was commenced in the County Court and transferred by order to the High Court of Justice in which all subsequent proceedings were carried on.—*Per* Gwynne, J., *contra*. Where the case is transferred because the pleas ousted the County Court of jurisdiction an appeal lies.—Leave to appeal cannot be granted under 60 & 61 Vict. c. 34, s. 1 (e), in a case not appealable under the general provisions of R. S. C. c. 135. *Tucker v. Young*, xxx., 185.

8. CRIMINAL APPEALS.

116. *Crown case reserved*—*Questions of law*—*New trial*—C. S. U. C. c. 112—C. S. L. C. c. 77, ss. 57, 58, and 59; 32 & 33 Vict. c. 29, s. 80—38 Vict. c. 11, s. 49.]—Since the passing of 32 & 33 Vict. c. 29, s. 80, repealing so much of C. S. L. C. c. 77 as would authorize a court

in Quebec to order a new trial in a criminal case, and of 32 & 33 Vict. c. 30, repealing C. S. L. C. c. 77, s. 63, the Court of Queen's Bench (Que.) has no power to grant a new trial, and the Supreme Court of Canada, exercising its ordinary appellate powers under 38 Vict. c. 11, ss. 38 and 49, rendered the judgment which the court appealed from ought to have given, reversed the judgment and ordered the prisoner's discharge. *Laliberté v. The Queen*, i., 117.

117. *Criminal trial*—*Motion for reserved case—Unanimity on one of several grounds—Jurisdiction*.]—Where the court appealed from has affirmed the refusal to reserve a case moved for at a criminal trial on two grounds, and is unanimous as to one of such grounds but not as to the other, the Supreme Court on appeal can only take into consideration the ground of motion in which there was dissent. *McIntosh v. The Queen*, xxiii., 180.

118. *Jurisdiction*—*Criminal law*—*The Criminal Code, 1892, ss. 742-750—New trial—Statute, construction of*—55 & 56 Vict. c. 20, s. 742.]—An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of Appeal, under the provisions of the Criminal Code, 1892, ss. 742 to 750 inclusively. The word "opinion" as used in s.-s. 2 of s. 742 of "The Criminal Code, 1892," must be construed as meaning a "decision" or "judgment" of the Court of Appeal in criminal cases. *Viau v. The Queen*, xxix., 90.

9. CROSS APPEALS.

119. *Verdict*—*Reduction of damages by judgment appealed from*—*Cross-appeal—Relief for respondent—Restoration of trial judgment*.]—Where there has been no cross-appeal taken relief against an improper reduction of damages assessed at the trial cannot be granted to the respondent. *Stephens v. Chaussé*, xv., 379.

120. *Order for new trial—Issues on appeal—Failure to cross-appeal*.]—A rule was discharged so far as it asked a nonsuit but was made absolute for a new trial. *Held*, on an appeal by defendant, that although the plaintiff was entitled to recover, yet, as he had not appealed from the order for a new trial, the rule should be affirmed and the appeal dismissed with costs. *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2 ed.) 729.

121. *Cross-appeal pending in Privy Council—Stay of proceedings—Practice*.]—At the hearing of the appeal it appeared that the respondent had taken an appeal from the same judgment to Her Majesty's Privy Council, and that the respondent's said appeal was then pending before the Judicial Committee of the Privy Council. The court, in consequence, stopped the arguments of counsel and ordered that the hearing of the appeal to the Supreme Court of Canada should stand over until after the adjudication of the said appeal to the Privy Council. *McGreevy v. McDougall*, 3rd March, 1888.

122. *Cross-appeal—Rules 62 and 63—Compliance with*.]—A cross-appeal will be disregarded by the court when rules 62 and 63 of the Supreme Court Rules have not been complied with. *Bulmer v. The Queen*, xxiii., 488.

123. *Increasing damages without cross-appeal*—Rule 61, *Supreme Court Rules*—*Special statute*.]—Under the Ontario Judicature Act, R. S. O. 1887 c. 44, ss. 47 and 48, the Court of Appeal has power to increase damages awarded to a respondent without a cross-appeal, and the Supreme Court has the like power under its rule No. 61. Taschereau, J., dissented.—*Per Strong, C.J.* Though the court will not usually increase such damages without a cross-appeal, yet where the original proceedings were by arbitration under a statute providing that the court, on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the court may do, and a cross-appeal is not necessary. *Town of Toronto Junction v. Christie*, xxv., 551.

124. *Appeal by respondent*—*Motion to quash*—*Cross-appeal*—*Costs*.

See COSTS, 8.

125. *Verdict for damages*—*Solatium*—*Death of parent*—*Negligence*—Art. 1056 C. C.—*Lord Campbell's Act*—*Evidence of pecuniary loss*—*Cross-appeal*—*Practice*.

See DAMAGES, 3.

126. *Filing case*—*Inscription*—*Cross-appeal*—*Principal appeal case not filed*.

See PRACTICE OF SUPREME COURT, 27. *

10. DEATH OF PARTIES.

127. *Death of party*—*Appeal by executors*—*Motion to quash*.

See PRACTICE AND PROCEDURE, 75.

128. *Action under Lord Campbell's Act*—*Abatement of appeal*—*Death of plaintiff*—*Actio personalis moritur cum persona*.

See No. 1, ante.

11. DISCRETIONARY ORDERS.

129. *Jurisdiction*—Section 22, *Supreme and Exchequer Courts Act*—*Matter of discretion*.]—Under s. 22 of the Supreme and Exchequer Court Act, no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion. [See R. S. C. c. 135, s. 24 (d), as amended by 54 & 55 Vict. c. 25, s. 2, enacted since date of above decision.] *Boak v. Merchants' Marine Ins. Co.*, i., 110.

130. *Jurisdiction of Appellate Court*—*New trial*—*Setting aside verdict to enter another*—37 Vict. c. 7, ss. 32, 33 (Ont.)—R. S. O. (1877) c. 50, ss. 264, 283—38 Vict. c. 11, ss. 20, 22, 38 (D.)—*Amendments to pleadings*.]—In an action tried with a jury, under 37 Vict. c. 7, s. 32 (Ont.), the judge entered a verdict for the plaintiff upon the answers of the jury to questions submitted. Upon a rule nisi the Court of Queen's Bench entered a verdict for the defendants (41 U. C. Q. B. 497) and, on an appeal, the Court of Appeal for Ontario, being equally divided (3 Ont. App. R. 331),

the Q. B. judgment stood. *Held*, reversing the judgment appealed from, Taschereau, J., dissenting, that the Court of Queen's Bench had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants in direct opposition to the finding of the jury on a material issue; that the court below might have ordered a new trial upon the ground that the finding of the jury upon the questions submitted to them was against the weight of evidence, but they exercised their discretion in declining to act, or in not acting, on this ground and, therefore, no appeal to the Supreme Court of Canada would lie on such ground, under 38 Vict. c. 11, s. 22.—That before the Act 43 Vict. c. 34, if an amendment to a plea was authorized by the court below, but such amendment was never actually made, the Supreme Court had no power to consider the case as if the amendment had in effect been made.—*Per Gwynne, J.* That the plaintiff could not have been non-suited in virtue of 37 Vict. c. 7, s. 33 (Ont.), as it is only where there is no evidence in support of the plaintiff's case, that a non-suit can be entered; and that in this case, the proper verdict which the law required to be entered upon the answers of the jury was one in favour of the plaintiff. [NOTE.—The Privy Council (6 App. Cas. 644) affirmed the first holding and held that the Act, 38 Vict. c. 11, gave the Supreme Court power to render any judgment which the court below might or ought to have given, and might order a new trial on ground of misdirection or verdict being against weight of evidence; and that power was not taken away by s. 22 in case the court below did not exercise discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject.] *Moore v. Connecticut Mut. Life Ins. Co.*, vi., 634.

131. *Discretion of court below*—*New trial ordered by court below*—*Verdict against weight of evidence*.]—*Held*, that the Supreme Court will not hear an appeal from a judgment of the court below, in the exercise of its discretion, ordering a new trial on the ground that the verdict is against the weight of evidence. *Eureka Woollen Mills Co. v. Moss*, xi., 91.

132. *Discretion of court below*—*Interference on appeal*.]—A Court of Appeal ought not to interfere with the order of the court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. *Per Ritchie, C.J.* *Jones v. Tuck*, xi., 197.

133. *Matter of practice*—*Bail*—*Security for costs*—*Exoneretur*—*Parties*—*Discretion of court below*—*Jurisdiction*.]—S. brought an action against J. and issued a writ of *capias*. Bail was given and special bail entered in due course, but the bail-piece was not filed, nor judgment entered against J., for some months after. On application to a judge in chambers an order was made for the discharge of the bail on account of delay in entering up judgment, and the full court refused to set aside the order. An appeal was brought to the Supreme Court of Canada entitled in the suit against J., from the judgment of the full court, and the bond for security for costs was given to J. *Held*, that as the bail, the only parties really interested in the appeal, were not before the court and not entitled to the benefit of the bond, the appeal must be quashed

for want of proper security. *Held*, also, that the appeal would not lie as the matter was simply one of practice, in the discretion of the court below. *Scammell v. James*, xvi., 593.

134. *Judicial discretion—Executors and trustees—Accounts.*—The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove executors and trustees which report disallowed items in accounts previously passed by the Probate Court, will not reconsider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved. *Grant v. McLaren*, xxiii., 310.

135. *Order to amend pleadings—Interference with—Discretion of court below—Procedure.*—The Supreme Court will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the court below. *Williams v. Leonard & Sons*, xxvi., 406.

136. *Notice of action—Negligence of municipal corporation—Discretion of trial judge—Reviewing on appeal.*—An appellate court should not interfere with the discretion exercised by the trial judge in dispensing with notice of action against a municipal corporation guilty of gross negligence as provided by the Ontario Municipal Act in respect to the condition of winter sidewalks. (23 Ont. App. R. 406, affirmed). *City of Kingston v. Drennan*, xxvii., 46.

137. *Discretion of court appealed from—Costs.*—It is only when some fundamental principle of justice has been ignored, or some other gross error appears that the Supreme Court will interfere with the discretion of provincial courts in awarding or withholding costs. *Smith v. The Saint John City Railway Company; The Consolidated Electric Company v. The Atlantic Trust Company; Consolidated Electric Co. v. Pratt*, xxviii., 603.

138. *Issue on appeal—Church discipline—Domestic tribunal.*—Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. *Ash v. The Methodist Church*, xxxi., 497.

139. *Parties on appeal—Practice—Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.*—Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *es qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side), reversed the judgment of the Court of Review on the ground that it had

no jurisdiction to allow the amendment and hear the case on its merits, and that, consequently, all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from, (Q. R. 10 K. B. 511), the Chief Justice and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interfered. *Price v. Fraser*, xxxi., 505.

140. *Practice—Adding alternative claims—Amendment—Discretionary orders—Duty of appellate court.*—Where the courts below have, in the exercise of judicial discretion ordered or refused leave to amend the pleadings there ought not to be any interference with this exercise of their discretion on an appeal. *Porter v. Pelton*, xxxiii., 449.

141. *Discretionary order—Revision by appellate court.*

See MANDAMUS, 1.

142. *Order extending time—Jurisdiction of Court of Appeal for Ontario.*

See No. 436, *infra*.

12. ELECTION APPEALS.

143. *Election law—38 Vict. c. 11, s. 48—Judgment on preliminary objections.*—No appeal lay under 38 Vict. c. 11, s. 48, to the Supreme Court of Canada, from a judgment dismissing an election petition on preliminary objections. *The Charlevoix Election Case; Brassard v. Langevin*, ii., 319.

(NOTE.—See Amending Acts.)

144. *Motion to quash—Parliamentary election—Notice—Setting down for hearing—Jurisdiction.*—*Held*, notice of setting down an election appeal for hearing is a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal. *North Ontario Election Case.—Wheler v. Gibbs*, iii., 374.

145. *Controverted election—R. S. C. c. 9, ss. 32, 33, 50—Jurisdiction—Dismissal for non pros.*—An appeal does not lie from a judgment on a motion dismissing an election petition because the trial had not been commenced within the six months limited by s. 32, Dominion Controverted Elections Act. *L'Assomption Election Case; Québec Co. Election Case*, xiv., 429.

146. *Controverted election—Ruling at trial—R. S. C. c. 9, ss. 32, 33, 50—Jurisdiction—Want of prosecution.*—Where the trial judge has overruled an objection on the ground of want of prosecution to trial within six months from the presentation of the petition, an appeal will lie to the Supreme Court of Canada. *Glengarry Election Case*, xiv. 453.—(Leave to appeal to the Privy Council was refused, (59 L. J. 279; 4 Times L. R. 664).)

147. *Dismissing appeal—Controverted election case—Application to judge in chambers.*—An application to dismiss an election appeal for want of prosecution should be made to a judge in chambers. *Halton Election Case, Lush v. Waldie*, xix., 1557; *Chicoutimi and*

Saguenay Election Case, May 16th, 1892.
[NOTE.—All applications to dismiss for want of prosecution, should be made to the registrar in chambers.]

148. *Controverted election—Discontinuance—Certificate to Speaker.*—Upon respondent's counsel, in an election appeal, notifying the court that he had been served with notice of discontinuance, the court struck the appeal off the list, and the notice having been filed in the registrar's office, certified to the Speaker of the House of Commons that by reason of such discontinuance the decision of the trial judges and their report had been left unaffected by the proceedings in the Supreme Court. *L'Assomption Election Case*, *Gauthier v. Brien*, xxi., 29.

149. *Irregular inscription—Hearing ex parte—Factum filed too late.*—When appeal called, counsel for appellants appears. No one appears on behalf of respondent. The appellant's factum not having been filed till the morning the appeal is called on for hearing, instead of three clear days before the first day of the session, as required by rule 54, the court refuses to hear him *ex parte* while thus irregularly before the court. *Levis Election Case*, 30th Oct., 1884; Cass. Dig. (2 ed.), 686.

150. *Election petitions—Separate trials—R. S. C. c. 9, ss. 30 and 50—Ruling on objection.*—The ruling of the court below on an objection in proceedings on an election petition, viz.: That the trial judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary as directed by s. 30 of c. 9, R. S. C., is not an appealable judgment or decision. *R. S. C. c. 9, s. 50.* (Sedgewick, J., doubting.) *Vaudreuil Election Case*, xxii., 1.

151. *Appeal—Election petition—Preliminary objection—Delay in filing—Objections struck out—Order in chambers—R. S. C. c. 9, s. 50.*—The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Elections Act, and if it were no judgment on the motion could put an end to the petition. *West Assiniboia Election Case*, xxvii., 215.

152. *Appeal—Preliminary objections—R. S. C. c. 9, ss. 12 and 50—Order dismissing petition—Affidavit of petitioner.*—The appeal given to the supreme court of Canada by The Controverted Elections Act (R. S. C. c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under s. 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. *Marquette Election Case*, xxvii., 219.

153. *Jurisdiction—Preliminary objections—42 Vict. c. 39, s. 10—Rule to extend time for service of election petition—Controverted Dominion election.*

See ELECTION LAW, 9.

154. *Jurisdiction—Controverted election—Rule in banc—Preliminary objections—42 Vict. c. 39, s. 10.*

See ELECTION LAW, 10.

155. *Election petition—Dissolution of Parliament—Abatement of proceedings—Return of deposits—Payment out of court below—Practice.*

See ELECTION LAW, 63.

13. FINAL JUDGMENTS.

156. *Final judgment—Demurrer—Supreme and Exchequer Courts Act, s. 11—R. S. N. S. (4 ser.) c. 94, s. 124.*—An order setting aside a demurrer as frivolous and irregular under the Nova Scotia Practice Act is an order on a matter of practice and not a final judgment appealable under the 11th section of the Supreme and Exchequer Courts Act. *Kandick v. Morrison*, ii., 12.

157. *Jurisdiction—Question raised by court—Rule setting aside judgment and execution—“Final judgment”—Supreme and Exchequer Courts Act, s. 17—Construction of s. 2 (d.).*—The Supreme Court of Canada may, of its own motion, entertain a question of jurisdiction.—An order vacating a final judgment and setting aside an execution issued thereunder is a “final judgment” within the meaning of the Supreme and Exchequer Courts Act, and subject to appeal under the provisions of that Act. (Strong, J., dissenting.) *Wallace v. Bossom*, ii., 488.

158. *Summary jurisdiction—Order upon immediate officers—Application by third party on rule nisi—Final order—Interest on deposit.*—An order by a Superior Court exercising its summary jurisdiction over its own immediate officers, on an application by a third party to obtain an order for the payment over of interest received by such officer on moneys held by him on deposit as an officer of the court, is a final order from which an appeal will lie to the Supreme Court of Canada, under 38 Vict. c. 11, s. 11. (Fournier, J., dissenting; Taschereau, J., dubitante.) *Wilkins v. Geddes*, iii., 203.

159. *Mandamus—Final judgment—Decision—Supreme and Exchequer Courts Act, 38 Vict. c. 11, ss. 11, 17 and 23—Costs—Motion to quash—Constitutional law.*—Appeals to the Supreme Court of Canada in cases of *mandamus*, under 38 Vict. c. 11, s. 23, were restricted to decisions of the “highest court of final resort” in the province; and an appeal would not lie from any court in the Province of Quebec but the Court of Queen's Bench. (Fournier and Henry, JJ., dissenting.) *Quære*, Can the Dominion Parliament give an appeal in a case in which the Legislature of a province has expressly denied it? *Semble*, per Strong, J., that under the above Act, an appeal would lie from an Exchequer Court decision which was not final. (Note.—See amendment by 53 Vict. c. 35.)—The appeal was quashed with costs, which included general costs of the appeal up to hearing of motion to quash. The registrar taxed the full fee of \$25 on argument of motion. This was increased to \$75 by Henry, J. The objection to the jurisdiction was taken by motion, and also in respondent's factum. *Danjou v. Marquis*, iii., 251.

160. *Final judgment—Order making rule absolute—Jurisdiction.*—A judgment of the Supreme Court of Nova Scotia making absolute a rule *nisi* to grant rank and precedence to a Queen's Counsel is one from which an

appeal would lie to the Supreme Court of Canada, Fournier, J., dissenting. *Lenoir v. Ritchie*, iii., 575.

161. *Jurisdiction—Demurrer sustained in provincial Court of Appeal—Final judgment—Judicial proceedings*—42 Vict. c. 39, ss. 3 & 9.]—The Superior Court sustained a demurrer, and, on appeal, the Court of Queen's Bench affirmed the judgment. On appeal to the Supreme Court, respondent moved to quash on the ground of want of jurisdiction: *Held*, that as the judgment of the Court of Queen's Bench (the highest court of last resort having jurisdiction in the Province of Quebec), finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of s. 9 of "The Supreme Court Amendment Act of 1879," such judgment was one from which an appeal would lie to the Supreme Court of Canada; and though an appeal cannot be taken from a court of first instance directly to the Supreme Court until there is a final judgment, yet, whenever a provincial Court of Appeal has jurisdiction, the Supreme Court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal. *Chevallier v. Cuvillier*, iv., 605.

162. *Final judgment partly interlocutory—Effect—References to experts—Res judicata—Right of appeal—Waiver.*]—In an action for balance due on a building contract, defendant denied the claim, and, by incidental demand, claimed damages from defective work. The Superior Court gave judgment in favour of the plaintiff for the amount of his claim, and dismissed the incidental demand. This judgment was reversed in review and, on appeal, the Court of Queen's Bench held plaintiff entitled to the balance claimed, from which should be deducted the cost of rebuilding the defectively constructed work, and in order to ascertain such cost, the case was remitted to the Superior Court, by which experts were appointed to ascertain the damage, and, on their report, the Superior Court held that it was bound by the judgment of the Court of Queen's Bench, and, deducting the amount awarded by the experts from the balance claimed, gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench on a second appeal. *Held*, that the judgment of the Court of Queen's Bench on the first appeal was a final judgment on the merits, that the Superior Court, when the case was remitted, rightly held that it was bound by the judgment, and that plaintiff was entitled to the balance thereby found due to him. 2. That although on an appeal from a final judgment an appellant may have the right to impugn an interlocutory judgment rendered in the cause, yet he loses this right if he voluntarily and without reserve acts upon such interlocutory judgment. *Per Fournier, J.*, that the judgment of the Court of Queen's Bench on the first appeal, though interlocutory on that part of it which directed the reference to experts, was final on the other points in litigation, and could therefore have properly been appealed from as a final judgment. *Shaw v. St. Louis*, viii., 385.

163. *Final judgment—Demurrer—Pleading—Equal division of opinion—Dismissal of appeal without costs.*]—Although a judgment may be a decision on a demurrer to part of the action only, it is a final judgment in a judicial proceeding within the meaning of the

Supreme Court Act and an appeal will lie. (Taschereau and Gwynne, JJ., dissented.)—The opinion of the judges who heard this appeal being equally divided, the appeal was dismissed without costs. *Shields v. Peak*, viii., 579.

164. *Demurrer to plea—Entry of judgment—Appeal from judgment on merits—Final judgment—Supreme and Exchequer Courts Acts, 1875, s. 25, 1879, s. 9.*]—In an action by the indorsee of a note the defendant pleaded that the amount of the note had been attached in their hands by one of the payee's judgment creditors and paid, under a judge's order. To this plea plaintiff demurred on the ground that the debt was not one which could properly be attached, and the Supreme Court (P. E. I.) sustained the demurrer. No rule for judgment on the demurrer was taken out by the plaintiff, and three months later judgment was signed for the plaintiff. On motion to quash an appeal for want of jurisdiction, on the ground that the appeal should have been taken from the judgment on the demurrer, and within thirty days from the date when it was rendered: *Held*, that the latter judgment was the "final judgment" in the case from which an appeal would lie to the Supreme Court. *Roblee v. Rankin*, xi., 137.

165. *Capias—Petition for discharge—R. S. C. 135, s. 23—Arts. 819-821, C. C. P.—Final judgment—Judicial proceeding.*]—A writ of capias having been issued against McK. under the provisions of art. 798 of C. C. P. (P.Q.), he petitioned to be discharged under art. 819, C. C. P., and issue having been joined on the pleadings under art. 820, C. C. P., the petition was dismissed by the Superior Court, that judgment being affirmed by the Queen's Bench (15 R. L. 34). *Held*, that the judgment was a final judgment in a judicial proceeding within the meaning of R. S. C. c. 135, s. 28, and therefore appealable—Taschereau, J., dissenting. *Stanton v. Canada Atlantic Ry. Co.* (Cass. Dig. 2 ed. 249) reviewed. *MacKinnon v. Keroack*, xv., 111.

166. *Rule of court—Contempt—R. S. C. c. 135, s. 24 (a)—Final judgment—Practice.*]—By a rule nisi, E. was called upon to shew cause why an attachment should not issue against him, or he be committed for contempt of court, in publishing certain articles in a newspaper. The rule was made absolute, and a writ issued commanding the sheriff to have the body of E. before the court on a day named. By the practice in such cases in the Supreme Court (N. B.) the attachment issued merely to bring the party into court, where he might, by answering interrogatories, purge his contempt. If unable to do this the court would pronounce sentence. E. appealed from the judgment making the rule absolute. On motion to quash appeal: *Held*, that the judgment appealed from was not a final judgment from which an appeal would lie under s. 24 (a) of the Supreme and Exchequer Courts Act. *Ellis v. Baird*, xvi., 147.

167. *Contempt of court—Constructive contempt—Discretion of court—Final judgment—Sentence—Fine—R. S. C. c. 135, s. 24, s-s. (a), s. 26, s-s. (1), s. 27.*]—The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited by s. 27 of the Supreme and Exchequer Courts Act. Taschereau, J., *dubitante*—The Supreme Court has jurisdiction to entertain such an appeal

from the judgment of the Court of Appeal of the province, not only under s. 24, s.s. (a) of Supreme and Exchequer Courts Act as final judgment in an action or suit, but also under s.s. (1) of s. 26 of the same Act, as a final judgment "in a matter or other judicial proceeding" within the meaning of said s. 26.—The adjudication that the appellant, a solicitor and officer of the court and moved against in that quality, had been guilty of a contempt, is by itself an appealable judgment, although no sentence for the contempt has been pronounced by the court.—When the party in contempt has been ordered to pay the costs of the application to commit the court in effect inflicts a fine for the contempt. *In re O'Brien*, xvi., 197.

168. *Jurisdiction — Final judgment — Demurrer to replication — Disposal of issues.*—A judgment allowing demurrer to plaintiff's replication to one of several pleas (5 Man. L. R. 334), which does not put an end to the whole or any part of the action or defence is not a final judgment from which an appeal will lie. *Shaw v. Canadian Pacific Ry. Co.*, xvi., 703.

169. *Jurisdiction — Petitioner let in to defend — Non-compliance with terms — Final judgment — Discretion — R. S. C. c. 135, s. 24 (a) 27.*—Judgment was recovered in *Virtue v. Hayes*, to realize mechanics' liens, and C., the owner of the land on which the work was done, petitioned to have judgment set aside as a cloud upon his title. On this petition an order was made allowing C. to come in and defend the action for lien on terms, which not being complied with, the petition was dismissed, and the judgment dismissing it was affirmed by the Divisional Court and the Court of Appeal. *Held*, that the judgment appealed from was not a final judgment within the meaning of s. 24 (a) of the Supreme and Exchequer Courts Act or, if it was, it was a matter in the judicial discretion of the court, from which by s. 27 no appeal lies to the Supreme Court of Canada. *Virtue v. Hayes*, *In re Clark*, xvi., 721.

170. *Jurisdiction — "Final judgment" — Interlocutory order — Matters of procedure — Special leave.*—Art. 1116 C.C.P.—*Amount in controversy*—R.S.C. c. 135, ss. 28 & 29—*Refusal of bond by court appealed from—Leave granted by Supreme Court judge.*—The defendant's application to a judge of the court appealed from for an order settling the case and approval of an appeal bond, on appeal from a judgment quashing an appeal for want of regular procedure was refused, but on a subsequent application to a judge of the Supreme Court of Canada in chambers, the application was granted.—A judgment quashing a writ of appeal on the ground that it had issued contrary to the provisions of art. 1116, C. C. P., as to appeals from interlocutory judgments, is not "a final judgment" within the meaning of s. 28 of the Supreme and Exchequer Courts Act. *Shaw v. St. Louis*, (8 Can. S. C. R. 387) distinguished.—The Supreme Court has no jurisdiction under s. 29 of the Supreme and Exchequer Courts Act, to hear an appeal by the defendant where the amount in controversy has not been established by the judgment appealed from. Gwynne, J., reserved his opinion on this question. *Ontario & Quebec Ry. Co. v. Marcheterre*, xvii., 141.

See 54 & 55 Vict. c. 25, s. 3.

171. *Jurisdiction — Final judgment—Mandamus — Judgment on demurrer — Supreme and Exchequer Courts Act, s. 24 (g) 28, 29 & 30.*—Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under s. 24 (g) of the Supreme and Exchequer Courts Act. The word "judgment" in that subsection means the final judgment in the case. *Strong and Patterson, JJ.* dissented. *Langevin v. Commissaires d'Ecole de St. Marc*, xviii., 599.

172. *Jurisdiction — Final judgment—Order for new trial — Supreme and Exchequer Courts Act, ss. 24 (g), 30, 61.*—Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interest of the parties on the findings of the jury as a whole, no appeal will lie from such order which is not a final judgment and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. *Barrington v. Scottish Union & Nat. Ins. Co.*, xviii., 615.

173. *Jurisdiction — Interlocutory judgment — Saisie conservatoire — Contestation.*—R. S. C. c. 135, ss. 24, 28.—A judgment of the Court of Queen's Bench, on appeal, reversing a Superior Court judgment, which had quashed a seizure before judgment, and ordering that the hearing, in contestation of the seizure should be proceeded with in the Superior Court at the same time as the trial of the merits, is not a final judgment appealable to the Supreme Court. *Strong, J.*, dissenting. *Molson v. Barnard*, xviii., 622.

174. *Jurisdiction — Mis-trial — Insufficient answers by jury — New trial — Final judgment — Supreme and Exchequer Courts Act ss. 24, 27, 28, 29, 30, 61—Costs.*—The Court of Review dismissed plaintiffs' motion for judgment on the findings by a jury and on defendant's motion dismissed the action. On appeal this judgment was reversed and the Court of Queen's Bench set aside the assignment of facts to the jury and all subsequent proceedings and *suo motu* ordered a *venire de novo* on the ground that the assignment of facts was defective and insufficient and the answers of the jury were insufficient and contradictory. *Held*, that the order was not a final judgment and did not come within the exceptions allowing an appeal in cases of new trials, and appeal would not lie.—As the objection to the jurisdiction was not made by respondent the appeal was quashed without costs. *Accident Ins. Co. of N. A. v. McLachlan*, xviii., 627.

175. *Jurisdiction — Application to set aside a writ of summons — Final judgment.*—An application to a judge to set aside a writ of summons served out of jurisdiction on the grounds that the cause of action arose in England and the defendant was not subject to the process of the court, and if this court had jurisdiction that the writ was not in proper form was refused and this decision was affirmed by the full court. *Held*, Gwynne, J., *hesitante*, that the decision of the full court was not a final judgment in an action, suit, matter or any other judicial proceeding within the meaning of the Supreme Court Act, and no appeal would lie from such decision to the Supreme Court of Canada. *Martin v. Moore*, xviii., 634.

176. *Jurisdiction — Final judgment — Judicial discretion — Summons and order for signing judgment.*—An appeal does not lie from a decision of the Court of Queen's Bench (7 Man. L. R. 128) affirming the order of a judge, made on the return of a summons to shew cause, allowing judgment to be entered on a specially indorsed writ, which is not a "final judgment," within the meaning of the Supreme Court Act.—*Per Patterson, J.* Such decision is a "final judgment," but the order which it affirmed was one made in the exercise of judicial discretion as to which s. 27 of the Act does not allow an appeal. *Municipality of Morris v. London & Canada Loan & Agency Co.*, xix., 434.

177. *Jurisdiction — Final judgment — Judicial discretion*—*R. S. C. c. 135, ss. 2 (e), 27.*—Defendants in the High Court of Justice of Ontario were made bankrupt in England, and plaintiffs filed a claim with the assignee in bankruptcy. The High Court of Justice in England made an order restraining plaintiffs from proceeding with their action and a like order was made by a Divisional Court judge in Ontario perpetually restraining plaintiffs from proceeding but reserving liberty to apply. This latter order was affirmed by the Divisional Court and the Court of Appeal, and plaintiffs sought an appeal to the Supreme Court of Canada. *Held*, that the judgment from which appeal was sought was not a final judgment within the meaning of the Supreme Court Act.—*Held, per Patterson, J.*, that if it were a final judgment the order plaintiffs wished to get rid of was made in the exercise of judicial discretion as to which s. 27 of the Supreme Court Act does not allow an appeal. *Maritime Bank of Canada v. Stewart*, xx., 105.

178. *Jurisdiction — Security for costs — R. S. C. c. 135, s. 46 — Final judgment — Admission of attorney.*—Appeal from the refusal of the Supreme Court (N. S.) to admit appellant as an attorney of the court. There being no person interested in opposing the application or the appeal, no security for costs was given. *Held, Gwynne, J.*, dissenting, that the court had no jurisdiction to hear the appeal.—*Per Ritchie, C.J.* and Taschereau, J. Except in cases specially provided for, no appeal can be heard by this court unless the security for costs has been given as provided by s. 46 of the Supreme Court Act.—*Per Strong and Taschereau, JJ.* It was never intended that this court should interfere in matters respecting the admission of attorneys and barristers in the several provinces.—*Per Taschereau and Patterson, JJ.* The judgment sought to be appealed from is not a final judgment within the meaning of the Supreme Court Act. *In re Cahan*, xxi., 100.

179. *Taxation of Costs — Application by ratepayer — R. S. O. (1887) c. 147, s. 42 — Jurisdiction — Discretion — Proceeding originating in Superior Court — Final judgment.*—By R. S. O. (1887) c. 147, s. 42, any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the High Court, or of the County Court for an order of taxation. In an action against school trustees, a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judg-

ment. The application was refused, but on appeal to the Divisional Court this judgment was reversed (21 O. R. 289). There was no appeal as of right from the latter decision, but on leave to appeal being granted it was reversed and the original judgment restored (19 Ont. App. R. 56). *Held, per Ritchie, C.J.*, and Strong and Gwynne, JJ., that assuming the court had jurisdiction to entertain the appeal, the subject matter being one of taxation of costs, this court should not interfere with the decision of the provincial courts which are the most competent tribunals to deal with such matters.—*Per Ritchie, C.J.* and Patterson, J., that a ratepayer is not entitled to an order for taxation under said section.—*Held, per Taschereau, J.*, that the court had no jurisdiction to entertain the appeal, as the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; the matter was one in the discretion of the courts below, and the proceedings did not originate in a Superior Court.—*Per Patterson, J.* The making or refusing to make the order applied for is a matter of discretion and the case therefore not appealable. *McGugan v. McGugan*, xxi., 267.

180. *Report of referee—Judgment in affirmation — Trial judgment — Jurisdiction.*—A judgment of the Court of Appeal affirming that of the Divisional Court which affirmed the report of the referee refusing a set-off to plaintiff's claim is not a final judgment from which an appeal lies to the Supreme Court of Canada. *McDougall v. Cameron; Bickford v. Cameron*, xxi., 379.

181. *Jurisdiction — Final judgment — Reprise d'instance — Res judicata — Art. 439, C. C. P.—R. S. C. c. 135, ss. 2, 24 & 28.*—In an action to set aside a deed of assignment the plaintiff died before the case was ready for judgment, and respondent petitioned to continue the suit as legatee under a will dated the 17th November, 1869. Appellant contested the *reprise d'instance* on the ground that this will had been revoked by a later will which was contested by respondent as null and void. Upon that issue the Court of Queen's Bench reversing the Superior Court declared the later will null and void and maintained the *reprise d'instance*. On motion to quash appeal on the ground that the judgment appealed from was interlocutory: *Held*, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable. *Shaw v. St. Louis*, (8 Can. S. C. R. 385) followed. *Baptist v. Baptist*, xxi., 425.

182. *Practice — Judgment of court — Withdrawal of opinion — Master's report — Credibility of witnesses — Apportionment of damages — Irrelevant evidence — Severance of damages — Reasons for report — Equal division of judges in appeal — Final judgment.*—The Court of Appeal for Ontario, composed of four judges, pronounced judgment, two being in favour of dismissing an appeal, the other two pronouncing no judgment. In the Supreme Court it was objected that in the judgment appealed from no decision had been arrived at. *Held*, that the appellate court could not go behind the formal judgment which stated that the appeal had been dismissed: further the proposition was the same as if the four judges had been equally divided in opinion in which case the appeal would have been properly dismissed.—In an action

against several mill-owners for obstructing the Ottawa river by throwing sawdust and refuse into it from their mills a reference was made to the master to ascertain the amount of damages. *Held*, affirming the judgment appealed from, that the master rightly treated the defendants as joint tort-feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant, and that he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff.—*Held*, further, that the master was the final judge of the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.—On a reference to a master, the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons for, or enter into a detailed explanation of his report to the court. (Compare, 11 O. R. 491; 14 Ont. App. R. 419; 15 App. Cas. 188.) *Booth v. Ratté*, xxi., 637.

183. *Exchequer Court reference—Judgment on report—Limitation of time—Final judgment.*—On trial in 1887 of an action against the Crown for breach of contract, the case was referred to ascertain the damages. In 1891 the referees reported and judgment was entered for the amount found due. The Crown appealed, obtained an extension of the time for appeal limited by statute (3 Ex. C. R. 1.) and sought to impugn the judgment pronounced in 1887. *Held*, Gwynne and Patterson, JJ., dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment of 1887 could only be brought within 30 days thereafter unless the time was extended as provided by the statute and the extension of time granted on its face only referred to an appeal from the judgment pronounced in 1891.—*Held*, per Gwynne and Patterson, JJ., that the judgment of 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings and on appeal therefrom all matters in issue were necessarily open. *The Queen v. Clarke*, xxi., 656.

184. *Jurisdiction—Final judgment—Demurrer—Practice—Case defective—Formal judgment—Objection in factum—Costs.*—In an action (Sup. Ct., P. E. I.), for assault and false imprisonment, defendants justified by *ca. sa.* issued against plaintiff under a judgment against him. By replication plaintiff alleged that the *capias* issued in blank and was filled up with the necessary particulars after the sealing and delivery, and also that it was sealed, issued and delivered without a *præcipe*. To these replications the defendants demurred, and to the latter replication pleaded a rejoinder that after the issue of the writ their attorney transmitted a *præcipe* to the prothonotary. To this rejoinder the plaintiff demurred. Judgment was for the plaintiff on all the demurrers and defendants appealed to the Supreme Court of Canada. The printed case contained the demurrer book, and reasons for judgment, and a certified extract from the minutes of the prothonotary as follows:—"Demurrers argued 30th October last, when the court took time to consider. The Chief Justice now gives judgment for the plaintiff on all the demurrers. Mr. Justice Peters, concurs; Mr. Justice Hensley, concurs."—*Held*, 1. The case was defective in not shewing that a judgment had

been entered up on the demurrers. 2. Even if judgment had been entered up such judgment would not be a final judgment from which an appeal would lie within the meaning of the Supreme and Exchequer Courts Act, 1875, or the Supreme Court Amendment Act of 1879.—Appeal quashed with costs of a motion to quash. The objection to the jurisdiction was taken by the respondent in his factum. *Reid v. Ramsay*, Cass. Dig. (2 ed.), 420; Cass. Prac. (2 ed.), 30, 64, 81.

185. *Jurisdiction—Final judgment.*—In 1877 an order was made by the Chief Justice of Nova Scotia, on the petition of a number of property owners whose lands would be affected directing the prothonotary of the county to draw and strike a jury, under the provisions of R. S. N. S. (3 ser.) c. 70, to appraise the lands and property taken for the purpose of the Eastern Extension Railway. In 1878 a rule *nisi* was taken to set the whole proceedings aside, but a year later it was discharged on motion of the party who had obtained it. A question having been raised as to the validity of the incorporation of the railway company under 39 Vict. c. 4 (N. S.), and legislation being about to be passed to remove such doubts, another rule was obtained in 1879, on the ground that the H. & C. B. R. & C. Co., had no legal existence. After the argument of this rule, and before judgment, 41 Vict. cc. 66 and 70 (N. S.) were passed, the Supreme Court (N. S.) held that the County of Pictou was estopped by these statutes last mentioned from disputing the appraisement of lands taken, and by its act in issuing debentures to parties to whom damages had been awarded for the lands appropriated to the railway, some of which had been indorsed to third parties. (1 Russ. & Geld, 448; *sub nom. Re Pictou Railway Damages*). *Held*, that the judgment was not one from which an appeal would lie, there being no finality about the order made by the Chief Justice in 1877, which was what this appeal sought to set aside. *Hocutt v. Halifax & C. B. Ry. & Coal Co.*, Cass. Dig. (2 ed.), 423.

186. *Jurisdiction—Final judgment—Judgments on demurrers and on verdict rendered—Appeal per saltum after quashing appeal on demurrers.*—On appeal brought from a judgment overruling demurrers to some of the counts of a declaration only, while rehearing was pending upon an order to enter final judgment on the whole case upon the verdict rendered; *Held*, that as the judgment on the demurrers was not a final judgment the appeal must be quashed for want of jurisdiction, but on the application of the appellant, made at the same time as the motion to quash, leave was given to appeal *per saltum* (after the expiration of the 30 days limited by the Act) on whole case upon terms, and the deposit already made in court was ordered to remain on deposit to avail as security for this appeal. *Bank B. N. A. v. Walker*, Cass. Dig. (2 ed.), 214, 425, 670.

187. *Jurisdiction—Final judgment—R. S. (N. S.), 4th series, c. 94, ss. 56, 75—Refusing leave to defend—Discretionary order—Matter of procedure—Practice.*—Action of replevin to recover 125 barrels of flour. Plaintiffs were indorsees of a bill of lading of the goods, which were held by the defendant as freight agent of the I. C. R. at Truro. The action was begun and the goods were replevied and the writ was served on 9th April, 1881. A default was marked on 25th April, 1881.

On 10th Sept., 1881, plaintiffs' attorney issued a writ of inquiry, under which damages were assessed under R. S. N. S. (4 ser.) c. 94, s. 56. An order *nisi* to remove the default and let in defendant to defend, was taken out on 11th Oct., 1881, and discharged with costs. The judgment being affirmed on appeal (4 Russ. & Geld. 168). R. S. N. S. (4 ser.) c. 94, s. 75, enacts that it shall be lawful for the court or a judge, at any time within one year after final judgment, to let in defendant to defend upon application supported by satisfactory affidavits accounting for his non-appearance, and disclosing a defence upon the merits, etc.—*Held*, that the judgment appealed from was not a final judgment within the meaning of s. 3 of the Supreme Court Amendment Act of 1879, and was not appealable. *Held*, also, that if the court could entertain the appeal, the matter was one of procedure and entirely within the discretion of the court below, and this court would not interfere. Appeal dismissed with costs. *Gladwin v. Cummings*, Cass. Dig. (2 ed.), 426; Cass. Prac. (2 ed.), 31.

188. *Final judgment—Order on appeal—Quashing interim injunction.*—On motion to quash an interim injunction, Mathieu, J., suspended its operation until final adjudication on the merits. Both parties appealed to the Queen's Bench, which quashed the injunction absolutely. An application to one of the judges of Queen's Bench for leave to appeal was refused on the ground that the judgment quashing the writ was not a final judgment, and, "notwithstanding the offer and sufficiency of the security." Appellants served notice of further application to a judge of the Supreme Court to be allowed to give proper security to the satisfaction of that court, or of a judge thereof, for the prosecution of an appeal to that court, notwithstanding the refusal in the court below, and the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal. Henry, J., in chambers enlarged the motion for hearing in court where it was argued at length, and it was *Held*, that the judgment of the Court of Queen's Bench (21 C. L. J. 355), quashing the interim injunction, was not a final judgment from which an appeal would lie. Motion refused. *Stanton v. Canada Atlantic Ry. Co.*, Cass. Dig. (2 ed.), 430; Cass. S. C. Prac. (2 ed.) 31.

189. *Jurisdiction—Contempt of court—Criminal proceeding—R. S. C. c. 135, s. 68—Final judgment.*—Contempt of court is a criminal matter and an appeal to the Supreme Court from a judgment in proceedings therefor, cannot be brought unless it comes within s. 68 of the Supreme and Exchequer Courts Act, *O'Shea v. O'Shea* (15 P. D. 59), followed. *In re O'Brien* (16 C. S. C. R. 197), referred to.—The Supreme Court (N.B.) adjudged E. guilty of contempt but deferred sentence. *Held*, that this was not a final judgment from which an appeal would lie to the Supreme Court of Canada. Appeal quashed. *Ellis v. The Queen*, Cass. Dig. (2 ed.), 133; Cass. S. C. Prac. (2 ed.), 31, 104.

190. *School corporation—Decision of superintendent of public instruction—Final judgment—Mandamus—R. S. Q. Arts. 2055, 2056—55 & 56 Vict., c. 24, ss. 18 and 19 (Que.) Practice.*—Under the provisions of art. 2055 of the Revised Statutes of Quebec, as amended

by 55 and 56 Vict. c. 24, ss. 18 and 19, certain ratepayers of a school district appealed to the Superintendent of Public Instruction for the Province of Quebec, who thereupon rendered a decision, and gave orders and directions respecting the erection of a school-house, which, however, the School Commissioners neglected to perform. *Held*, affirming the judgment appealed from, that in such cases, the decision of the Superintendent of Public Instruction was final; that no appeal therefrom would lie to the Superior Court, and that the proper remedy to enforce the execution of the orders and directions of the Superintendent was by mandamus. *Commis-saires d'Ecole de St. Charles v. Cordeau*, 9th December, 1895.

191. *Jurisdiction—Criminal proceeding—Contempt of court—Final judgment, R. S. C. c. 135, s. 68.*—Contempt of court is a criminal proceeding and unless it comes within s. 69 of the Supreme Court Act an appeal does not lie to this court from a judgment in proceedings therefor. *O'Shea v. O'Shea* (15 P. D. 59), followed; *In re O'Brien* (16 Can. S. C. R. 197), referred to. In proceedings for contempt of court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought. *Ellis v. The Queen*, xxii., 7.

192. *Order for new trial—Jurisdiction—Final judgment.*—An ~~order~~ for a new trial is not a final judgment, and is not appealable to the Supreme Court of Canada. *Canadian Pac. Ry. Co. v. Cobban Mfg. Co.*, xxii., 132.

193. *Sheriff's sale of immovable—Action to vacate—Appeal from judgment in.*—An appeal will lie to the Supreme Court under s. 29 (b) of the Supreme Court Act from the judgment in an action to vacate the sheriff's sale of an immovable. *Dufresne v. Dixon* (16 Can. S. C. R. 596) followed. *Lefeuntun v. Véronneau*, xxii., 203.

194. *Final judgment—Petition for leave to intervene—Judgment on—Interlocutory proceedings.*—No appeal lies to the Supreme Court from the judgment of the Court of Queen's Bench on a petition for leave to intervene in a cause, the proceedings being interlocutory only. *Hamel v. Hamel*, xxvi., 17.

195. *Interlocutory order—Trial by jury—Final judgment.*—A judgment of the Court of Queen's Bench for Lower Canada, affirmed a judgment of the Superior Court, by which the defendant's application to have the issues tried by a jury under the provisions of arts. 348-350 C. C. P., was refused. The defendant took an appeal to the Supreme Court of Canada, whereupon the plaintiff moved to quash. *Held*, that the decision complained of was an interlocutory judgment only, and that no appeal could lie under the provisions of "The Supreme and Exchequer Courts Act," and amendments thereto. (The appeal was quashed with costs.) *Demers v. Bank of Montreal*, xxvii., 197.

196. *Jurisdiction—Final judgment—Discretionary order—Default to plead—R. S. C. c. 135, ss. 24 (a), 27—R. S. O. c. 44, s. 46—Ontario Judicature Act, Rule 796.*—After judgment has been entered by default in an action in the High Court of Justice it is in the discretion of a master in chambers to

grant or refuse an application by the defendant to have the proceedings re-opened to allow him to defend, and an appeal to the Supreme Court from the decision of the court of last resort on such an application is prohibited by s. 27 of "The Supreme and Exchequer Courts Acts." *Quære*, Is the judgment on such application a "final judgment" within the meaning of s. 24 (a) of the Act? *O'Donohue v. Bourne*, xxvii., 654.

197. *Court of Review—Right of appeal to Privy Council—Construction of statute—Final judgment—R. S. C. c. 135, ss. 24 (j), 28 & 29—54 & 55 Vict. c. 25, s. 3 (D).*—Certain ratepayers of the City of Montreal having objections to one of the commissioners named in proceedings taken for the expropriation of land required for the improvement of a public street, in which they were interested, presented a petition to the Superior Court demanding his recusal. The petition was dismissed; on an appeal to the Court of Review, the judgment dismissing the petition was affirmed, and further appeal was then taken to the Supreme Court of Canada. On motion to quash the appeal for want of jurisdiction, *Held*, that no appeal *de plano* would lie from the judgment of the Court of Review to Her Majesty's Privy Council, and consequently there was no appeal therefrom to the Supreme Court of Canada under the provisions of the Act, 54 & 55 Vict. c. 25, s. 3, amending the Supreme and Exchequer Courts Act. *Held*, further, that the judgment of the Court of Review was not a final judgment within the meaning of s. 29 of the Supreme and Exchequer Courts Act. *Ethier v. Ewing*, xxix., 446.

198. *Jurisdiction—Final judgment—Plea of prescription—Judgment dismissing plea—Costs—R. S. C. c. 135, s. 24—Art. 2267 C. C.*—A judgment affirming dismissal of a plea of prescription when other pleas remain on the record is not a final judgment from which an appeal lies to the Supreme Court of Canada. *Hamel v. Hamel* (26 Can. S. C. R. 17) approved and followed.—An objection to the jurisdiction of the court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed the respondent may be allowed costs of a motion only. *Griffith v. Harwood*, xxx., 315.

199. *Vendor and Purchaser Act—Reference to master—Admission of evidence—Appeal from certificate—Final judgment—R. S. C. c. 135, s. 24 (e).*—Where a master, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to shew what covenants the lease should contain, an appeal does not lie to the Supreme Court from the judgment affirming such ruling it not being a final judgment and the case not coming within the provisions of s. 24 (e) of the Supreme and Exchequer Courts Act, relating to proceedings in Equity. *Gwynne, J.*, dissented. *Canadian Pacific Ry. Co. v. City of Toronto*, xxx., 337.

200. *Jurisdiction—Interlocutory proceeding—Final judgment.*—An order requiring opponents *à fin de charge* to furnish security that lands seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is merely an interlocutory judgment from which no appeal lies to the Supreme Court of Canada. *Lacroix v. Moreau* (16 L. C. R. 180), referred to. *Desaulniers v. Payette*, xxxiii., 340.

201. *Appeal from Court of Review—Construction of statute—Final judgment—Appellate jurisdiction.*

See No. 289, *infra*.

14. FINDINGS IN COURTS BELOW.

202. *Questions of fact—Conflicting evidence—Findings of court below.*—*Held*, where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not on appeal reverse the decree of the judge of the court below, merely upon a balance of testimony. *The Picton*, iv., 648.

203. *Question of jurisdiction of court below—Directions given on appeal—Second decision of court below—Powers of Supreme Court on first appeal—Jurisdiction to hear second appeal—Findings of fact.*—Where an appeal is limited to a question of the jurisdiction of the court appealed from, the Supreme Court of Canada cannot decide upon the merits of the case, and where, in such a case, further adjudication is ordered, a second judgment therein deciding upon the merits is appealable under the Supreme Court Act.—On appeal the findings of fact by the trial judge ought not to be reversed unless his conclusions appear, beyond a doubt, to be erroneous. *Bellechasse Election Case*, v., 91.

204. *Findings of trial judge—Reversal on appeal.*—Where there was evidence which, in the opinion of the Supreme Court of Canada, established the creation of a new tenancy at will within ten years, the court reversed the holding of the Court of Appeal for Ontario, which had reversed the findings of fact by the trial judge.—*Per Gwynne, J.* A court of appeal should not reverse the finding upon matters of fact of the judge who tried the cause and had the opportunity of observing the demeanor of the witnesses unless the evidence be of such a character as to convey to the mind of the judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. *Ryan v. Ryan*, v., 387, 406.

205. *Special vindictive damages—Slander—Quantum of damages—Effect of findings on an appeal.*—If the amount of damages awarded at the trial is not such as to shock the sense of justice and shew error or partiality in the discretion exercised by the judge under the circumstances of the case, an appellate court ought not to interfere with such discretion in determining the amount of damages. *Levi v. Reed*, vi., 482.

206. *Conflicting evidence—Findings of trial judge.*—Where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanor while under examination. *Grassett v. Carter*, x., 105.

207. *Findings by jury—Interference on appeal.*—Where a jury has made findings of fact and the verdict has been affirmed by the judgment appealed from, the Supreme Court of Canada will not disturb the decision. *Cas-sells v. Burns*, xiv., 256.

208. *Jurisdiction—Findings of fact—Petition of right*—46 Vict. c. 27 (Que.)—Where a judgment appealed from is founded wholly upon questions of fact the Supreme Court of Canada will not reverse it unless convinced, beyond all reasonable doubt, that such judgment is clearly erroneous.—The provisions of the Supreme and Exchequer Courts Act relating to appeals from the Province of Quebec apply to cases instituted under the Quebec Petition of Right Act. *McGreevy v. The Queen* (14 Can. S. C. R. 735), followed. *Arpin v. The Queen*, xiv., 736.

209. *Question of fact—Finding of courts below*.—M. assigned for the benefit of creditors. His wife preferred a claim against the estate for money lent to M. and used in his business, which the assignee refused to acknowledge, contending that it was not a loan but a gift to M. It was not disputed that the wife had money of her own and that M. had received it. The trial judge found against the assignee, holding that M. did not receive the money as a gift. This judgment was affirmed on appeal. *Held*, affirming the Court of Appeal for Ontario, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law of Ontario, is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favour of the wife and confirmed by the Court of Appeal, the second appellate court would not interfere with such finding. *Warner v. Murray*, xvi., 720.

210. *Findings by trial judge—Appreciation of evidence—Jury trials—Non-jury cases*.—An appeal court exercises different functions in dealing with a case tried by a judge from those exercised in jury cases. In the former case the court has the same jurisdiction over the facts as the trial judge, and can deal with them as it chooses. In the latter the court cannot be substituted for the jury to whom the parties have agreed to assign the facts for decision. *Per Strong, J. Phoenix Insurance Co. v. McGhee*, xviii., 61.

211. *Question of fact—Finding of trial judge—Interference on appeal—Retainer*.—A solicitor brought action against the officers of a Liberal-Conservative Association for services alleged to have been rendered as their solicitor and counsel in a controverted election. Plaintiff swore that he was duly appointed solicitor to carry on the election petition by resolution passed at a meeting of the association, and that in consequence of such resolution he acted as such solicitor in the conduct of the petition. The defence was that no such appointment was made, or if it was that plaintiff agreed to render his services gratuitously, and the evidence given for defendants was that plaintiff offered his services free of charge, and it was decided to protest the election in consequence of such offer. The trial judge held that no retainer of plaintiff was proved and dismissed the action. His decision was reversed by the Queen's Bench Division, and their decision in its turn was reversed by the Court of Appeal for Ontario, and the judgment of the trial judge restored. *Held*, affirming the Court of Appeal, that the question being purely one of fact which the trial judge was the person most competent to determine from seeing and hearing the witnesses, and it not being clear beyond all reasonable doubt that his decision was erroneous,

but, on the contrary, the weight of evidence being in its favour, his judgment should not be interfered with on appeal. *Titus v. Colville*, xviii., 709.

212. *Findings of fact—Receipt—Error—Parol evidence—Prohibitive law—Nullity—Arts. 14, 1234, C. C.*—S. brought action to compel V. to account for \$2,500 alleged to have been paid on 6th Oct., 1885, to be applied to S.'s first promissory notes maturing and in acknowledgment of which V.'s bookkeeper gave the following receipt: "Montreal, October 6th, 1885.—Received from S. the sum of \$2,500 to be applied to his first notes maturing. M. V. per F. L." and which V. failed and neglected to apply. V. pleaded that he never got the \$2,500 and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given the Superior Court (affirmed by the Queen's Bench [M. L. R. 7 Q. B. 137]), dismissed the action. *Held*, that the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with.—That the prohibition of art. 1234 C. C. against the admission of parol evidence to contradict or vary a written instrument, is not *d'ordre public*, and that if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a court of appeal.—That parol evidence in commercial matters is admissible against a written document to prove error. *Etna Insurance Co. v. Brodie* (5 Can. S. C. R. 1), followed. *Schwarsenski v. Vineberg*, xix., 243.

213. *Questions of fact—Finding of trial judge—Concurrence of lower appellate court*.—Findings upon matters of fact by the trial judge who saw and heard the witnesses, affirmed by a Court of Appeal should not be interfered with on appeal to the Supreme Court of Canada. *Strong, J.*, dissented. *Bickford v. Hawkins*, xix., 362.

214. *Jurisdiction—Amount in controversy—Adding interest—Costs—Finding of fact—Assuming jurisdiction on dismissal on merits*.—Appeal from judgment affirming an award for \$1,974.75 damages on expropriation of lands, with interest from date of award and costs. On hearing the appeal, *Strong and Taschereau, JJ.*, doubted the court's jurisdiction, but concurred in the decision of the court dismissing the appeal on the merits, assuming, without deciding, that there was jurisdiction to entertain it.—*Per Taschereau, J.* The court will not, on appeal, interfere with concurrent findings of fact in the courts below, fully supported by evidence. [NOTE.—(See Cass. Dig. 2 ed. p. 451). On application by appellant in the Court of Queen's Bench, *Tessier, J.*, being of opinion that no appeal lay, refused to allow the security. The Registrar of the Supreme Court held that the controversy was as to the amount at the time of the judgment appealed from, i.e., the principal awarded with interest to that date making an amount in excess of \$2,500; as to costs he considered them incidental to the award and not in controversy within the meaning of the Supreme Court Act. On appeal to *Fournier, J.*, the judgment of the registrar was affirmed. 24th November, 1890.] *Quebec, Montmorency, and Charlevoix Ry. Co. v. Mathieu*, xix., 426.

215. *Concurrent findings of fact—Interference on appeal*.—At the trial parol evidence

was given to establish an alleged trust affecting lands and its existence was found as a fact by the trial judge who made a decree ordering the property to be sold and the proceeds applied according to the contention of the plaintiff and the evidence. The Supreme Court (B.C.) affirmed this decree. *Held*, that the fact of the existence of the trust having been found by the trial judge, and such finding having been affirmed by the full court, it should not be disturbed on this further appeal. *Bowker v. Laumeister*, xx., 175.

216. *Questions of fact—New trial—Duty of appellate court.*—Action to recover from the bank a special deposit by plaintiff. Defence that the amount had been already paid to an agent of plaintiff who had indorsed plaintiff's name upon and given up the deposit receipt. It was contended that no such authority was given to the agent and that plaintiff's name had been forged on the receipt. The jury found the facts in favour of this contention, and plaintiff obtained a verdict which was set aside by the full court and a new trial ordered. *Held*, that a new trial having been ordered to try questions of fact, such order should not be interfered with by an appellate court. *Scott v. Bank of New Brunswick*, xxi., 30.

217. *Finding of fact—Value of land taken—Award by Exchequer Court.*—The Supreme Court will not interfere with the award of the Exchequer Court as to value of land expropriated for railway purposes where there is evidence to support the finding and it is not clearly erroneous. *Town of Levis v. The Queen*, xxi., 31.

218. *Victimative damages for serious personal injuries—Abuse of authority—Injury to feelings, reputation, and health—Discretion of trial judge—Measure of damages.*—In allowing the appeal with costs, *Levi v. Reed* (6 Can. S. C. R. 482), was approved and the Supreme Court *Held*, Taschereau, J., dissenting, that in view of very serious injuries sustained by the plaintiff and of the misconduct of the defendant in abusing his position of a justice of the peace, \$3,000 awarded by the trial judge was not so clearly excessive as to justify a reversal of his judgment. Taschereau, J., while holding that the amount to which the Court of Queen's Bench had reduced the damages (\$600) was not sufficient, considered that, taking into consideration the position of the plaintiff and the nature of the injuries, \$3,000 was excessive. Fournier, J., considered that the abuse of the defendant of his position of justice of the peace was an important element to be taken into consideration in fixing the amount of damages. *Per Gwynne, J.* The sound rule to adopt is that in mere matters of fact, or in the estimation of damages not susceptible of precise calculation or not ascertainable by the application of any rule prescribing a measure of damages, the appeal court should sustain the judgment of the trial judge unless satisfied that his conclusions are clearly erroneous. *Gingras v. Desilets*, Cass. Dig. (2 ed.) 212.

219. *Findings of courts below—Verdict affirmed by two courts.*—Appeal from two judgments of the Court of Appeal for Ontario, affirming judgments recovered in actions on contracts on trials by a judge without a jury. The verdicts had been sustained by the Queen's Bench and Common Pleas, respectively. The

appeal was dismissed with costs. *Per Gwynne, J.*—When a judge has tried a case without a jury and found a verdict, which verdict has been affirmed by two courts, this court, sitting in appeal, should not reverse the conclusion arrived at by the lower courts on the weight of evidence, unless convinced beyond all reasonable doubt that all the judges before whom the case came have clearly erred. [Note.—Compare *Bellechasse Election Case*, 5 Can. S. C. R. 91.]—*Bickford v. Howard*, 18 C. L. J. 422; Cass. Dig. (2 ed.) 286.

220. *Questions of fact—Findings of trial judge—Negligence—Improper construction of street car track.*—The plaintiff who was thrown out of a waggon sustaining injuries, brought action for negligence owing to improper construction and bad order of the company's track. Torrance, J., found that the track was in bad order, the switch three inches above the level of the road, contrary to law, and that this caused the accident without any fault on the part of the plaintiff, whose damages he assessed at \$2,500. The Queen's Bench reversed this judgment, being of opinion that the rails, as well as the part of the roadway the company was bound to maintain, were lawful and sufficient; that the company was not at fault, and that the plaintiff had not exercised necessary caution and prudence and might, by reasonable caution and prudence, have avoided the accident. *Held*, that as the questions to be decided were purely matters of fact, the judgment of the court of first instance should not have been disturbed. Strong, J., dissented, on the ground that the judgment of the Court of Queen's Bench on the facts was correct. *Parker v. Montreal City Pass. Ry. Co.*, Cass. Dig. (2 ed.) 731.

[The Privy Council refused leave to appeal, as the findings of fact should not have been disturbed; see 6 Can. Gaz. 174.]

221. *Contract—Collateral agreement—Questions for jury—Verdict—New trial—Duty of appellate court.*—Whether or not a memorandum of agreement set up by the defendant as containing the only contract between the parties was intended to settle the contract in whole or in part is a question for the jury. The onus of shewing that it contained all the terms of the contract is upon the party producing it. In such a case oral testimony is admissible on behalf of both parties. A verdict based upon the appreciation of the evidence in such a case ought not to be interfered with by an appellate court. *Peters v. Hamilton*, Cass. Dig. (2 ed.) 763.

222. *Questions of fact—Concurrent findings in courts below.*—*Per Taschereau, J.*—Concurrent findings on a question of fact in two courts below ought not to be reversed on appeal except under very unusual circumstances. *Hays v. Gordon*, (L. R. 4 P. C. 337); *Gray v. Turnbull*, (L. R. 2 H. L. 53); *Bell v. City of Quebec*, (5 App. Cas. 94); *Smith v. Lawrence*, (L. R. 5 P. C. 308), referred to. *Black v. Walker*, Cass. Dig. (2 ed.) 768.

223. *Award on expropriation—Questions of fact—Findings of court appealed from.*—On 3rd February, 1882, the Minister of Railways and Canals, requiring part of a lot for construction of the I. C. Ry. deposited, in accordance with the Government Railway Act, 1881, a plan of the land, and gave notice under s. 15 tendering compensation. The lot had been

used as a cove, and a profitable lumber business had been conducted thereon by means of a wharf running into deep water, at which vessels of large size could load. The portion of the lot taken was 25 feet wide through the middle of it and across the wharf by 211 feet, in all 5,156 square feet: the portion of the wharf expropriated being 1,000 square feet. Respondents refused the sum tendered, and the question of compensation was submitted by the Minister, under the Act, to the official arbitrators who, after hearing evidence of the claimants and the Crown, awarded the amount tendered and refused as full compensation for the land expropriated and all damages, and imposed the costs of arbitration upon the claimants. An appeal to the Exchequer Court was heard by Fournier, J., one witness on either side being examined, the award of the arbitrators was set aside, the claimants allowed \$11,073 (\$8,500 damages and \$2,573 value of land expropriated), costs of appeal (save of witnesses in the Exchequer Court) and before the arbitrators. On further appeal to the Supreme Court, respondents gave notice of intention upon the hearing to contend that the decision should be varied and respondent allowed a larger sum as compensation and damages. The questions were entirely of fact, and it was *Held*, that the judgment of the court below should be affirmed and the appeal dismissed with costs. *The Queen v. Murphy*, Cass. Dig. (2 ed.) 314.

224. *Collusive judgment entered by default—Chamber order to set aside—Recitals in order—Findings of fact.*—Where an order in chambers setting aside a judgment entered by default as fraudulently obtained and allowing executors in to defend, was affirmed by the C. P. division and by the judgment appealed from (11 Ont. App. R. 673): *Held*, that it is doubtful if an appeal would lie in such a case to the Supreme Court of Canada, and in any event the statement in the order as to what took place in chambers and as to the matter which was submitted to and argued, must be taken to be conclusive. *Schroeder v. Rooney*, Cass. Dig. (2 ed.) 403, 434; Cass. S. C. Prac. (2 ed.) 29.

225. *Trial by jury—Withdrawal from jury—Reference to court—Consent of parties—Railway company—Negligence.*—On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court, with power to draw inferences of fact and on the law and facts either to assess damages to the plaintiff or enter a judgment of nonsuit. On appeal from the decision of the full court assessing damages to plaintiff: *Held*, Gwynne and Patterson, J.J., dissenting, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitrator and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the court.—*Held*, further, that if the merits of the case could be entered on appeal the judgment appealed from

should be affirmed.—*Held*, per Gwynne and Patterson, J.J., that the case was properly before the court and as the evidence shewed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train the company was not liable. *Canadian Pacific Ry. Co. v. Fleming*, xxii., 33.

226. *Collision at sea—Negligence—Defective steering gear—Question of fact—Interference with decision of local judge in admiralty.*—In an action against the owners of the "Santanderino" for damages for collision with respondent's barge, the "Juno," through the breaking down of the steering apparatus, the local judge in Admiralty District of Nova Scotia, who was assisted on the trial by a nautical assessor, found that the steering gear was constructed on an approved patent, and was in good order when the "Santanderino" started on her voyage, but that the collision was due to want of prompt action by the master and officers when the wheel refused to work (3 Ex. C. R. 378). On appeal to the Supreme Court of Canada, it was *Held*, Sedgewick and King, J.J., dissenting, that only a question of fact was involved, and though it was doubtful if the evidence was sufficient to warrant the finding, the decision was not so clearly wrong as to justify an appellate court in reversing it. *S.S. "Santanderino" v. Vanvert et al.*, xxiii., 145.

227. *Expropriation—Award of arbitrators—Interference on appeal.*—In a matter of expropriation, the decision of the majority of the arbitrators, men of more than ordinary business experience, upon a question merely of value, should not be interfered with on appeal. *Lemoine v. City of Montreal; Allan v. City of Montreal*, xxiii., 390.

228. *Questions of fact—Unsatisfactory findings of jury—Interference with—Second appellate court.*—*Held*, per Fournier, Taschereau, Gwynne, and Sedgewick, J.J., that, though the findings of the jury were not satisfactory upon the evidence, yet, where they had been upheld on a first appeal, a second appellate court could not interfere.—King, J., held that the findings of the jury had to be accepted by the appellate court. *Grand Trunk Ry. Co. v. Weegar*, xxiii., 422.

229. *Evidence—Questions of fact.*—*Held*, per Strong, C.J., that although the case might properly have been left to the jury, the judgment of nonsuit, having been affirmed by two courts, should not be interfered with. *Headford v. McClary Mfg. Co.*, xxiv., 291.

230. *Master and servant—Negligence of servant—Deviation from employment—Resumption—Contributory negligence—Infant—Evidence.*—If in a case tried without a jury, evidence has been improperly admitted, a court of appeal may reject it and maintain the verdict if the remaining evidence warrants it. *Merritt v. Hepenstal*, xxv., 150.

231. *Questions of fact—Reversal on.*—If a sufficiently clear case is made out, the court will allow an appeal on mere questions of fact against the concurrent findings of two courts. *Arpin v. The Queen* (14 Can. S. C. R. 736); *Schweersenski v. Vineberg* (19 Can. S. C. R. 243) distinguished. *North British and Mercantile Ins. Co. v. Tourville et al.*, xxv., 177.

232. *Assessment of damages — Questions of fact.*—The Supreme Court of Canada will not interfere with the amount of damages assessed by a judgment appealed from if there is evidence to support it. *Montreal Gas Co. v. St. Laurent; City of St. Henri v. St. Laurent*, xxvi., 176.

233. *Questions of fact — Reversal in Court of Appeal.*—The Supreme Court of Canada will take questions of fact into consideration on appeal, and if it clearly appears that there has been an error in the admission or appreciation of evidence by the courts below, their decisions may be reversed or varied. *North British and Mercantile Ins. Co. v. Tourville* (25 Can. S. C. R. 177) followed. *Lefeunteum v. Beaudoin*, xxviii., 89.

234. *Evidence taken by commission — Reversal on questions of fact.*—Where the witnesses have not been heard in the presence of the judge, but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it. *Malzard v. Hart*, xxvii., 510.

235. *Questions of fact — Second appellate court.*—Where a judgment upon questions of fact rendered in a court of first instance has been reversed upon a first appeal, a second court of appeal should not interfere to restore the original judgment, unless it clearly appears that the reversal was erroneous. *Demers v. Montreal Steam Laundry Co.*, xxvii., 537.

236. *Finding of courts below — Questions of fact.*—Where there does not appear to have been manifest error in the findings of the courts below they will not be disturbed on appeal. *Paradis v. Municipality of Limoilou*, xxx., 405.

237. *Evidence — Concurrent findings on questions of fact — Reversal on appeal.*—Although there may be concurrent findings on questions of fact in both courts below, the Supreme Court of Canada will, upon appeal, interfere with their decision where it clearly appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary. *Taschereau, J.*, dissented, holding that as there had been concurrent findings in both courts below supported by the evidence, an appellate court ought not to interfere. *City of Montreal v. Cadieux*, xxix., 616.

238. *Negligence — Trial by judge without a jury — Findings of fact — Evidence — Reversal by appellate court.*—In an action for damages for personal injuries, the trial judge, who heard the case without a jury, and before whom the witnesses were examined, held that the evidence of the witnesses for the defence was best entitled to credit and dismissed the action. The judgment was reversed in the Court of Review and its decision affirmed on further appeal by the Court of Queen's Bench. On appeal to the Supreme Court, *Held*, that as the judgment at the trial was supported by evidence, it should not have been disturbed. Judgment appealed from reversed and judgment of the trial judge restored. *Village of Granby v. Ménard*, xxxi., 14.

239. *Negligence — Proximate cause of accident — Injuries to workman — Employer's liability — Presumptions — Findings of jury sustained by courts below.*—As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability, on a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff, not assented to by the trial judges, have been sustained by two courts below. *Taschereau, J.*, dissented, taking a different view of the evidence, and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co. v. Bowchard* (28 S. C. R. 580), and *The Metropolitan Ry. Co. v. Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal. *The Asbestos and Asbestic Co. v. Durand* (30 S. C. R. 285) discussed and approved. *Dominion Cartridge Co. v. McArthur*, xxxi., 392. (Leave to appeal to Privy Council granted, 2nd Aug. 1902.)

240. *Nuisance — Operation of electric railway — Powerhouse machinery — Vibration, smoke and noise — Injury to adjoining property — Evidence — Assessment of damages — Reversal on questions of fact.*—In an action of the owner of adjoining property for damages caused by the vibrations of machinery in an electric powerhouse, the evidence was contradictory and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality. *Held*, *Taschereau, J.*, dissenting that, notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. *Goreau v. Montreal Street Railway Co.*, xxxi., 463.

241. *Exchequer appeal — Assessment of damages — Interference with findings of Exchequer Court judge.*—The Exchequer Court judge heard witnesses and upon his appreciation of contradictory testimony awarded damages to the respondents. The Crown appealed on the ground that the damages were excessive. *Held*, *Gwynne and Girouard, JJ.*, dissenting, that as it did not appear from the evidence that there was error in the judgment appealed from the Supreme Court would not interfere with the decision of the Exchequer Court judge. *The Queen v. Armour*, xxxi., 499.

242. *Arbitration — Condition precedent — New grounds taken on appeal — Assessment of damages — Interference by appellate court.*—An objection as to arbitration and award being a condition precedent to an action for damages which had been waived or abandoned in the Court of Queen's Bench cannot be invoked on an appeal to the Supreme Court.—On a cross-appeal the Supreme Court refused to

interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence. *Hamelin v. Bannerman*, xxxi., 534.

243. *Facts found by courts below — Weight of evidence — Verdict.*—The court refused to disturb the verdict on the ground that it was against the weight of evidence after it had been affirmed by the trial judge and the Court of Appeal. *Toronto Railway Co. v. Balfour*, xxxii., 239.

244. *Admiralty law — Collision — Ship at anchor — Anchor light — Lookout — Weight of evidence — Credibility — Findings of trial judge — Negligence.*—The S. S. "Lake Ontario" was proceeding in charge of a pilot to her dock in Halifax harbour, N. S., on a blustery night in January, 1900, came in collision with and sank appellant's coal barge, "A. L. Taylor," lying at anchor north of George's Island. The steamship had signalled by guns and whistles for a medical officer at the quarantine grounds before the collision, and her officers and crew testified that they were alert, and anxiously working the steamship through anchored vessels in the darkness and blustery weather and came suddenly upon the "Taylor," and that no lights were seen on her. The barge caretaker, who was not on deck at the time, swore that a proper anchor light was burning on the barge, his statement being corroborated by the captain of a schooner lying close by and by several boatmen and labourers on the wharves. The trial judge accepted the evidence of the defence as correct and found that the collision and loss were wholly attributable to negligence of the "Taylor" in failing to have an anchor light and to keep a sharp lookout, and dismissed the action. On appeal the Supreme Court affirmed the decision at the trial (7 Ex. C. R. 403). *Dominion Coal Co. v. S. S. "Lake Ontario"*, xxxii., 507.

245. *Concurrent findings of fact — Duty of appellate court — Evidence.*—A judgment based upon concurrent findings of fact in the courts below ought not to be disturbed on appeal to the Supreme Court of Canada if the evidence be contradictory. *D'Avignon v. Jones et al.*, xxxii., 650.

246. *Evidence — Findings by jury — Verdict.*—An appellate court should not disregard the verdict of a jury which is supported by evidence. *McKelvey v. Le Roi Mining Co.*, xxxii., 664.

247. *Concurrent findings of courts below.*—The Supreme Court of Canada affirmed the concurrent findings of three courts below on a question of fact, as they were supported by the evidence. *Bank of Montreal v. Demers*, 7th November, 1899.

[NOTE.—This decision was given on hearing upon the merits of the appeal in which proceedings were stayed till after the judgment on an appeal to the Privy Council. See 29 Can. S. C. R. 435.]

248. *Questions of fact — Concurrent findings of courts below — Duty of Appellate Court.*—During the argument of counsel for respondent, he was stopped, the Chief Justice announcing that the majority of the court considered that there should be no interference with the judgment appealed from, he said, "I am clearly of opinion that we should dismiss

the appeal as it is upon questions of fact already passed upon by two courts below and, if we should reverse, it would be in the teeth of decided cases in this court. As to sufficiency of the proofs of loss, that is answered in the printed judgments of Meredith, C.J., and Moss, J., and, as to the question of increase of risk, I cannot see that there was an increase. We are not prepared to interfere with the judgment appealed from." (Tasche-reau, Sedgewick, and King, JJ., concurred. Gwynne, J., said, "I cannot accede, at present, to the views of the majority of the court. I am not in a position to express an opinion as I have not yet had an opportunity of examining the evidence and opinions of the judges below; I would like to do so before coming to a conclusion as to whether the action was right or wrong.") The appeal was dismissed with costs. *Quebec Fire Ins. Co. v. Bank of Toronto*, 27th April, 1900.

249. *Questions of fact — Findings of trial court — Reversal on appeal — Interference on further appeal.*—On the merits in this case (see 31 Can. S. C. R. 175), the controversy rested upon the fact whether or not a ship had been acquired by some of the partners in a commercial firm for the purposes of the firm's business or merely as a private venture. The Court of Queen's Bench had reversed the trial court judgment, and held that it belonged to the firm. As it was not made clear that there was error in the judgment appealed from, the Supreme Court of Canada dismissed the appeal with costs. *Bell v. Vipond*, 29th Oct. 1901.

250. *Findings of courts appealed from — Evidence — Questions of fact — Reversal on appeal.*—There is no rule of law or of procedure which prevents the Supreme Court or an intermediate court of appeal from reversing the decision at the trial on the facts.—*Held, per* Girouard, J., following *Village of Granby v. Menard* (31 Can. S. C. R. 14) that the evidence being contradictory and the trial judge having found for the defendant, which finding the evidence warranted, his judgment should not have been reversed on appeal. *Dempster v. Lewis*, xxxiii., 292.

251. *Concurrent findings of courts below — Reversal on questions of fact — Improper rulings — Reversal on a matter of procedure.*—Where the findings of the trial courts were manifestly erroneous and the trial appeared to have been irregularly conducted, the Supreme Court of Canada reversed the concurrent findings of the courts below, and also reversed the concurrent rulings of those courts refusing leave to amend the statement of claim by alleging an account stated. *Belcher v. McDonald*, xxxiii., 321.—*Leave to appeal to Privy Council granted August, 1903.*

252. *Assessment of damages — Estimating by guess — Concurrent findings — Reversal on appeal — New trial.*—The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both courts below. *Armour, J.*, however, was of opinion

that the proper course was to order a new trial. *Williams v. Stephenson*, xxxiii., 323.

253. *Questions of law — Findings of fact—Reversal on appeal.*—On questions of law, the judgment appealed from was reversed, *Davies, J., dubitante*, but the findings, on confictory testimony, in respect of damages, by the trial judge were not disturbed on the appeal. *Mas-sawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

254. *Findings by courts below — Inferences from evidence — Fausse cause — Revision by appellate court.*

See WILL, 1.

255. *Findings of fact — Bribery — Corrupt intent.*

See ELECTION LAW, 84.

256. *Findings of fact — Reversal refused.*

See ELECTION LAW, 50.

257. *Evidence—Findings of fact.*

See WINDING-UP ACT, 8.

258. *Findings of fact — Intention of parties to agreement — Amendment of pleadings.*

See CONTRACT, 169.

259. *Interference with findings — Inferences drawn by trial judges—Reversal on appeal.*

See ELECTION LAW, 87.

260. *Findings of fact — Corrupt practices at elections — Interference on appeal.*

See ELECTION LAW, 88.

261. *Concurrent judgments — Findings by trial judge.*

See SOLICITOR, 8.

262. *Findings of fact — Assessment of damages.*

See DAMAGES, 50.

263. *Finding of jury — Interference with — Question of fact.*

See MASTER AND SERVANT, 15.

264. *Award — Questions of fact.*

See ARBITRATION, 56.

265. *Questions of fact — Evidence—Burden of proof — Railway company — Negligence—Damages by fire — Sparks from engine or "hot-box"—Art. 1053 C. C.*

See RAILWAYS, 73.

266. *Matters of fact — Evidence.*

See CONTRACT, 213.

267. *Question of fact — Warranty — Defect in construction — Satisfaction by acceptance and user — Variation from design — Demurrage — Evidence — Onus of proof—Expert testimony — Concurrent findings.*

See EVIDENCE, 166.

268. *Evidence — Improper principle of appreciation — Duty of Appellate Court—Findings of fact — Estimating damages.*

See ARBITRATION, 15.

269. *Negligence — Master and Servant — Employer's liability — Concurrent findings of fact — Contributory negligence — Duty of appellate court.*

See NEGLIGENCE, 121.

270. *Negligence—Evidence of facts—Findings of jury — Common law liability — Employer and employee—Assessment of damages.*

See NEGLIGENCE, 100.

271. *Collision — Proper navigation—Negligent outlook — Sufficiency of anchor light — Findings of fact — Appreciation of evidence—Practice.*

See ADMIRALTY LAW, 3.

272. *Findings of jury — Answers to questions — Verdict reversed on appeal.*

See NEGLIGENCE, 51.

15. HABEAS CORPUS.

273. *Habeas corpus — Filing of case — Time — Practice.*—The first proceeding in *habeas corpus* appeals is the filing of the case with the registrar of the Supreme Court of Canada, which must be done within 60 days of the pronouncing of the judgment appealed from. *Re Smart*, xvi., 396.

274. *Criminal matters — Habeas corpus — Jurisdiction of Supreme Court of Canada.*—A judge of the Supreme Court of Canada will not assume appellate jurisdiction by issuing a writ of *habeas corpus* in a matter which has been disposed of in a provincial Court of Appeal. *In re Boucher* (1879), *Cass. Dig.* (2 ed.) 325; *S. C. Prac.* (2 ed.) 54.

275. *Jurisdiction — Habeas corpus — Prisoner discharged before appeal—Costs.*—The prisoner was convicted before the stipendiary magistrate of Truro, N. S., of violating the license laws in force in the town, and fined \$40 and costs as for a third offence. Execution issued in the form given in the *R. S. N. S.* (4 ser.) c. 75, under which F. was committed to jail. While there he was convicted of a fourth offence and fined \$80 and costs, and was detained under an execution in the same form. The Supreme Court (N. S.) on motion to make absolute a rule *nisi* granted under *R. S. N. S.* (4 ser.) c. 99, discharged the rule. Before the institution of the appeal to the Supreme Court of Canada, the time for which the appellant had been imprisoned had expired and he was at large. On motion to dismiss for want of jurisdiction, *Held*, that an appeal will not lie in any case of proceedings for or upon a writ of *habeas corpus* when at the time of bringing the appeal the appellant is at large.—The question of costs on dismissal was reserved and subsequently the court ordered that the respondent should be allowed his general costs of the appeal. *Fraser v. Tupper*, *Cass. Dig.* (2 ed.) 421; *Cass. Prac.* (2 ed.) 53, 54, 88.

276. *Habeas corpus — Change in position of parties pending appeal.*—Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of *habeas corpus*, for the possession of Quai Sing, a Chinese

female under age), counsel for the respondent produced to the court an order of the Supreme Court of British Columbia, dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in question, whereupon the Chief Justice intimated that, under the circumstances, it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant. The appeal was consequently dismissed with costs. *Seid Sing Kaw v. Bowes*, 17th May, 1898.

277. *Habeas corpus — Extradition — Necessity to quash.*—By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135) "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal. *Held*, that the matter was *coram non iudice* and there was no necessity for a motion to quash. *In re Lazier*, xxix., 630.

278. *Criminal appeals — Jurisdiction — Questions of fact — Certiorari — Sup. & Ex. Courts Act, s. 49—Sup. Court Amendment Act, 1876, s. 34—R. S. O. (1877) c. 70.*

See HABEAS CORPUS, 1.

279. *Writ of habeas corpus — Improvident issue — Jurisdiction — Sup. & Ex. Courts Act, s. 51—Ultra vires — Material in record—Control of court over its own process—Practice — Presence of prisoner.*

See HABEAS CORPUS, 2.

16. INJUNCTION.

280. *Interim injunction—Order dissolving—Decision on merits.*

See INJUNCTION, 3.

17. INSOLVENCY.

281. *Jurisdiction — Claim in insolvency under Act of 1875—40 Vict. c. 41, s. 28.*—A final judgment of the Court of Queen's Bench for Lower Canada (appeal side), upon a claim of a creditor filed with the assignee of an estate under the Insolvent Act of 1875, is not appealable to the Supreme Court of Canada, the right of appeal having been taken away by 40 Vict. c. 41 s. 28 (D.), *Cushing v. Dupuy*, (5 App. Cas. 409), followed. *Seath v. Hagar*, xviii., 715.

18. JURISDICTION.

See p. ~~xxx~~

282. *Quashing appeal — Irregular security bond—Interested parties—Matter of practice in court below.*—Where the appeal bond fails to inure to the benefit of parties interested in the result of the appeal, there can be no attention paid to the appeal.—A question simply of practice in the discretion of the court below will not be entertained on appeal. *Scammell v. James*, xvi., 593.

284. *Practice—Assuming jurisdiction—Dismissal on merits.*—The Supreme Court of Canada, without deciding the question of jurisdiction raised on motion to quash, assumed jurisdiction and quashed the appeal on the merits. *Great Eastern Ry. Co. v. Lambe*, xxi., 431.

285. *Jurisdiction — Motion to quash in chambers—Summary application ordered to stand.*—Under the provision of the Act, 38 Vict. c. 11, s. 41, a motion to dismiss or to quash an election appeal, on the ground of unnecessary delays or want of jurisdiction, was ordered to stand over until the appeal came on for hearing in court, as it was a matter of too great importance to be disposed of on summary application. *Charlevoix Election Case*, (1879) Cass. Dig. (2 ed.), 695; Cass. S. C. Prac. (1 ed.) 45. [NOTE.—Since *The Halton Election Case* (19 Can. S. C. R. 557) *q. v.*, such motions have been made in chambers. Cass. S. C. Prac. (2 ed.) 133.]

286. *Controverted election — Preliminary objection to hearing—Ruling of trial judges—Jurisdiction—R. S. C. c. 9, s. 50.*—An order by election judges overruling objections made to proceeding with the trial of a controverted election is not a judgment or decision appealable to the Supreme Court of Canada. *Vaudreuil Election Case*, xxii., 1.

287. *Order of court or judge — Vacating sheriff's sale.*—An action in an action to vacate the sheriff's sale of an immovable is appealable to the Supreme Court under s. 29 (b), of the Supreme and Exchequer Courts Act. *Dufresne v. Dixon* (16 Can. S. C. R. 506), followed. *Lefebvre v. Veronneau*, xxii., 203.

287a. *Interlocutory proceeding—Petition for leave to intervene.*—No appeal lies to the Supreme Court from a judgment of the Court of Queen's Bench refusing leave to intervene. *Hamel v. Hamel*, xxvi., 17.

288. *Appeal—Jurisdiction—Amount in controversy—Affidavits conflicting as to amount.*—On motion to quash respondents filed affidavits that the amount in controversy was less than that necessary to give jurisdiction. Affidavits were also filed by appellants, shewing that the amount was sufficient to give jurisdiction under the statute. The motion was dismissed, but appellants were ordered to pay the costs, as jurisdiction did not appear until the filing of the affidavit in answer to the motion. *Dreschel v. Auer Incandescent Light Mfg. Co.*, xxviii., 268.

289. *Final judgment—Jurisdiction — Court of Review—Judgment in first instance varied—Art. 43 C. P. Q.—54 & 55 Vict. c. 25, s. 3, s.-s. 3—Construction of statute.*—Where the Court of Review has varied a judgment, by increasing the damages, the judgment rendered in the court of first instance is not thereby confirmed so as to give an appeal direct to the Supreme Court of Canada under 54 & 55 Vict. c. 25, s. 3, s.-s. 3 (D.), amending the Supreme and Exchequer Courts Act. *Simpson v. Palliser*, xxix., 6.

290. *Objections to jurisdiction — Quashing appeals — Costs.*—An objection to the jurisdiction of the court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed, the

respondent may be allowed costs of a motion only. *Griffith v. Harwood*, xxx., 315.

291. *Controverted election — Lost record — Substituted copy — Judgment on preliminary objections — Discretion of court below — Jurisdiction.*—The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections and, in re-transmission to the court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was re-constructed in substitution of the lost record, and upon verification as to its correctness, the court below ordered the substituted record to be filed. Thereupon, the respondent in the court below raised preliminary objections traversing the correctness of a clause in the substituted petition which was dismissed by the judgment appealed from. Held, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits of the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the court below in ordering the substituted record to be filed. *Two Mountains Election Case*, xxxii., 55.

292. *Jurisdiction — Annulment of procès-verbal—Matter in controversy.*—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a *procès-verbal* establishing a public highway notwithstanding that the effect of the *procès-verbal* in question might be to involve an expenditure of over \$2,000 for which the appellant's lands would be liable for assessment by the municipal corporation. *Dubois v. The Village of St. Rose* (21 Can. S. C. R. 65); *The City of Sherbrooke v. McManamy* (18 Can. S. C. R. 594); *The County of Verchères v. The Village of Varennes* (19 Can. S. C. R. 365) and *The Bell Telephone Company v. The City of Quebec* (20 Can. S. C. R. 230) followed.—*Webster v. The City of Sherbrooke* (24 Can. S. C. R. 52, 268) and *McKay v. The Township of Hinchinbrooke* (24 Can. S. C. R. 55) referred to.—*Reburn v. The Parish of Ste. Anne* (15 Can. S. C. R. 92) overruled. *Toussignant v. County of Nicolet*, xxxii., 353.

293. *Jurisdiction — 60 & 61 Vict. c. 34—Criminal case.*—The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court (60 & 61 Vict. c. 34) applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code. *Rice v. The King*, xxxii., 480.

294. *Jurisdiction—Yukon Territorial Court—Decisions of gold commissioner — Special appellate tribunal — Finality of judgment — Legislative jurisdiction of Governor-in-Council — 62 & 63 Vict. c. 11, s. 13—1 Edw. VII. order-in-council p. lxxii.—2 Edw. VII. c. 35—Mining lands.*—The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the Court of Appeal constituted by the ordinance of the Governor-in-Council of the 18th of March, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor-in-Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 Vict.

c. 11 of the statutes of Canada. *Hartley v. Matson*, xxxii., 575.

295. *Objections to jurisdiction — Jurisdiction of court below.*—An objection that a judge of the court below had no jurisdiction to render a judgment from which an appeal is asserted is not proper ground on which to question the jurisdiction of the appellate court to entertain the appeal. *McKelvey v. Le Roi Mining Co.*, xxxii., 664.

296. *Jurisdiction — Matter in controversy — Removal of executors—Acquiescence in trial court judgment—Right of appeal—R. S. C. c. 135, s. 29.*—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors though, by the action, an account for over \$2,000 had been demanded and refused by the judgment at the trial against which the plaintiff had not appealed. *Noel v. Chevreffils* (30 Can. S. C. R. 327) followed; *Chaberge v. The Equitable Life Assurance Society* (24 Can. S. C. R. 59) distinguished. *Donohue v. Donohue*, xxxiii., 134.

297. *Appeal — Jurisdiction — Award — B. C. Arbitration Act — Judgment on motion —Enforcing award.*—The full court in British Columbia affirmed an award in favour of respondent for compensation for the opening of a highway through his lands by the Township of Langley under a by-law passed in June, 1896. The Supreme Court quashed the appeal for want of jurisdiction on a motion to that effect based on grounds (1) that the judgment appealed from was not one on a motion to set aside the award nor by way of appeal from the award, within R. S. C. c. 135, s. 24, s.s. (f). (2) That no appeal could lie. (3) That the judgment merely permitted the enforcement of the award by allowing respondent's appeal from the order of a County Court judge refusing an application to enforce the award and referring the matter back to the arbitrators for further consideration and that no appeal could lie. And (4) that no appeal lies to the Supreme Court of Canada from a judgment on a motion under s. 13 of R. S. B. C. (1897) c. 9, to enforce an award or form on a judgment in appeal from such an order. *Township of Langley v. Duffy*, 30th May, 1899.

298. *Appeal — Allowing security—Jurisdiction of Supreme Court.*—Application for completion of security bond on appeal from a judgment condemning V. to pay O. \$37,500 and dismissing the intervention of P. who claimed half the money. It appeared that there was \$30,400 deposited in the Quebec Bank to the credit of V. and his application was that this sum should be paid into court and that he should be required to give security only for the balance, instead of being obliged to give security for the whole sum in order to stay execution. The court held that it had no jurisdiction to make the order and dismissed the application with costs. *Veilleux & Price v. Ordway*, 5th May, 1903.

298a. *Territorial Court of Yukon Territory —Quorum to constitute court for hearing appeals.*—*Quere.* Whether under the provisions of section six of the Yukon Territory Act, 62 & 63 Vict. c. 11, and of the North-West Territories Act, R. S. C. c. 50, s. 42,

thereby made applicable to the Territorial Court of Yukon Territory, three judges of that court are necessary to constitute a quorum for the hearing of appeals from judgments rendered upon the trial of causes therein. *Barrett v. Le Syndicat Lyonnais du Klondyke*, 24th August, 1903, xxxiii., 667.

NOTE.—See also the following sub-classifications, under this subject, viz., 3. APPLICATION OF STATUTES—5. CERTIORARI—CONTRADICTORY INVOLVED—11. DISCRETIONARY ORDERS—13. FINAL JUDGMENT—15. HABEAS CORPUS—16. INJUNCTION—25. NOTICE OF APPEAL—32. RIGHT OF APPEAL—34. TIME FOR APPEALING, and appropriate headings under the subject "PRACTICE OF SUPREME COURT OF CANADA."

299. *Amount in controversy—Discretion of court below as to damages.*

See No. 32, ante.

300. *Assuming jurisdiction — Dismissal on merits.*

See LIEN, 7.

301. *Objection taken in factum—Quashing appeal for want of jurisdiction—Motion at hearing.*

See COSTS, 1.

302. *Quashing appeal—Objection taken by court—Costs.*

See No. 109, ante.

303. *Suit for joint penalties—Second offence—Jurisdiction of Superior Court—Withdrawal of defence raising constitutional question.*

See No. 93, ante.

304. *Appeal per saltum — Jurisdiction—R. S. C. c. 135, s. 26 (3).*

See No. 331, infra.

305. *Jurisdiction—Interlocutory proceeding—Final judgment.*

See No. 200, ante.

306. *Jurisdiction—Amount in controversy—Sequestration by insolvent—Contrainte par corps—Arts. 885; 888, C. P. Q.*

See No. 95, ante.

307. *Jurisdiction—Matter in controversy—Right of appeal—Personal condemnation—Action possessoire.*

See No. 96, ante.

308. *Appeal on special questions—Issues on appeal—Powers of Appellate Court.*

See No. 97, ante.

AND see appropriate headings classified generally, under this subject.

19. LEAVE TO APPEAL.

309. *Approval of security—Leave to appeal—Ouster of jurisdiction.*—Approval of security is a mode of granting leave to appeal to the Supreme Court of Canada, the court or judge so approving becomes *functus officio* and, except as regards stay of proceedings, orders thereafter made in a cause by the court or judge below will be disregarded by the Supreme Court. *Lakin v. Nuttall*, iii., 685.

310. *Binding local decision — Question of law — Appeal direct — Supreme Court Act, (1879), s. 6.*—Leave to appeal to the Supreme Court of Canada without any intermediate appeal to the Court of Appeal for Ontario, was granted by Gwynne, J., under s. 6 of the Supreme Court Amendment Act of 1879, on the ground that the Court of Appeal for Ontario would be bound by the case of *Cameron v. Kerr* (3 Ont. App. R. 30), whereas the appellant sought to avoid the effect of that decision in this action. *Moffatt v. Merchants' Bank of Canada*, xi., 46.

311. *Appeal direct from court of original jurisdiction—Supreme Court Act (1879), s. 6—R. S. C. c. 135, s. 26, s.-s. 3—Opinion of court below on merits—Church lands—Rector and wardens—Interest to appeal—Indemnity.*—In a suit against D., as rector of St. James' Cathedral, Toronto, to have certain lands declared to be held by him not only for himself as such rector, but also for the benefit of the other rectories in the City of Toronto, the decision of Ferguson, J., in favour of plaintiff was upheld on appeal to the Chancery Division. Up to the time of the judgment rendered by the latter court, the proceedings had been carried on in the name of D. by arrangement between him and the church-wardens of St. James' Cathedral who contended that they had an interest separate from that of D. in the disposition of the lands, and the revenues therefrom, and who had indemnified D. against costs. But upon the church-wardens proposing to appeal, D. refused to allow his name to be further used in the proceedings. The Court of Appeal, upon an application being made by the church-wardens for leave to appeal, refused to grant such leave, holding that the church-wardens had no interest in the lands or revenues. The church-wardens thereupon appealed to Strong, J., in chambers, for leave to appeal *per saltum* to the Supreme Court of Canada under s. 6 of the Supreme Court Act (1879). The judge held, that the church-wardens had an interest at least which justified them in appealing; he would not, however, as a judge in chambers, overrule the decision of the Court of Appeal, but granted leave to renew the application to the full court.—On the motion coming before the full court, it was *Held*, that leave to appeal should be allowed, upon a proper indemnity being given by the church-wardens to D. against all possible costs; the court expressing no opinion on the merits of the case itself. Henry, J., dissented, on the ground that it was impossible to decide the right to appeal without entering into the merits, and on the merits the church-wardens had no interest in the lands or revenues. *Dumoulin v. Langtry*, xiii., 258.

312. *Leave to appeal per saltum—Divisional Court judgment—Special circumstances—Decision of Court of Appeal on abstract question involved—R. S. C. c. 135, s. 26.*—It is not a sufficient ground for allowing an appeal direct from the decision of the trial judge on further consideration or of a Divisional Court of the High Court of Justice of Ontario, that the Court of Appeal of that province had already, in a similar case before it, given a decision on the abstract question of law involved in the case in which the appeal was sought, though it might be sufficient if such decision had been given on the same state of facts and the same evidence. *Kyle v. The Canada Co.; Hislop v. Town of McGillivray*, xv., 188.

313. *Appeal direct from trial court—Leave granted by registrar—Practice—Special circumstances.*—Leave to appeal *per saltum* directly from a decision of the Chancellor of Ontario, was granted where it appeared that the Court of Appeal had already given a decision upon the merits by its order on an application for injunction in the case. *Attorney-General v. Vaughan Road Co.*, xxi., 631; Cass. S. C. Prac. (2 ed.) 37.

314. *Jurisdiction—Leave to appeal—Privy Council rule—Appeal in formâ pauperis.*—The Supreme Court, or a judge thereof, has no power to allow an appeal in *formâ pauperis*, or to dispense with the giving of the security required by the statute.—Approving of the security is a mode of allowing leave to appeal.—Section 24, Supreme and Exchequer Courts Act, does not give the court power to allow leave to appeal, because Her Majesty may be recommended to do so by the Judicial Committee of the Privy Council, nor is it in the power of the judges of the court to make rules or orders for the allowance of leave to appeal; nor does s. 79, Supreme and Exchequer Courts Act, give the court or a judge any power to grant or to make rules for granting the prayer of a petition to be allowed to have or prosecute an appeal in *formâ pauperis*.—*Fournier, J.*, in chambers; *Richards, C. J.*, in chambers. *Fraser v. Abbott*, Cass. Dig. (2 ed.) 695; Cass. S. C. Prac. (2 ed.) 63, 68.

315. *Security for costs of appeal allowed to be given by judge of Supreme Court under s. 31, Supreme and Exchequer Courts Act, as amended by s. 14 Supreme Court Amendment Act, 1879—Vacation.*—On 27th June, 1881, judgment was rendered overruling demurrers, and on verdict previously rendered allowing plaintiff to enter judgment for \$5,000. On 4th July defendants' solicitor served notice of appeal to the Supreme Court of Canada on plaintiff's solicitor and of intention to apply next day for allowance of security. On 5th July, the C. J. of B. C. refused leave to appeal, on the ground that the judgment on the demurrers was the judgment of the full court, but that on verdict was his own judgment from which no appeal would lie until re-heard before the full court, and that under the Administration of Justice Act, 1881, a full court could not be held until the lapse of about a year from that date. Defendants' solicitor then and several times afterwards tendered to the C. J. and to the registrar of that court, \$6,500, \$6,000 having been asked by plaintiff's solicitor as security under Supreme and Exchequer Courts Act, s. 32, s. 5, and \$500 as security for the costs of appeal, but the C. J. refused to allow it to be paid into court.—On 11th July, 1881, the C. J. of B. C. ordered that upon paying to plaintiff \$1,000 and his taxed costs, execution should be stayed and defendants have leave within 4 days after next sitting of full court to move such court for a re-hearing of the argument on the demurrers, and to move for a new trial, or to enter judgment for defendants.—On 23rd August, 1881, defendants applied to Strong, J., in chambers for leave to give security. The application was refused because made in vacation and not on notice.—On 13th September following, defendants renewed the application to a judge of the Supreme Court of Canada.—An order was made allowing defendants to pay into the Supreme Court of Canada \$500 as security for the costs of appeal, notwithstanding the ex-

piration of the time limited for appealing. *Bank of B. N. A. v. Walker*, Cass. Dig. (2 ed.) 670, 697.

316. *Appeal per saltum—Supreme Court Amendment Act, 1879, s. 6—Costs.*—On application for leave to appeal direct from the judgment of Begbie, C.J., without intermediate appeal, the affidavit set out that in British Columbia, the court of final resort consisted of five judges, two of whom had been previously engaged as counsel in the cause, and refused to adjudicate; that another judge was absent and it was uncertain, if he ever would resume judicial functions; that a new Administration of Justice Act, 1881, had recently come into operation, but no rules had been made thereunder and s. 28 of said Act required three judges to constitute a quorum of the full court to be held only once in each year.—*Fournier, J.*, in chambers, referred the application to the full court. *Held*, that the circumstances disclosed did not warrant the court in granting the application. Motion refused with \$20 costs. *Sewell v. British Columbia Towing Co.*, Cass. Dig. (2 ed.) 670; Cass. S. C. Prac. (2 ed.) 36.

317. *Appeal per saltum—Expiration of time limit.*—An appeal from the court of original jurisdiction may be allowed by the Supreme Court or a judge thereof, under the sixth section of the Supreme Court Act, 1879, although the judgment appealed from has been pronounced, entered, or signed more than thirty days before the date of the application. *Bank of British North America v. Walker*, Cass. Dig. (2 ed.) 670.

318. *Direct appeal from court of original jurisdiction—Supreme Court Act (1879), s. 6.*—Under special circumstances shewn leave to appeal *per saltum* was granted. *Bank of British North America v. Walker*, Cass. Dig. (2 ed.) 671; Cass. S. C. Prac. (2 ed.) 35.

319. *Leave to appeal—Constitutional law—Security—Ontario Judicature Act (1881), s. 43.*—Where the Court of Appeal for Ontario, under s. 43 Ontario Judicature Act, 1881, refused leave to appeal to the Supreme Court of Canada, the matter in controversy being under \$1,000. *Held*, that the appellant should be permitted to pay \$500 into the Supreme Court as security for the costs of the appeal. [The court expressed great doubts as to the constitutionality of the section mentioned.] *Forristal v. McDonald*, Cass. Dig. (2 ed.) 422.

[NOTE.—See *Clarkson v. Ryan* (17 S. C. R. 251), No. 341, *infra*.]

320. *Jurisdiction—42 Vict. c. 39, s. 8—Practice—Motion to rescind order of a provincial judge—Opposition to seizure—Amount in controversy.*—In execution of a judgment for \$723, defendants' land and building were seized. Opposition was filed on the ground that the will, under which they held, prohibited alienation of the property. The Superior Court dismissed plaintiff's contestation, and maintained the opposition, holding the prohibition to alienate legal and valid, and quashed the seizure. In the Queen's Bench an appeal was dismissed.—Application in chambers for leave to appeal to the Supreme Court was refused, on the ground that an appeal would not lie under 42 Vict. c. 39, s. 8 (D.). (9 Q. L. R. 262).—On motion in the Supreme Court,

asking leave to appeal: *Held*, that the Supreme Court had no jurisdiction to grant the motion, even if there was a right to appeal in such a case.—Motion refused with costs fixed at \$25. *Bourget v. Blanchard*, Cass. Dig. (2 ed.) 423; Cass. Prac. (2 ed.) 40.

[NOTE.—Compare *Champoux v. Lapierre*, No. 47, ante, and *Martin v. Mills* (12 Q. L. R. 98.)]

321. *Appealing direct from trial court—Time limit.*]—*Per* Ritchie, C.J., in chambers.—*Semble*, an application to the Supreme Court or a judge thereof, to be allowed to give security under Supreme and Exchequer Courts Act, s. 31, as amended by Supreme Courts Amendment Act, 1879 s. 14 should be within the time limited by the Supreme and Exchequer Courts Act, s. 25, or further time allowed by a judge of the court below under Supreme and Exchequer Courts Act, s. 26. *Walmesley v. Griffiths*, Cass. Dig. (2 ed.) 670; Cass. Prac. (2 ed.) 69.

322. *Application for leave—Security—Effect of allowance—Rescinding order—Evocation to Supreme Court of Canada—Discretion in court below—Expiration of time.*]—Improving of security is a means of granting leave to appeal.—When a judge of the court below has made an order allowing the security, he is *functus officio*, and the appeal is then subject to the jurisdiction of the Supreme Court. No application can be made to the judge or the full court below to rescind the order. Any application must be thereafter made to the Supreme Court or a judge thereof. (Chambers.)—Appellant had applied to a judge of the Court of Appeal (Ont.), under Supreme and Exchequer Courts Act, s. 26 for further time to appeal; the judge refused the application. Appellant then applied to Ritchie, C.J., in chambers for leave to give security under Supreme and Exchequer Courts Act, s. 31, as amended by s. 14 in 1879.—The Chief Justice was of opinion that the parties having applied to a judge of the court below, who was familiar with and had considered all the facts, the decision of such judge ought not to be interfered with, even if a judge of the Supreme Court were not bound as to time by Supreme and Exchequer Courts Act, s. 25. He was inclined to hold, however, that an application to the Supreme Court, or a judge thereof, for leave to give security pursuant to Supreme and Exchequer Courts Act, s. 31, as amended, should be made within the time limited by s. 25, or such further time as a judge of the court below may have allowed under s. 26.—Applications dismissed with costs. *Walmesley v. Griffiths*, Cass. Dig. (2 ed.) 670, 697, 699; Cass. S. C. Prac. (2 ed.) 60, 63.

323. *Allowance of security—Leave to appeal—Stay of proceedings in court below—Costs.*]—The Supreme Court allowed an appeal from a judgment of the Court of Appeal directing a reference which had been partly proceeded with after the allowance of the security.—The solicitor for the appellant desired the registrar to insert a provision in the order in appeal of the Supreme Court specially "including the costs of and attending the reference." The registrar referred the point to the Chief Justice in chambers and His Lordship stated his opinion to be that the Supreme Court could not recognize any proceedings taken in the court below after the allowance of

the security, which acted as a stay of all proceedings, except of execution in cases provided for by Supreme and Exchequer Courts Act, s. 32. If proceedings had been taken in the court below which should not have been taken, application should be made to that court with reference to such proceedings. The order of the Supreme Court should provide generally for the payment of all costs incurred by the appellant. *Starrs v. Cosgrave Brewing and Malting Co.*, Cass. Dig. (2 ed.) 697; Cass. S. C. Prac. (2 ed.) 63, 69.

324. *Special leave—Per saltum.*]—On motion for leave to appeal direct from a decision of the Divisional Court (Ontario), it appeared that the action was brought to replevy from appellant the books which he held as clerk of the corporation, he having been dismissed from the office. He refused to give up the books, on the ground that his dismissal was illegal. Judgment was given for the corporation at the trial, and affirmed by the Divisional Court, and an application for special leave to appeal was refused by the Court of Appeal for Ontario.—The motion was first made to the registrar of the Supreme Court, in chambers, for leave to appeal *per saltum* and was dismissed. An appeal from this order to a judge in chambers was dismissed, and a further appeal was taken to the full court.—The court held that appellant had failed to shew sufficient cause to justify the order asked for. *Bartram v. Village of London West*, xxiv., 705.

325. *Special leave—60 & 61 Vict. (D) c. 34, s. 1 (e)—Benevolent society—Certificate of insurance.*]—An action in which less than the sum or value of one thousand dollars is in controversy, and wherein the decision involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance, and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates, is not a matter of such public importance as would justify an order by the court granting special leave to appeal under the provisions of s.-s. (e) of the first section of the statute 60 & 61 Vict. c. 34. *Fisher v. Fisher*, xxviii., 494.

326. *Appeals from Exchequer Court—Amount of controversy less than \$500—Discretion of judge in chambers—Special leave.*]—Where the amount involved is under \$500, leave to appeal from the judgment of the Exchequer Court of Canada ought not to be granted unless it appears to the judge of the Supreme Court, to whom the application is made, that the judgment of the court below is clearly erroneous, or might be reversed on a point of law or because the conclusions are not warranted by the evidence. *Per* Gwynne, J. (in chambers), 6th May, 1899. *Schultz v. The Queen*, 6 Ex. C. R. (note) 273.

327. *Exchequer Court—Order after lodging of appeal to Supreme Court of Canada—Jurisdiction of court below.*]—After an appeal from the final judgment of the Exchequer Court was lodged in the Supreme Court, the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages. *Held*, that the judge of the Exchequer Court had authority to allow the appeal and it was properly before the Supreme Court. *The Queen v. Woodburn*, xxix., 112.

328. *Jurisdiction—Special leave—R. S. C. c. 135, ss. 40, 42—Form of application and order.*—In an order granting special leave to appeal under s. 42, Supreme and Exchequer Courts Act, after the expiration of the time limited by s. 40, it is not necessary to set out the special circumstances under which such leave to appeal has been granted nor to state that such leave was granted under special circumstances. *Bank of Montreal v. Demers*, xxix., 435.

329. *Divisional Court judgment — Appeal direct—R. S. C. c. 135, s. 26, s.-s. 3—Appeal from order in chambers.*—*Held*, per Strong, C.J. and Gwynne, J., (Taschereau and Sedgewick, J.J. contra), that under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is no right of appeal to the Court of Appeal. *Parquharson v. Imperial Oil Co.*, xxx., 188.

330. *Practice — Appeal per saltum—Divisional Court judgment — 62 Vict. (2) c. 11, s. 27 (Ont.)—Constitutional question—Indian lands—Legislative jurisdiction—Costs.*—*Per* Girouard, J. (in chambers).—Under the provisions of s. 26, s.-s. 3 of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave. *Ontario Mining Co. v. Seybold*, xxxi., 125. (See [1903] A. C. 73.)

331. *Appeal per saltum—Jurisdiction—R. S. C. c. 135, s. 26 (3).*—Leave to appeal direct to the Supreme Court from a judgment of a divisional court of the High Court of Justice under s. 26, s.-s. 3 of the Supreme and Exchequer Courts Act, cannot be granted unless it is clear that there is a right of appeal from such judgment to the Court of Appeal for Ontario. *Ottawa Electric Co. v. Brennan*, xxxi., 311.

332. *Ontario appeals — Special leave — 60 & 61 Vict. c. 34, s. 1 (e).*—Special leave to appeal from a judgment of the Court of Appeal for Ontario under 60 & 61 Vict. c. 34, s. 1 (e) will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded. *Royal Templars of Temperance v. Hargrove*, xxxi., 385.

333. *Special leave to appeal — Matter in controversy — Special reasons against judgment in court below — Railways — Overhead bridge — Car of foreign company — “Used on railway” — 51 Vict. c. 29, s. 192 (D.).*—In affirming a judgment for \$500 damages, the Court of Appeal for Ontario, (1 Ont. L. R. 168) held that “when a car of a foreign railway company forms part of a train of a Canadian railway company, it is “used” by the latter company within the meaning of s. 192 of the Railway Act, 51 Vict. c. 29 (D.), so as to make the company liable in damages for the death of a brakeman caused by the car being so high as not to leave the prescribed headway between it and an overhead

bridge.” On special application for leave to appeal from this judgment it was urged that the car had been taken over from an American line to which the Act limiting height of cars in the Dominion could not apply, that the company was by statute obliged to accept and haul the car, that in hauling the car the company could not, at most, be subject to any other than the penalty prescribed by statute, and that, in any case, deceased was insured against accidents in the company's association and his representatives could claim no more than \$250 for which he was insured. The application was refused on the ground that a sufficient *prima facie* case for granting special leave for an appeal had not been made out. (Present: Taschereau, Gwynne, Sedgewick, King and Girouard, J.J.) *Grand Trunk Ry. Co. v. Atchison*, 5th March, 1901.

334. *Special leave for appeal—Rule as to new trials.*—On special application for leave to appeal from a judgment (1 Ont. L. R. 224) affirming the trial court judgment awarding less than \$1,000 damages, it was urged that the courts below had erred in adhering to rules laid down years ago in respect to granting nonsuits, with which the later English decisions do not accord. The application was refused by the Supreme Court, without calling upon respondent's counsel. *Grand Trunk Ry. Co. v. Vallee*, 18th March, 1901.

335. *Special leave — Application refused by court below.*—The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal and leave has been refused. *Town of Aurora v. Village of Markham*, xxxii., 457.

336. *Special leave to appeal — Jurisdiction — R. S. C. c. 135, s. 24—“Judge of court appealed from” — Construction of statute.*—A judge of the Supreme Court of British Columbia may grant special leave for an appeal to the Supreme Court of Canada although he did not sit as a member constituting the full court which rendered the judgment appealed from. *Oppenheimer v. Brackman & Ker Milling Co.*, xxxii., 699.

337. *Appeal — Special leave — 60 & 61 Vict. c. 34 (e) — Error in judgment — Concurrent jurisdiction — Procedure.*—Special leave to appeal from a judgment of the Court of Appeal for Ontario, under sub-section (e) of 60 & 61 Vict. c. 34, will not be granted on the ground merely that there is error in such judgment.—Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.—The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S. having been refused such fiat applied for a writ of mandamus which the Divisional Court granted and its judgment was affirmed by the Court of Appeal.—*Held*, that the mandamus having been granted the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal though it might have had the writ been refused.—The question raised by the proposed appeal is, if not one of practice, a question of the control of provincial courts over their own records and officers with which the Supreme Court should not interfere. *Attorney-General of Ontario v. Scully*, xxxiii., 16.

337a. *Appeal per saltum*—*Jurisdiction of Yukon Territorial judges*—*Extension of time for appealing*—*Sup. & Ex. Courts Act, s. 42.*—A judge of the court appealed from has no jurisdiction to extend the time for appealing *per saltum* to the Supreme Court of Canada. After the expiration of sixty days from the signing, entry or pronouncing of judgment, leave to appeal *per saltum* to the Supreme Court of Canada cannot be granted. *Barrett v. Le Syndicat Lyonnais Du Klondyke*, 24th August, 1903; xxxiii., 667.

338. *No quorum in Provincial Court of Appeal*—*Appeal direct from trial court*—*Supreme Court Act, 1876, s. 6.*

See PRACTICE, 184.

339. *Per saltum*—*Special circumstances*—*Privy Council judgment*—*Costs.*

See PRACTICE, 171.

20. LEGISLATIVE JURISDICTION.

340. *Appeal to Supreme Court of Canada*—*Constitutional law*—*42 Vict. c. 39, s. 6 (D.)*—*Per Taschereau, J.*—The provision for an appeal to the Supreme Court of Canada by s. 6 of c. 39 of the statutes of Canada, 42 Vict., is *ultra vires* of the Parliament of Canada. *Grand Trunk Ry. Co. v. Credit Valley Ry. Co. et al.* Doutre, Constitution of Canada, p. 337.

341. *Legislative jurisdiction*—*Ont. Judicature Act, 1881, s. 43*—*Appeal to Supreme Court*—*Limitation imposed by provincial Act.*—The 43rd section Ont. Jud. Act, 1881, providing that where the amount in controversy is under \$1,000, no appeal shall lie from the decision of the Court of Appeal for Ontario to the Supreme Court of Canada, except by leave of a judge of the former court, is *ultra vires* of the Legislature of Ontario and not binding in the Supreme Court.—(Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal.) *Clarkson v. Ryan*, xvii., 251.

342. *Municipal assessment*—*Rating in City of St. John, N. B.*—*Provisions against appeals*—*52 Vict. c. 27 (N. B.)*—The provisions of the assessment law of the City of St. John, N. B., taking away the right of appeal from a rating by the assessors made upon neglect to furnish a statement in the statutory form given in 52 Vict. c. 27 (N. B.) only applies to appeals against over-valuation under C. S. N. B. c. 100, s. 60, and not to an appeal against the right to make any assessment whatever.—*Per Gwynne, J.* The St. John City Assessment law does not apply to railways. *Timmerman v. City of St. John*, xxi., 691.

343. *Jurisdiction*—*Constitutional law*—*Legislative powers*—*Appeals from the Court of Review*—*54 & 55 Vict. c. 25, s. 3 (D.)*—*B. N. A. Act, 1867, s. 101*—*Illegal consideration of contract*—*Lottery*—*Correlative agreements.*—The power of the Parliament of Canada under s. 101 of the British North America Act, 1867, respecting a general Court of Appeal for Canada is not restricted to the establishment of a court for the administration of laws of Canada and, consequently, there was constitutional authority to enact the provisions of the third section of the Dominion

statute, 54 & 55 Vict. c. 25, authorizing appeals from the Superior Court, sitting in review, in the Province of Quebec.—On the merits, this appeal was allowed with costs, Girouard, J., dissenting, the decision in *L'Association St. Jean-Baptiste de Montréal v. Brault* (30 Can. S. C. R. 598), respecting lotteries and contracts for illegal consideration, being followed. *L'Association St. Jean-Baptiste de Montréal v. Brault*, xxxi., 172.

21 MANDAMUS.

344. *Writ of mandamus*—*Return*—*Demurrer.*—On an appeal from an order of the Supreme Court (N. S.) quashing, on demurrer, a return to a writ of mandamus, and ordering a peremptory writ to issue, the objection was taken that under the practice in Nova Scotia a demurrer would not lie to a return to a writ of mandamus.—*Held*, that this objection must be overruled and the appeal heard on its merits. *Dartmouth v. The Queen*, Cass. Dig. (2 ed.) 515.

(See ASSESSMENTS AND TAXES, No. 62.)

22. NEW GROUNDS TAKEN ON APPEAL.

345. *Plans filed on appeal*—*Documents not produced at trial*—*Evidence.*—Documents which have not been proved nor produced at the trial cannot be relied on or made part of the case in appeal. *Montreal Loan & Mortgage Co. v. Fauteux*, iii., 411; *Lionais v. Molsons Bank*, x., 526.

346. *Pleadings*—*Point not urged in court below.*—A plea of justification under statute which has not been pleaded in the courts below, cannot be added on appeal to the Supreme Court of Canada. *South-West Boom Co. v. McMillan*, iii., 700.

347. *Benefit society*—*Expulsion of member*—*Prior notice*—*Mandamus*—*Pleading.*—L. was expelled from membership in an incorporated benefit society, for default to pay six months' contributions. The society's by-law 20, s. 5, provided that "When a member shall have neglected during six months to pay his contributions . . . the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the collector-treasurers to make known the names of those who are indebted in six months' contributions . . . and then any one may move that such members be struck off from the list of members of the society." L. applied for a writ of mandamus, enjoining the society to reinstate him in his rights and privileges as a member on the grounds, that he had not been put *en demeure* in any way; that no notice had been given him of the amount of his indebtedness; that many other members were in arrear for similar periods, and distinction could not be made amongst those in arrears, and that no motion was made at any regular meeting.—The Court of Queen's Bench held that he should have had "prior notice" of the proceedings for expulsion. On appeal, *Held*, reversing the judgment appealed from, that as L. did not plead the want of "prior notice," or make it a part of his case in the court below, he could not do so in appeal.—*Per Taschereau and Gwynne*,

JJ. A member of that society, who admits that he is in arrear for six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues. *Union St. Joseph de Montréal v. Lapicrre*, iv., 164.

348. *Setting aside award—Practice in Nova Scotia—Specified objections—New ground taken on appeal.*—In Nova Scotia, where the rule *nisi* to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal. *Oakes v. City of Halifax*, iv., 640.

349. *Practice—Technical objection first taken on appeal—Form of bail bond.*—A technical objection to the form of a bail bond cannot be taken for the first time on an appeal to the Supreme Court of Canada. *Woodworth v. Dickie*, xiv., 734.

350. *Practice—Evidence—Document not proved at trial—Case on appeal.*—A document not proved at the trial but relied on in the Court of Queen's Bench for the first time cannot be relied on or made part of the case in appeal. *Montreal Loan & M. Co. v. Fauteux* (3 Can. S. C. R. 433), and *Lionais v. Molsons Bank* (10 Can. S. C. R. 527), followed. *Exchange Bank of Canada v. Gilman*, xvii., 108.

351. *Objection first taken on appeal—Practice—Parties.*—An objection taken for the first time on appeal to the Supreme Court, that the legal representatives of the assured were not made parties to the cause comes too late. *Venner v. Sun Life Ins. Co.*, xvii., 394.

352. *Practice—Privy Council rule—Technical objection first taken on appeal.*—Technical objection not taken in the court below, cannot be allowed to prevail in appeal, following the rule of the Privy Council.—*Per Taschereau, J.*, *Fuller v. Ames*, 10th June, 1880. *Cass. Dig.* (2 ed.) 140; *Cass. S. C. Prac.* (2 ed.) 144.

353. *Pleadings—Objection first raised on appeal.*—An objection to the sufficiency of the traverse to a declaration will not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient. *Mylus v. Jackson*, xxiii., 485.

354. *Judge's notes—Additions after notice of appeal.*—*Per Taschereau, J.* Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly allowed to form part of the case on appeal and could not be considered by the appellate court. *Mayhew v. Stone*, xxvi., 58.

355. *Technical grounds—Surprise.*—An appellate court will not give effect to mere technical grounds of appeal, against the merits, and where there has been no surprise or disadvantage to the appellant. *Gorman v. Dixon*, xxvi., 87.

356. *Objections first taken on appeal—Written instrument—Objection to validity.*—

Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained. *The Queen v. Poirier*, xxx., 36.

357. *Assessments for local improvements—Widening streets—Trivial objection taken for first time on appeal.*—Where an assessment roll covering a valuation of over a half a million dollars has been, after contestation, duly confirmed, a ratepayer cannot be permitted to raise the objection, upon an application to quash the roll, that his property was assessed for a comparatively trivial amount over its proper value, when he had failed to urge that objection before the Board of Revisors. *City of Montreal v. Belonger*, xxx., 574.

358. *New points on appeal—Objection to jurisdiction—Want of jurisdiction in court below.*—Questions of law appearing upon the record but not raised in the courts below may be relied upon for the first time on an appeal to the Supreme Court of Canada where no evidence in rebuttal could have been brought to affect them had they been taken at the trial. *Gray v. Richford* (2 Can. S. C. R. 431); and *Scott v. Phoenix Assurance Co.* (Stu. K. B. 354), followed. *McKelvey v. Le Roi Mining Co.*, xxxii., 664.

359. *Deed given in evidence—Question of its effect not raised at trial or in term—Entertainment of question on appeal.*

See WILL, 56.

360. *Setting aside award—Grounds specified in rule—Objection on appeal.*

See ARBITRATION, 49.

361. *Condition in policy—Prosecution of claim—Limitation of time—Waiver—Pleading.*

See INSURANCE MARINE, 12.

362. *Case—Evidence not used at trial.*

See PRACTICE OF SUPREME COURT, 18.

363. *New trial—Excessive damages—Improper rejection—Pleading—New grounds taken on appeal.*

See EVIDENCE, 13.

364. *Amendment of pleadings—New objection taken on appeal—Supplementary evidence—Costs.*

See PRACTICE OF SUP. CT., 218.

365. *Arbitration—Condition precedent—Grounds abandoned in court below.*

See RIVERS AND STREAMS, 6.

23. NEW TRIALS.

366. *Verdict against weight of evidence—Order for new trial—Appeal entertained.*—Where the Supreme Court of Nova Scotia ordered a new trial on the ground that no insurable interest was shewn in the plaintiff who had brought an action on a policy of insurance, the appeal was heard, notwithstanding that it was asserted from a judgment ordering a new trial on the ground that the verdict

was against the weight of evidence. *Eureka Woolen Mills Co. v. Moss* (11 Can. S. C. R. 91), distinguished. *Howard v. Lancashire Insurance Co.*, xi., 92.

367. *Practice—Amendment of case—Application after judgment.*—When a new trial was ordered by the Supreme Court for misdirection in not submitting a question to the jury, the plaintiff applied to vary or reverse the judgment on affidavits shewing that the question had actually been submitted and answered. *Held*, that the application was too late, as the court had to determine the appeal on the case transmitted, and the plaintiff had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended. *Providence Washington Ins. Co. v. Gerow*, xiv., 731.

368. *Question of law — Discretion—Order for new trial—Jurisdiction—R. S. C. c. 135, s. 24 (d)—Costs.*—Defendant, against whom a verdict had passed, moved for a new trial before the Divisional Court on grounds of misdirection, surprise and the discovery of further evidence, and the motion was granted for misdirection (15 O. R. 544). Plaintiff appealed and the Court of Appeal held that there was no misdirection, but that the order of the Divisional Court directing the case to be submitted to another jury should not be interfered with, the circumstances of the case being peculiar. *Held*, that as the judgment of the Court of Appeal did not proceed upon the ground that the trial judge had not ruled according to law no appeal would lie to the Supreme Court of Canada from its decision.—In the *factum* of respondents no objection was made to the jurisdiction of the Supreme Court, but it was urged that the appeal should not be entertained and that the court should not interfere with the discretion in favour of a new trial exercised by the two lower courts, the circumstances, it was contended, being stronger than those in the *Eureka Woolen Mills Co. v. Moss* (11 Can. S. C. R. 91).—As the appeal was quashed for want of jurisdiction the costs imposed were only costs of a motion to quash. *O'Sullivan v. Lake*, xvi., 636.

369. *Jurisdiction—R. S. C. c. 135, s. 41—Judgment on motion for nonsuit or new trial—Notice of appeal—Extension of time—Application after time has expired.*—The Supreme Court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the judge has not ruled according to law," unless the notice required by s. 41 of the Supreme Court Act has been given.—An order made by a judge of the court appealed from giving the defendants "leave to appeal to the Supreme Court of Canada leaving it to plaintiffs to dispute the right of appeal in the Supreme Court," even if considered as an enlargement of the time for giving notice, will not give the court jurisdiction if no notice is given pursuant to such enlargement.—The time for giving notice under s. 41 can be extended as well after, as before the twenty days have elapsed.—*Per Strong, J.* In s. 42, providing that under special circumstances the court appealed from, or a judge thereof, may "allow an appeal," although the time limited therefor by previous sections has expired, the expression "allow an appeal" means only that the court or judge may settle the case and approve the security. *Vaughan v. Richardson*, xvii., 703.

370. *Judgment on motion for new trial—R. S. C. c. 135, s. 24 (d)—Jury cases.*—Section 24 (d) of the Supreme Court Act, allowing an appeal "from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law," is applicable to jury cases only. Gwynne, J., *dubitante*. *Halifax Street Railway Co. v. Joyce*, xvii., 709.

[54-55 Vict. c. 25, s. 1, amended s. 24 by striking out of paragraph (d) the words "upon the ground that the judge has not ruled according to law."]

371. *Jurisdiction—New trial—Excessive damages—Discretion—Costs.*—Plaintiff declared on a special contract for the sale of a vessel to defendant, averring performance of all conditions necessary to entitle him to payment of the price, and assigning as a breach non-payment by defendant. The plaintiff further declared on the common counts.—Defendant pleaded non-assumpsit, non-delivery of the vessel, payment and set-off.—The cause was tried with a jury who found a verdict for plaintiff for \$3,000. A rule *nisi* to set aside this verdict was made absolute by the Supreme Court of Nova Scotia on the ground that the damages were excessive, observing that it was unnecessary to decide whether the verdict was objectionable on other grounds.—On appeal prior to R. S. C. c. 135, s. 24 (d) as amended by 54 & 55 Vict. c. 25, *Held*, on motion to quash, Henry, J., *dubitante*, that the judgment ordering a new trial on the ground of excessive damages, proceeded upon matter of discretion only, and that such judgment was not appealable.—Appeal quashed with the general costs of appeal to hearing. By fiat of Taschereau, J., a counsel fee of \$50 on motion was taxed. *McGowan v. Mockler*, 13th October, 1879; Cass. Dig. (2 ed.) 421; Cass. Prac. (2 ed.) 81, 82.

372. *Quashing on ex parte hearing—Objection taken by court—Jurisdiction—Verdict against weight of evidence—Sections 20 & 22 Supreme Court Act—Costs.*—Appeal from a judgment of the Supreme Court of New Brunswick, making absolute a rule to set aside a verdict for the defendants, and for a new trial, on the several grounds of improper reception of evidence, misdirection, and because the verdict was against the weight of evidence. *Held*, that the court below having proceeded as well on the ground that the verdict was against the preponderance of the evidence, as on the law, the appeal came within s. 22 of the Supreme Court Act, and would not lie.—Appeal quashed for want of jurisdiction, but without costs, the appeal having been heard *ex parte*, the respondent not appearing. *Domville v. Cameron*, Cass. Dig. (2 ed.) 421; Cass. S. C. Prac. (2 ed.) 81.

(See R. S. C. c. 135, s. 24 d; 54 & 55 Vict. c. 25.)

373. *Failure to take cross-appeal—Partial relief—Nonsuit—New trial—Appeal dismissed.*—Where the court below discharged a rule for nonsuit but ordered a new trial on motion against a verdict for plaintiff, defendant appealed but plaintiff did not ask relief by cross-appeal. *Held*, that although the evidence entitled plaintiff to hold his verdict, yet, not having appealed from the order for a new trial, that rule should be affirmed and the appeal dismissed with costs. *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2 ed.) 729.

374. *Jurisdiction—Criminal law—Criminal Code, 1892, ss. 742-750—New trial—Statute, construction of—55 & 56 Vict. c. 29, s. 742.*—An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of Appeal under the provisions of the Criminal Code, 1892, ss. 742 to 750 inclusively.—The word "opinion," as used in s.-s. 2 of s. 742 of "The Criminal Code, 1892," must be construed as meaning a "decision" or "judgment" of the Court of Appeal in criminal cases. *Viau v. The Queen*, xxix., 90.

375. *Appeal—Libel—Question of privilege—Proof of malice—Improper admission of evidence—Misdirection—Power to grant new trial on appeal—N. S. Judicature Act. O. 57, R. 5; O. 38, R. 10.*—Where the defendant asked only for a new trial in the court appealed from the Supreme Court of Canada cannot order judgment to be entered for him on the appeal. *Green v. Miller*, xxxiii., 193.

376. *Crown case reserved — New trial — Questions of law.*

See No. 116, ante.

377. *Municipal corporation — Construction of sidewalk—Trespass—Action en bornage—Petitory action — Amendment of pleadings—Practice—Ceasing litigation—R. S. C. c. 135, s. 65.*

See PRACTICE OF SUPREME COURT, 5.

24. NON PROS. JUDGMENT.

378. *Appeal—Dismissal for want of appearance—Application to reinstate—Notice—Practice—Costs.*—The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs.—On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice.—The court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but, under the circumstances, the motion was dismissed without costs. *Hall Mines (Limited) v. Moore*, 20th May, 1898.

379. *Judgment of non-procedendo — Appellant failing to appear—Costs.*

See PRACTICE OF SUPREME COURT, 91.

380. *Dismissal for non-appearance at hearing—Application to restore.*

See PRACTICE OF SUPREME COURT, 95.

25. NOTICE OF APPEAL.

381. *Notice of appeal — Rules of Maritime Court—R. S. C. c. 137, ss. 18, 19—Judgment of surrogate—Date of pronouncing—Entry by registrar.*—Rule 269 of the Maritime Court of Ontario requires notice of appeal from a decision of that court to the Supreme Court of Canada to be given within 15 days from the pronouncing of such decision. A judgment of the Maritime Court was handed by the surrogate to the registrar, but not in open court, and was not drawn up and entered by the registrar for some time after. *Held*, Taschereau, J., *dubitante*, that notice of appeal within 15 days from the entry of such judgment was sufficient under the said rules.—*Quere*, Is rule 269 *intra vires* of the Maritime Court? *Robertson v. Wigle*, xv., 214.

382. *Notice of appeal—Extension of time—Application after time expired.*—The Supreme Court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the judge has not ruled according to law," unless the notice required by s. 41 of the Supreme and Exchequer Courts Act, R. S. C. c. 135, has been given.—The time for giving notice under s. 41 can be extended as well after as before the 20 days have elapsed. *Laughan v. Richardson*, xvii., 703.

383. *Notice—Extension of time—R. S. C. c. 135, s. 41.*

See PRACTICE OF SUPREME COURT, 120.

26. PETITION OF RIGHT.

384. *Jurisdiction — Petition of right — 46 Vict. c. 27 (Que.)*—The provisions of the Supreme and Exchequer Courts Acts relating to appeals from the Province of Quebec, apply to cases arising under the Petition of Right Act of that Province, 46 Vict. c. 27. *McGreevy v. The Queen*, xiv., 735.

27. PRECEDENT.

385. *Court equally divided—Binding effect of judgment.*—When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed, the result of the case in the Supreme Court affects the actual parties to the litigation only and the court, when a similar case is brought before it, is not bound by the result of the previous case. *Stanstead Election Case (Rider v. Snow)*, xx., 12.

28. PRIVY COUNCIL.

386. *Appeal in forma pauperis—Leave to appeal to Privy Council—Transmission of record—Payment of Supreme Court fees.*—On 7th October, 1902: Present, Sir Henry Strong, C.J., and Taschereau, Sedgewick, Girouard,

Davies, and Mills, JJ. A motion was made for an order directing the registrar of the Supreme Court of Canada to transmit the record to the registrar of His Majesty's Privy Council, on an appeal by the respondent, without the payment of the fees in stamps as required by the statute and rules of practice of the court. After hearing counsel for the parties, the motion was allowed and the order made as applied for, the Chief Justice stating that, as this was an extraordinary case in which the Judicial Committee of the Privy Council had granted special leave to appeal *in forma pauperis*, the ordinary rules could not apply. *Dominion Cartridge Co. v. McArthur*, 7th October, 1902. *Leave to appeal to Privy Council in forma pauperis granted Aug. 1902*

387. *Special reference—Agreement at hearing—Further appeal to Privy Council.*

See CONTRACT, 14.

388. *Cross-appeal to Privy Council—Stay of proceedings—Costs.*

See No. 422, *infra*.

389. *Inscription pending Privy Council appeal—Stay of proceedings—Costs.*

See No. 423, *infra*.

29. PROCEDURE IN COURTS BELOW.

390. *Quashing appeal — Irregular security bond—Interested parties—Matter of practice in court below.*—Where the appeal bond fails to inure to the benefit of parties interested in the result of the appeal, there can be no attention paid to the appeal.—A question simply of practice in the discretion of the court below will not be entertained on appeal. *Scammell v. James*, xvi., 593.

391. *Final judgment entered after notice of appeal from interlocutory judgment — Matter of procedure — Court of Appeal — Adding of pleas — Insufficient cause shown — Stay of proceedings—Art. 1120 C. C. P.; C. S. L. C. c. 77, s. 26.*—Defendant applied by motion for permission to file new pleas, which was refused by the Superior Court on account of insufficiency of the affidavit in support thereof, and, therefore, defendant served notice of intention to appeal from this interlocutory judgment to the Court of Queen's Bench. Notwithstanding this notice, plaintiff moved for and obtained judgment in the Superior Court, and this judgment was affirmed by the Court of Queen's Bench.—On appeal to the Supreme Court of Canada, *Held, per Ritchie, C.J., and Strong and Taschereau, JJ.*, that on a question of procedure an appellate court should not interfere.—*Per Fournier and Henry, JJ.*, that the affidavit filed by the appellant in support of his amended plea was insufficient, not being sufficiently positive and precise.—*Per Taschereau, J.* Only a rule for leave to appeal would have the effect of staying proceedings, not a mere service of a motion for leave to appeal. Appeal dismissed with costs. *Dawson v. Union Bank*, Cass. Dig. (2 ed.) 428; Cass. S. C. Prac. (2 ed.) 31, 85.

392. *Matters of procedure — Interference with, on appeal.*—Decisions of provincial courts resting upon mere questions of procedure will not be interfered with on appeal to the Supreme Court of Canada except under

special circumstances. *Ferrier v. Trepannier*, xxiv., 86.

393. *Appeal in matters of procedure — Art. 188 C. C. P.*—A judgment of the Court of Queen's Bench for Lower Canada (appeal side) held that a *venditioni exponas* issued by the Superior Court at Montreal, to which court the record in contestation of an opposition had been removed from the Superior Court of the District of Iberville under art. 188 C. C. P., was regular.—On an appeal to the Supreme Court of Canada, *Held*, that on a question of practice such as this the court would not interfere. *Mayor of Montreal v. Brown* (2 App. Cas. 184) followed. *Arvin v. Merchants Bank of Canada*, xxiv., 142.

394. *Questions of practice — Duty of Appellate Court.*—The Supreme Court of Canada will take into consideration questions of practice when they involve substantial rights, or the decision appealed from may cause grave injustice.—Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchère* it was ordered that the property described in the *procès-verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold, and further, because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or prior to the proceedings for *folle enchère*.—*Held*, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error. *Lambe v. Armstrong*, xxvii., 309.

395. *Question of local practice — Inscription for proof and hearing — Peremptory list — Notice — Surprise — Artifice — Requête civile—Arts. 234, 235, 505, C. C. P. (old text) —R. of P. (S. C.) LV.*—Where a grave injustice has been inflicted upon a party to a suit, the Supreme Court of Canada will interfere for the purpose of granting appropriate relief although the question involved upon the appeal may be one of local practice only. *Lambe v. Armstrong* (27 Can. S. C. R. 390) followed. *Eastern Townships Bank v. Swan*, xxix., 193.

396. *Acquiescement — Estoppel — Question of costs — Practice — Motion to quash.*—In order to avoid expense the Supreme Court of Canada will, when possible, quash an appeal involving a question of costs only, though there may be jurisdiction to entertain it. *Schlomann v. Dowker*, xxx., 323.

397. *Title to land — Troubles de droit — Eviction — Legal warranty — Issues on appeal — Parties.*—A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments maintaining both the principal action and the action in warranty although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. *Monarque v. Banque Jacques-Cartier*, xxxi., 474.

398. *Question of procedure — Verdict — Weight of evidence.*—The Supreme Court of Canada refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, namely, whether a verdict of a jury was a general or special verdict. *Toronto Ry. Co. v. Balfour*, xxxii., 239.

399. *Irregular procedure — Issues in courts below — Practice on appeal.*—The Supreme Court of Canada will not, on appeal, interfere with the action of the courts below in matters of mere procedure where no injustice appears to have been suffered in consequence, although there might be irregularities in the issues as joined which brought before the trial court a *demande* almost different for the matter actually in controversy. *Finnie v. City of Montreal*, xxxii., 335.

400. *Drainage — Qualification of petitioner — "Last revised assessment roll"*—*R. S. O. (1897) c. 226 — Costs of non-appealing party.*—The judgments appealed from (1 Ont. L. R. 156, 292) reversed the trial court judgment (32 O. R. 247) and held that the "last revised assessment roll" governing the status of petitioners in proceedings under the Drainage Act, was the roll in force at the time the petition was adopted by the municipal council and referred to the engineer for report, and not the roll in force at the time that the by-law was finally passed. The contractor had been made party in the Court of Appeal for Ontario and appeared at the hearing, but did not himself appeal. The judgment appealed from held that the effect of allowing the appeal did not give him any costs on the appeal. The Supreme Court affirmed the judgments appealed from. *Challoner v. The Township of Lobo*, xxxii., 505.

401. *Appeal—Order on matter of procedure in court below.*—The Supreme Court of Canada will not entertain an appeal from an order made upon a motion in a practice matter in the appellate court below. *Dueber Watch Case Co. v. Taggart*, 24th April, 1900.

402. *Appeal — Question of procedure in court below.*—The Supreme Court of Canada refused to interfere with the decision of the provincial court on matters of procedure, but, under the special circumstances of the case, the appeal was dismissed without costs. *Gibson v. Nelson*, 9th December, 1902.

403. *Stamps on election petition—Technical objection to form — Prête-nom.—Preliminary objections — Abandonment of proceedings — Reinstatement — Costs —Matter of procedure.*

See ELECTION LAW, 118.

404. *Concurrent findings of courts below—Reversal on questions of fact — Improper rulings — Reversal on matter of procedure.*

See No. 251, ante.

30. QUORUM OF SUPREME COURT.

405. *Jurisdiction — Quorum—Judge absent at hearing — Criminal conviction — 38 Vict. c. 11, s. 49 — Unanimous judgment.*—In Michaelmas term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the Court of Queen's Bench for Ontario, composed of Har-

rison, C.J., and Wilson, J., (the third judge necessary to constitute the full court being absent), and in February, 1878, the court, composed of the same judges, affirmed the conviction.—*Held*, that the conviction of the Court of Queen's Bench, although affirmed by but two judges, was unanimous, and therefore not appealable to the Supreme Court of Canada. *Amer v. The Queen*, ii., 592.

406. *Equal division in court below—Judges withholding opinions — Final judgment — Formal minutes appealed from — Evidence — Master's report.*—An appellate court should not look behind the formal judgment appealed from to ascertain whether judges there withheld opinions or left the court equally divided by dissenting.—On a reference to assess damages the master is the final judge of credibility of witnesses and his report should not be interfered with on appeal because irrelevant evidence, not likely to affect his judgment, may have been admitted, especially where there has been no appeal from his ruling as to the reception of such evidence. *Booth v. Ratté*, xxi., 637.

407. *Disqualification of judge — Quorum in such case — Resignation of judge — Re-hearing of appeal.*

See QUORUM, 1.

31. QUO WARRANTO.

408. *Writ of quo warranto — Appeal from Queen's Bench — Jurisdiction.*—An appeal from a decision of the Court of Queen's Bench for Lower Canada, (M. L. R. 2 Q. B. 482) was quashed on motion for want of jurisdiction, the proceedings being by *quo warranto* as to which there is no appeal by the statute. *Walsh v. Heffernan*, xiv., 738.

32. RIGHT OF APPEAL.

409. *Quashing appeal — Irregular security bond — Interested parties — Matter of practice in court below.*—Where the appeal bond fails to inure to the benefit of parties interested in the result of the appeal, there can be no attention paid to the appeal.—A question simply of practice in the discretion of the court below will not be entertained on appeal. *Scammell v. James*, xvi., 593.

410. *Appeals from Exchequer Court — 50 & 51 Vict. c. 16, s. 51—53 Vict. c. 35—Jurisdiction.*—*Quare*. A question was raised as to whether an appeal to the Supreme Court would lie under s. 51 of c. 16, 50 & 51 Vict, as originally enacted. (But see 53 Vict. c. 35 which amended that section.) *Carter, Macey & Co. v. The Queen*. Audette Ex. Ct. Prac. p. 115.

411. *Right of appeal — Acquiescence — Abandonment of appeal.*—The constitutionality of 36 Vict. c. 81 (Que.) being raised by defendant the Attorney-General of Quebec intervened. The judgment of the Superior Court maintained the action and intervention. Defendant abandoned an appeal from the judgment on the intervention. On appeal from the judgment of the Court of Queen's Bench on the principal action, defendant claimed he should

have the judgment of the Superior Court on the intervention reviewed.—*Held*, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this court. *Ball v. McCaffrey*, xx., 319.

412. *Acquiescence in judgment — Attorney at litem — Right of appeal — Estoppel.*—By a judgment of the Court of Queen's Bench defendant was ordered to deliver up a number of its shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for defendant delivered the shares to plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before plaintiff's attorney complied with the terms of the offer. On motion to quash the appeal on the ground of acquiescence in the judgment, *Held*, that the appeal would lie.—*Per Taschereau, J.* An attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken. *Société Canadienne-Française de Construction de Montréal v. Daveluy*, xx., 449.

413. *Appeal — Collocation and distribution — Arts. 761, 20 & 144 C. C. P.—Action to annul deed — Parties in interest — Incidental proceedings.*—The appeal from judgments of distribution under art. 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provision of art. 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench. *Guerin v. Gosselin*, xxvii., 514.

414. *Acquiescence in judgment — Reception of costs by appellant — Loss of right to appeal.*—The judgment appealed from gave certain costs to appellant which were taxed and paid to him out of moneys in court to the credit of the cause. A motion to quash was made on the ground that by accepting these costs the appellant had acquiesced in the judgment appealed from by taking a benefit thereunder. *Held*, that the reception of the costs in question was in no way inconsistent with the appeal against the construction the judgment had placed upon the will in dispute. *In re Ferguson, Turner v. Bennett, Turner v. Carson*, xxviii., 38.

415. *Right in Ontario cases — 60 & 61 Vict. c. 34 — Application to pending cases.*—The Act 60 & 61 Vict. c. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario as therein specified, does not apply to a case in which the action was pending when the Act came into force although the judgment directly appealed from may not have been pronounced until afterwards. *Hyde v. Lindsay*, xxix., 99.

416. *Controverted election — Trial of petition — Extension of time — Appeal — Jurisdiction.*—On 25th May, 1901, an order was made by Mr. Justice Belanger for the trial of the petition against the appellant's return s. c. D.—5

as a member of the House of Commons for Beauharnois thirty days after judgment should be given by the Supreme Court on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on 29th October and on 19th November, on application of the petitioner for instructions, another order was made by the said judge which decided that juridical days only should be counted in computing the said thirty days, stating that such was the meaning of the order of 25th May, and that 6th December would be the date of trial. On the petition coming on for trial on 6th December appellant moved for peremption on the ground that the six months' limit for hearing had expired. The motion was refused and on the merits the election was declared void. On appeal to the Supreme Court, *Held*, Davies, J., dissenting, that an appeal would not lie from the order of 19th November; that the judge had power to make such order, and its effect was to extend the time for trial to 6th December, and the order for peremption was, therefore, rightly refused. *Beauharnois Election Case*, xxxii., 111.

417. *Appeal — Controverted election—Judgment dismissing petition.*—An appeal does not lie to the Supreme Court of Canada from a judgment dismissing an election petition for want of prosecution within the six months prescribed by s. 32 of The Dominion Controverted Elections Act (R. S. C. c. 9). *Riche-lieu Election Case*, xxxii., 118.

418. *Jurisdiction — Amount in controversy — Interest before action — 60 & 61 Vict. c. 34, s. 1 (c).*—A judgment for \$1,000 damages with interest from a date before action brought is appealable under 60 & 61 Vict. c. 34, s. 1 (c). *Canadian Railway Accident Ins. Co. v. McNevin*, xxxii., 194.

419. *Ontario appeals — Application for leave to appeal refused by provincial court — 60 & 61 Vict. c. 34 (D).—Quashing by-law—Appeal de plano — Special leave.*—The appeals to the Supreme Court from judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 Vict. c. 34 (D.) and no appeal lies as of right unless given by that Act. *Town of Aurora v. Village of Markham*, xxxii., 457.

420. *Appeal from Court of Review—Judgment of trial court varied — Construction of statute.*

See No. 289, ante.

421. *Jurisdiction — Matter in controversy—Right of appeal — Personal condemnation — Action possessoire.*

See No. 96, ante.

33. STAY OF PROCEEDINGS.

422. *Privy Council — Cross-appeal — Stay of proceedings — Practice — Costs.*—Where the respondent has taken an appeal, from the same judgment as is complained of in the appeal to the Supreme Court of Canada, to the Judicial Committee of Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him.—In the

case in question the costs were ordered to be costs in the cause. *Eddy v. Eddy*, 4th October, 1898.

423. *Inscription pending appeal to Privy Council — Stay of proceedings — Costs.*—Where an appeal had been inscribed for hearing in the Supreme Court of Canada after notice of an appeal in the same matter by the respondent to the Privy Council, upon motion on behalf of the respondent the proceedings in the Supreme Court were stayed with costs against the appellant pending the decision of the Privy Council upon the respondent's appeal. (*Eddy v. Eddy* [No. 422, ante] followed.) *Bank of Montreal v. Demers*, xxix., 435.

424. *Election appeal — Peremptory order for hearing — Stay of proceedings refused.*

See ELECTION LAW, 67.

34. TIME FOR APPEALING.

425. *Time for appealing — Delay in settling minutes — Vacation — Formal entry of judgment — Special rule for Quebec cases.*—Where any substantial matter remains to be determined on the settlement of the minutes, the time for appealing to the Supreme Court of Canada will run from the entry of the judgment, otherwise it will run from the date on which the judgment is pronounced.—In the Province of Quebec the time runs in every case from the pronouncing of the judgment. *O'Sullivan v. Harty*, xiii., 431.

426. *Time for appealing — Supreme and Exchequer Courts Act, s. 25 — Pronouncing of judgment.*—Where the Court of Appeal for Ontario reversed the judgment of the Vice-Chancellor in favour of the plaintiff, and dismissed the action.—*Held*, that in such case no substantial question could remain to be settled before the entry of the judgment, and the time for appealing to the Supreme Court of Canada would therefore run from the pronouncing of the judgment. *O'Sullivan v. Harty* (13 S. C. R. 431), distinguished. *Walmsley v. Griffith*, xiii., 434; Cass. S. C. Prac. (2 ed.) 63.

427. *Time for appealing — Entry of judgment — Varying minutes — Settlement of substantial questions.*—After the minutes were settled, they were varied upon motion by the respondents, before the full court in British Columbia, by striking out certain declarations respecting the rights of parties on both sides and also with respect to costs. *Held*, that there being substantial questions to be decided before the judgment could be entered, the time for appealing to the Supreme Court of Canada would run from the date of the entry of judgment. *O'Sullivan v. Harty* (13 Can. S. C. R. 431), followed. *Martley v. Carson*, xiii., 439.

428. *Habeas corpus — Time for appealing — Commencement of proceedings in appeal.*—On appeal to the Supreme Court of Canada in matters of *habeas corpus* the first step is the filing of the case in appeal with the registrar.—Judgment of the Court of Appeal (12 Ont. P. R. 635) in a *habeas corpus* proceeding was pronounced 13th November, 1888; notice of appeal was immediately given but the case in appeal was not filed in the Supreme

Court until 18th February, 1889.—*Held*, that the appeal was not brought within 60 days from the date on which the judgment sought to be appealed from was pronounced and there was no jurisdiction to hear it. *In re Smart*, xvi., 396.

429. *Practice — Reference — Report of referee — Time for moving against — Notice of appeal — Cons. rules 848, 849 — Extension of time — Confirmation of report by lapse of time.*—In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to s. 101 of the Judicature Act and rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to \$600 damages. The municipality appealed to the Divisional Court from the report, and the court held that the appeal was too late, no notice having been given within the time required by cons. rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court on which it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do. *Held*, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by cons. rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which the Supreme Court would not interfere. *Township of Colchester South v. Valad*, xxiv., 622.

430. *Time limit — Commencement of — Pronouncing or entry of judgment — Security — Extension of time — Order of judge — Vacation — R. S. C. c. 135, ss. 40, 42, 46.*—On the trial of an action the plaintiffs obtained a verdict which the Divisional Court set aside, the Court of Appeal allowed an appeal, and restored the judgment at the trial, reducing the amount of damages by a certain specified sum.—*Held*, that nothing substantial remained to be settled by the minutes on entering the formal judgment of the Court of Appeal, and the time for appealing therefrom to the Supreme Court ran from the pronouncing and not from the entry of such judgment. *O'Sullivan v. Harty* (13 Can. S. C. R. 431); *Walmsley v. Griffith* (13 Can. S. C. R. 434); *Martley v. Carson* (13 Can. S. C. R. 439) followed.—By s. 42 of the Supreme and Exchequer Courts Act (R. S. C. c. 135), a court proposed to be appealed from, or a judge thereof may allow an appeal after the time prescribed therefor by s. 40 has expired, but an order by the court below or a judge thereof, extending the time, will not authorize the Supreme Court or a judge thereof to accept security after the 60 days have elapsed.—The 60 days for appealing to the Supreme Court prescribed by s. 40 of the Act, is not suspended during the vacation of that court established by its rules. *News Printing Co. v. Macrae*, xxvi., 695.

431. *Time Limit — Commencement of — Pronouncing or entry of judgment — Security — Extension of time — R. S. C. c. 135, ss. 40,*

42, 46.]—On the trial of an action to set aside a chattel mortgage, the plaintiff obtained a declaration that the mortgage was void, and an order setting it aside without costs. The decision was reversed on appeal, and the action dismissed with costs, both in the Court of Appeal and in the court below, by a judgment pronounced on the 7th November, 1895. The minutes had not been settled until some days afterwards, and at the time of the settlement the draft minutes were altered by the Registrar of the Court of Appeal by refusing costs to one of the respondents, and also by changing a direction therein as to the payment over of funds on deposit abiding the decision of the suit. On an application made more than 60 days from the pronouncing of the judgment, for the approval of security under s. 46 of the Supreme and Exchequer Courts Acts; *Held*, that nothing substantial remained to be settled by the minutes so as to take the case out of the general rule that the time for appealing runs from the pronouncing of the judgment, and that the application was too late. *Martin v. Sampson*, xxvi., 707.

432. *Arts. 1020, 1209, 1220 C. P. Q.—Expiration of time limit — Forfeiture of right—Condition precedent — Ouster of jurisdiction—Objection taken by court — Waiver.*—The provisions of arts. 1020 & 1209 C. P. Q., limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Cimon v. The Queen* (23 Can. S. C. R. 62) referred to.—[Compare *Park Iron Gate Co. v. Coates* (L. R. 5 C. P. 634)]. *Lord v. The Queen*, xxxi., 165.

433. *Appeal by the Crown—Special grounds—Extension of time.*—Where an application was made by the Crown for an extension of time for leave to appeal after the time prescribed by 50 & 51 Vict. c. 16, s. 51, as amended by 53 Vict. c. 35, and special grounds were not disclosed in the material read on the application as reasons for such extension, the application was refused. *MacLean v. The Queen*, 4 Ex. C. R. 257.

434. *Exchequer Court judgment—Lapse of time for appealing—Ex post facto rule—Setting down for hearing—Costs.*

See PRACTICE OF SUPREME COURT, 114.

435. *Appeal per saltum — Jurisdiction of Yukon Territorial Judges—Extension of time for appealing.*

See No. 337a, ante.

436. [NOTE of an Ontario decision.] *Ontario practice as to granting leave—Extension of time—Appeal from order.*—The Court of Appeal for Ontario has held that no appeal lies to that court from an order of a judge of that court extending time for appealing, under s. 26, Supreme and Exchequer Courts Act. *Neill v. Travellers' Ins. Co.* (9 Ont. App. R. 54). *Re Central Bank of Canada* (17 Ont. P. R. 395).

APPROPRIATION OF PAYMENTS.

See PAYMENT.

ARBITRATIONS.

1. APPEALS, 1-4.
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1. APPEALS.

1. *Appeal—Jurisdiction—Award—B. C. Arbitration Act—Judgment on motion—Enforcing award.*—The full court in British Columbia affirmed an award in favour of the respondent for compensation for the opening of a highway through his lands by the Township of Langley under a by-law passed in June, 1896. The Supreme Court quashed the appeal for want of jurisdiction on a motion to that effect based on grounds (1) that the judgment appealed from was not one on a motion to set aside the award nor by way of appeal from the award, within R. S. C. c. 135, s. 24, s.-s. (f). (2) That no appeal could lie. (3) That the judgment merely permitted the enforcement of the award by allowing respondent's appeal from the order of a County Court judge refusing an application to enforce the award and referring the matter back to the arbitrators for further consideration and that no appeal could lie. (4) That no appeal lies to the Supreme Court of Canada from a judgment on a motion under s. 13 of R. S. B. C. (1897) c. 9, to enforce an award or from a judgment in appeal from such an order. *Township of Langley v. Duffy*, 30th May, 1899.

2. *Appeal from award—Increase of damages—Cross-appeal.*

See APPEAL, 123.

3. *Appellate court increasing award—Hearing additional testimony—Appreciation of evidence.*

See APPEAL, 12.

4. *Reference by consent—R. S. O. (1877) c. 50, s. 189—Appeal.*

See APPEAL, 11.

2. ARBITRATORS, APPOINTMENT AND QUALIFICATION.

5. *Railways—Prohibition—Empropriation—Death of arbitrator pending award—51 Vict. c. 29, ss. 156, 157—Lapse of time for making award—Statute, construction of—Art. 12 C. C.]—In relation to expropriation for railway purposes, ss. 156 and 157 of "The Railway Act," (51 Vict. c. 29, (D.)), provide:—"156. A majority of the arbitrators at the first meeting after their appointment or*

the sole arbitrator, shall fix a day on or before which the award shall be made; and, if the same is not made on or before such day, or some other day to which the time for making it has been prolonged, either by consent of the parties or by resolution of the arbitrators, then the sum offered by the company as aforesaid, shall be the compensation to be paid by the company." "157. If the sole arbitrator appointed by the judge, or any arbitrator appointed by the two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then, in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of the parties, the company and party respectively may each appoint an arbitrator in the place of its or his arbitrator so deceased, or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply; but no recommencement or repetition of the previous proceedings shall be required in any case." (Section 151 provides for the appointment of a third arbitrator either by the two arbitrators or by a judge.)—*Held*, that the provisions of s. 157 apply to a case where the arbitrator appointed by the proprietor died before the award had been made, and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to a reasonable time for appointment of an arbitrator to fill the vacancy, and to have the arbitration proceedings continued although the time so fixed had expired without any award having been made, or the time for making it prolonged. *Shannon v. Montreal Park & Island Ry. Co.*, xxviii., 374.

6. *Expropriation—Street railway—Municipal ownership—Notice—Refusal to name arbitrator.*

See MUNICIPAL CORPORATION, 116.

7. *Expropriation—Form of appointment of arbitrator—Subsequent conduct of party.*

See No. 13, infra.

8. *Construction of contract—Inconsistent conditions—Dismissal of contractor—Architect's powers—Arbitrator—Disqualification—Probable bias—Rejection of evidence—Judge's discretion as to order of evidence.*

See CONTRACT, 63.

9. *Disqualification of arbitrator—Occasional employment—Notary—44 Vict. c. 43 (Q.)*—An award was made by a majority of arbitrators on the 1st Sept., 1883, establishing at the amount of \$4,474 the indemnity to be paid to respondents for land of which they were dispossessed by appellants under 45 Vict. c. 23 (Q.). Action was taken for that sum and costs of arbitration and law costs, amounting altogether to \$4,658.20, and a judgment recovered with interest and costs, which was affirmed by the Queen's Bench. The principal defence was that C., being agent of respondents, was disqualified to act as their arbitrator. *Held*, that the evidence shewed that C. was not in the continuous employ of respondents, but acted for them from time to time only, in his professional capacity as a notary public, and not in any other capacity,

he was not disqualified. *North Shore Ry. Co. v. Ursuline Ladies of Quebec*, Cass. Dig (2 ed.), 36.

3. ASSESSMENT OF DAMAGES.

10. *Award of official arbitrators—Past and future damages—Appeal—42 Vict. c. 8 (D.)—Review of award.*—On a reference being made to the official arbitrators of certain claims made by H. against the government for damages to land arising out of the enlargement of the Lachine Canal, the arbitrators awarded \$9,216 in full and final settlement of all claims. On appeal to the Exchequer Court by H., Taschereau, J., increased the amount to \$15,990, including \$5,600 for damages to the land from 1877 to 1884 by leakage from the canal since its enlargement, and reserved to H. the right to claim future damages from that date. *Held*, reversing the judgment of the Exchequer Court affirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present and future damages, and that the evidence did not justify any increase of the amount awarded.—Gwynne, J., was of opinion that under 42 Vict. c. 8, s. 38, the Supreme Court had power (although the Crown did not appeal to the Exchequer Court) to review the award of the arbitrators, and that in this case \$1,000 would be an ample compensation for any injury that the claimant's land can be said to have sustained, which upon the evidence can be attributed to the work of the enlargement of the canal. *The Queen v. Hubert*, xiv., 737.

11. *Expropriation—I. C. Ry. Co.—Award of official arbitrators—Compensation for land—Speculative values—Appellate Court.*—On appeal from a judgment of the Exchequer Court increasing the award of the official arbitrators for expropriation of land for the Intercolonial Railway. *Held*, reversing the judgment appealed from (1 Ex. C. R. 191), and restoring the award, that to warrant an interference with an award of value necessarily largely speculative an appellate court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on or something overlooked which ought to have been considered by the arbitrators, and upon the evidence in this case the court refused to interfere with the amount of compensation awarded. *The Queen v. Paradis*; *The Queen v. Beaulieu*, 1 Ex. C. R. 191.

12. *Sub-contract—Part performance—Rescission—Quantum meruit—Reconsideration of award.*—P. was a contractor with the government of Canada for building a post office and K. was sub-contractor to do the mason and brick work for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and an acceptance by K. P., being dissatisfied with the work done by K., took the contract out of his hands before it was completed and finished it himself. K. brought action for the value of work done by him and on reference by the court to arbitration an award was made in K.'s favour. The Court of Appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that though the contract did not authorize P. to take over the work and finish it at K.'s expense, and the latter was, therefore, entitled to recover on the *quantum meruit*, yet the cost

of completing the work was considerably in excess of the contract price.—*Held*, reversing the judgment appealed from, that as it appeared from the evidence that the arbitrator fully understood the matter and got all the information that could be obtained on the subject, and as no impropriety or mistake was shewn to have been committed by him, no benefit could result from sending the award back for reconsideration, and the decree of the Court of Appeal was not justified. *Kennedy v. Pigott*, xviii., 699.

13. *Expropriation*—*R. S. Q. art. 5164, ss. 12, 16, 17, 18, 24*—*Award*—*Arbitrators' jurisdiction*—*Lands injuriously affected*—43. & 44 *Vict. c. 43 (P.Q.)*—*Appeal*—*Amount in controversy*.]—On an expropriation respondent, naming his arbitrator, declared he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of \$1,974.25 damages and costs for land expropriated was made under art. 5164, R. S. Q. The demand for expropriation as formulated in the notice to arbitrate was for the width of the track, but the award granted damages for 3 feet outside of the fences on each side as being valueless. In an action by the company to set aside the award—*Held*, affirming the judgment appealed from (following 15 Q. L. R. 300), that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction. — Strong and Taschereau, JJ., doubted if the matter in controversy was sufficient to give the court jurisdiction to hear the appeal, the award being under \$2,000, but, assuming, without deciding that there was jurisdiction, they concurred in the judgment on the merits. *Quebec, Montmorency & Charlevoix R. Co. v. Mathieu*, xix., 426.

14. *Expropriation under Railway Act*—*R. S. C. c. 109, s. 8, ss. 20-21*—*Discretion of arbitrators*—*Award*—*Inadequate compensation*.]—An award in expropriation proceedings under the Railway Act, R. S. C. c. 109, where the arbitrators acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice, should not be interfered with. Judgment appealed from (*M. L. R. 6 Q. B. 385*) affirmed. *Benning v. Atlantic & N. W. Ry. Co.*, xx., 177.

15. *Railways*—*Eminent domain*—*Expropriation of Lands*—*Evidence*—*Findings of fact*—*Duty of appellate court*—51 *Vict. c. 29 (D.)*]—On an arbitration in a matter of the expropriation of land under the provisions of "The Railway Act," the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them.—*Held*, reversing the decision of the Court of Queen's Bench, and restoring the judgment of the Superior Court (*Taschereau and Girouard, JJ.*, dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong

principle in the estimation of the indemnity thereby awarded. *Grand Trunk Ry. Co. v. Coupal*, xxviii., 531.

16. *Expropriation by railway*—*Description of land*—*Setting aside award*—*Compensation for riparian rights*.

See EXPROPRIATION, 21.

17. *Damages*—*Award*—*Interest*.

See EXPROPRIATION, 10.

4. BOUNDARIES.

18. *Agreement respecting lands*—*Boundaries*—*Referee's decision*—*Bornage*—*Arts. 941-945 and 1341 et seq. C. C. P.*]—The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground, and agreeing further to abide by his decision, and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary, and to revendicate the strip of land lying upon his side of it.—*Held*, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed, and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations. *McGoey v. Leamy*, xxvii., 545.

5. CONDITION PRECEDENT.

19. *Policy of insurance*—*Condition precedent*—*Matters in difference*.]—A question as to payment of premiums was held to be a difference "relating to the insurance" within the meaning of the arbitration clause of the policy. *Anchor Marine Ins. Co. v. Corbett*, ix., 73.

20. *Reference by Crown*—*Costs disallowed*—*Waiver of strict rights*.]—A claim against the Crown, for the value of work alleged to have been done in the construction of a bridge contracted for, such value not having been included in the final certificate of the engineer, having been referred to arbitration under 31 *Vict. c. 12*.—*Held*, that the certificate of the engineer was under the contract a condition precedent to recovery, but if the Crown had intended to rely on its strict rights it should not have referred the claim to arbitration and it should, therefore, not be allowed the costs in any of the courts. *The Queen v. Starrs*, xvii., 118.

21. *Policy of fire insurance*—*Condition precedent to action*—*Award*.]—A condition in a policy of fire insurance provided that no action should be maintainable against the company for any claim thereunder until after an award obtained in the manner provided, fixing the amount of the claim. *Held*, that the making of such award was a condition precedent to any right of action to recover for a loss under the policy. *Guerin v. Manchester Fire Assur. Co.*, xxix., 139.

22. *Rivers and streams—Floatable waters—Construction of statute—“The Saw-logs Driving Act”*—R. S. O. (1887) c. 121—*Arbitration—Action upon award—River improvements—Detention of logs—Damages.*—When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them the owner is entitled to an arbitration under the Saw-logs Driving Act to determine the amount of his damages for such detention and is not restricted to the remedy provided by s. 3 of that Act, namely, removing the obstruction. Judgment of the Court of Appeal (26 Ont. App. R. 19) reversed. *Cockburn & Sons v. Imperial Lumber Co.*, xxx., 80.

23. *Use and occupation of land—Booming and storing logs—C. S. L. C. c. 51—Necessity of award—Right of action.*—The provisions of C. S. L. C. c. 51 do not take away from the parties the right of proceeding by action (see 7 Q. L. R. 286; 15 R. L. 514). *Breakey v. Carter*, 12th May, 1885. Cass. Dig. (2 ed.) 463.

24. *Street Railway Co.—Agreement with municipality—Repair of roadway—Termination of franchise.*

See CONTRACT, 86.

25. *Contract—Agreement for arbitration in—Suspension of right of action.*

See CONTRACT, 62.

26. *Contract for construction of railway—Condition precedent to payment—Certificate of engineer as sole arbiter.*

See CONTRACT, 69.

27. *Riparian rights—Building dams—Penning back water—Improvement of water-courses—Art. 5535 R. S. Q.—Arbitration—Condition precedent—New grounds on appeal—Assessment of damages—Interference by appellate court.*

See RIVERS AND STREAMS, 6.

6. COSTS.

28. *Expropriation of land—Railway—Matters considered by arbitrators—Estimation of indemnity—Costs.*—A railway company, having taken lands for the purposes of their railway, made an offer which was not accepted and the matter was referred to arbitration under the Cons. Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer. *Held*, affirming the Court of Appeal for Ontario, Gwynne, J., dissenting, that under the circumstances neither party was entitled to costs—Appeal dismissed with costs. (See 5 O. R. 674). *Ontario & Quebec R. Co. v. Philbrick*, xii., 288.

29. *Reference by Crown to arbitrators—Waiver of strict rights—Disallowance of Costs.*—Where the Crown intended to rely only on strict rights, it ought not to have referred a matter to arbitration and, therefore, no costs were allowed. *The Queen v. Starrs*, xvii., 118.

7. COUNTY BUILDINGS.

30. *Municipal Corporation—Construction of Statute—55 Vict., c. 42, ss. 397, 404, 467, 473 (Ont.)—City separated from county—Maintenance of court house and gaol—Care and maintenance of prisoners.*—No compensation can be awarded by arbitrators to a County Council in respect of the use, by a city separated from that county, of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality. A claim for compensation for the care and maintenance of prisoners' stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for the use of the court house and gaol. Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 409), affirmed. *County of Carleton v. City of Ottawa*, xxviii., 606.

8. DOMINION ARBITRATORS.

31. *Appeal—Jurisdiction—Award of arbitrators—54 & 55 Vict. c. 6 (D)—54 Vict. c. 2 (Ont.)—54 Vict. c. 4 (Que.)*—In an award made under the provisions of the Acts, 54 & 55 Vict. c. 6, s. 16 (D.), 54 Vict. c. 2, s. 6, (Ont.) and 54 Vict. c. 4, s. 6 (Que.), there can be no appeal to the Supreme Court of Canada, unless the arbitrators in making the award set forth therein a statement that in rendering the award they have proceeded on their view of a disputed question of law. *In re Common School Funds and Lands*, xxx., 306.

32. *Debts of Province of Canada—Deferred liabilities—Toll bridge—Reversion to Crown—Indemnity—Condition precedent—Petition of right—B. N. A. Act, 1867, s. 111—Liability of Province of Canada—Remedial process.*

See CONSTITUTIONAL LAW, 8.

AND see DOMINION ARBITRATORS.

9. DRAINAGE.

33. *Ditches and Watercourses Act, 1894 (Ont.)—Owner of land—Declaration of ownership—Defects—Validating award—57 Vict. c. 55—58 Vict. c. 54 (Ont.)*—A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1894, of Ontario. *Township of Osgoode v. York* (24 Can. S. C. R. 282), followed.—If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction.—Section 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not invalidate an award or proceedings where the party initiating the

latter is not an owner. *Township of McKillop v. Township of Logan*, xxix., 702.

34. Drainage—Defective award—Evidence—Failure to adjudicate—Reference to Court of Revision—Irregular assessment—Surveyor's report.

See DRAINAGE, 1.

35. Intermunicipal works—Sewer—Entry into adjoining municipality—R. S. O. (1887) c. 184, s. 479, s.s. 15—51 Vict. c. 28, s. 20 (Ont.).

See MUNICIPAL CORPORATION, 85.

36. Arbitration and Award—Drainage—Injuring liability—Cases arising under R. S. O. (1887) c. 184—Neglect to repair drains.

See DRAINAGE, 2.

37. Award by Drainage Referee—54 Vict. c. 51 (Ont.)—Appeal—Jurisdiction—R. S. C. c. 135, s. 24—Costs.

See APPEAL, 52.

10. EXECUTION OF AWARD.

38. Expropriation of lands—Compensation—Recovery—Money deposited.]—The proper mode of enforcing an award of compensation for lands expropriated under the Railway Act is by an order of a judge in chambers. *Canadian Pac. Ry. Co. v. Little Seminary of Ste. Thérèse*, xvi., 606.

39. Award—Lessor and lessee—Covenant in lease—Breach—Payment of compensation—Condition precedent to action.

See LESSOR AND LESSEE, 1.

40. Railway expropriation—Award on—Additional Interest—Confirmation of Title—Railway Act, 1888, ss. 162, 170, 172.

See EXPROPRIATION, 23.

41. Expropriation proceedings—Recourse for indemnity—Montreal City charter—59 Vict. c. 49, s. 17.

See ACTION, 48.

11. FORMS.

42. Expropriation—43 & 44 Vict. c. 43, s. 9 (*Que.*)—Award—Description of land—Procedure—Facts et articles—Order pro confessis—Art. 225, C. C. P.]—On 12th March, 1885, B. instituted an action against the company, based on an award, under 43 & 44 Vict. c. 43, s. 9, for land appropriated for the North Shore Railway. The company not having pleaded foreclosure was granted, and process for interrogatories on *faits et articles* was issued, returnable on 26th April; the company made default; on 18th June the *faits et articles* were declared taken *pro confessis*; on 16th May, B. consented that defendant be allowed to plead; on 7th July a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence. On 2nd September, B. inscribed for hearing on merits, on which day the company moved for leave to answer *faits et articles* and the motion was refused. The notice of expropriation and the award both described

the land expropriated as No. 1, on the plan of the railway, but in another part of the notice it was described as part of cadastral lot 2345, and in the award as forming part of lots 2344-2345. On 5th December judgment was rendered in favour of B. for the amount of the award, but the Court of Queen's Bench reversed the judgment, holding the award bad for uncertainty and that the case should be sent back to the Superior Court to allow defendants to answer the *faits et articles*.—*Held*, (1) reversing the judgment appealed from, Taschereau, J., dissenting, that there was no uncertainty in the award as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by arbitrators. (2) That the motion for leave to answer *faits et articles* had been properly refused by the Superior Court. *Beaudet v. North Shore Ry. Co.*, xv., 44.

[The Privy Council refused leave to appeal.]

43. Form of award—Specific finding on each of the matters in difference.]—Plaintiffs brought ejectment to recover possession of certain lands in the parish of P. After cause was at issue, under a rule, all matters in difference were referred to arbitration, and the arbitrators were to have power to make an award concerning the glebe and church lands at P., and to make a separate award concerning the school lands at P. The powers of the arbitrators were to extend to all accounts and differences between the parish and the late rector, and the defendant as his executrix, and also between the defendant individually and the parish. The arbitrators made two awards;—First, as to the school lands, that defendant was indebted to plaintiffs, as such executrix, on the school moneys, in the sum of \$1,400; that defendant should pay that sum to plaintiffs; and that judgment should be entered for plaintiffs for that amount;—Secondly, as to the glebe and church lands, that plaintiffs were entitled to recover the lands claimed, and that judgment in ejectment be entered for plaintiffs with costs; and, after reciting that all accounts respecting the receipt and disbursement of all moneys received from interest, rent and sale of these lands by the late rector, or his agents, or by defendant as his executrix, were also referred to them; as well as all accounts and differences between the parish and the defendant individually, they further awarded that defendant should "pay to the plaintiffs the sum of \$1 in full of the same," saving and excepting the matters in controversy respecting the school lands, on which they had made a separate award; and that judgment should be entered for the plaintiffs for the said sum of \$1. They also awarded that the defendant should pay all costs of the reference and award. On appeal from the judgment of the Supreme Court of Nova Scotia setting aside the awards; *Held*, that the awards sufficiently specified the claims submitted, and the various capacities in which such claims arose. That the first award, being against the defendant in her representative capacity, could not be considered against her personally, and negatived any claim of that kind, and also was an adjudication against the defendant that she had assets; and that the finding in the second award, that the defendant should pay \$1, could be considered a finding as against her in her individual capacity for that sum, and, as to the claims of the plaintiffs against her for moneys received by her husband, or by her

as his executrix, as a finding against the plaintiffs on their claim. That the part of the second award, directing payment of the costs of the reference and award was bad, but might be abandoned. *St. George's Parish v. King*, ii., 143.

44. *Submission—Special directions as to inquiry—Mediators—Award—Finality—Art. 1346, C. C. P.*—M. claiming money from the Government of Quebec under a contract for construction of a railway, agreed to submit to 3 mediators (*amiables compositeurs*) all controversies and difficulties between the Government and himself. The submission stated that these mediators should inquire into the intent of the obligation of the contract between the government and M.; the alterations and modifications made in the plans, particulars and specifications mentioned in the contract; what influenced the alterations and modifications may have had on the obligations of M. and on those of the government; the delays caused by reasons irrelevant to the action of the contractor; the pecuniary value, whether for more or for less, of the alterations or any increase in the works; and finally, all things connected with the matter and the execution of the contract, and with regard to the charges and obligations of both the government and the contractor, according to the terms of the contract. It also provided that the award was to be executed as a final and conclusive judgment of the highest court of justice. The award, after reciting the matters in controversy, found that the government was indebted to M. in \$147,473, and annexed thereto an affidavit stating they had inquired into all matters and difficulties submitted to them as appeared in the deed of submission. This being much less than the claim, M. filed a petition of right, asking that the award be set aside on the ground that it did not cover the matters so referred and decided matters not mentioned in the submission. The Superior Court set aside the award. The Queen's Bench reversed that judgment and dismissed the petition. *Held*, affirming the Court of Queen's Bench, Strong and Taschereau, JJ., dissenting, that the object of the submission was to ascertain what amount the contractor was to receive from the government, and the specification of the several matters referred to in the submission was merely to secure that, in determining the amount, the mediators should fully consider all these matters, and all matters having been so considered the award was valid.—*Per Fournier, J.* Mediators are not subject to art. 1346, C. C. P. and their award upon matters under reference can only be set aside by reason of fraud or collusion. *McGreevy v. The Queen*, xix., 180.

45. *Railway expropriation—Description of lands—Notice.*

See EXPROPRIATION, 24.

12. MISTAKE.

46. *Policy of insurance—Misdescription of risk—Reference of claim to arbitration—Waiver.*—Where an insurance has been treated as existing by the reference of a claim for loss to arbitration under a clause in the policy, the insurer is estopped from setting up the defence of no contract on the ground of mistake made on the part of the insured in describing the risk. *City of London Ins. Co. v. Smith*, xv., 69.

47. *Award final by submission—Setting aside—Wrong principle—Mistake.*—An award will not be set aside on the ground that a memo., furnished by the arbitrator to the losing party after its publication, shewed that the accounts between the parties were adjusted upon a wrong principle, the defect, if any, not being a mistake on the face of the award or in some paper forming part of, and incorporated with, the award, and there being no admission by the arbitrator himself that he had made a mistake. *McRae v. Lemay*, xviii., 280.

13. SETTING ASIDE AWARD.

48. *Award remitted back—The P. E. Island Land Purchase Act of 1875, s. 45.*—The Prince Edward Island legislature had authority to enact the "Land Purchase Act of 1875," and an award thereunder of the commissioners could not be quashed and set aside, or declared invalid and void, on an application made to the Supreme Court of the province; but it could have been remitted back to the commissioners in the manner prescribed by s. 45 of the Act. The application for the rule in the court below not having been made within the proper time, nor according to the provisions of that section, the decision of that court is against the express words of the statute, and cannot be allowed to stand. *Kelly v. Sullivan*, i., 1.

49. *Procedure—Enlarging time for making award—New ground on appeal.*—In an action on contract, the differences were, by rule of court, and consent of parties, submitted to arbitration. The award was to be made on or before 1st May, 1877, or such further or ulterior day as the arbitrators might indorse from time to time on the order. The time for making the award was extended by the arbitrators till 1st September, 1877. On 31st August, 1877, the attorneys for plaintiff and defendants, by consent indorsed on the rule, extended the time till the 8th September. On 7th September the arbitrators made their award in favour of plaintiff for \$5,001.42 in full settlement of all matters in difference. *Held*, reversing the judgment appealed from (13 N. S. Rep. 98), that where the parties, through their attorneys, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award made within the extended period is an award made under the rule of reference, and is valid and binding on the parties. 2. That the fact of one of the parties being a municipal corporation made no difference. 3. That in Nova Scotia, where the rule *nisi* to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal. *Oakes v. City of Halifax*, iv., 640.

50. *Misconduct of arbitrators—Bill to rectify award—Prayer for general relief—Jurisdiction—Practice—Scandalous factum—Discipline—Costs.*—The bill was to rectify an award under an arbitration, because the arbitrators had considered matters not included in the submission, and divided the sums received by the defendant from the plaintiffs, on the ground that defendant's brother and

partner was a party to such receipt, although the partnership affairs of the defendant and his brother were excluded from the submission. The bill prayed that the award might be amended, and the defendant decreed, to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties. There was also a prayer for general relief. *Held*, affirming the judgment appealed from (23 N. B. Rep. 392), that to grant the decree prayed for would be to make a new award, which the court had no jurisdiction to do, but (reversing the court below), that under the prayer for general relief the plaintiff was entitled to have the award set aside.

The plaintiff's factum containing reflections on the conduct of the judges of the court below, was ordered to be taken off the files as scandalous and impertinent, and the appeal was allowed without costs. *Vernon v. Oliver*, xi., 156.

51. *Reconsideration—Setting aside award—Time for application—9 & 10 Wm. III. c. 15, s. 2—R. S. O. (1887) c. 53, s. 37—Reference back to arbitrators—Concealment—New evidence.*—In Ontario, the law regulating the time for applying to set aside an award made under rule of court or to remit it to the arbitrators for re-consideration and re-determination, is R. S. O. (1887) c. 53, s. 37, and it is not necessary that the application should be made before the last day of the term next after the making of the award, as provided by 9 & 10 Wm. III. c. 15 s. 2. Gwynne, J., dissenting.—An award may be remitted to arbitrators for re-consideration and re-determination under the Ontario statute though the result of the re-consideration may be to have the award virtually set aside by a different, or even contrary, decision of the arbitrators.—The court is justified in remitting an award to the arbitrators if fraud or fraudulent concealment on the part of the persons in whose favour it is made is established, or if new evidence is discovered which, by the exercise of reasonable diligence, could not have been discovered before the award was made. *Green v. Citizens Ins. Co.*, xviii., 338.

52. *Amiables compositeurs—Art. 1346 C. C. P.—Fraud.*—*Per Fournier, J.*—Mediators are not subject to art. 1346 C. C. P., and their award on the matters under reference can only be set aside for fraud or collusion. *McGreevy v. The Queen*, xix., 180.

53. *Setting aside award—Expiration of time fixed by 9 & 10 Wm. III. c. 15.*—The appellant B. became plaintiff by order of revivor in a suit originally by P. against L. for dissolution, account and winding-up of partnership. A decree was made by consent for reference to three arbitrators, there being also a deed of submission, in the same terms as the decree, subsequently executed by the parties. An award was made on the 13th August, and L.'s solicitor, on 2nd September, 1878, served notice of appeal. Appellant's solicitor, on 8th October, 1878, served notice consenting to an order setting aside the award. No action being taken thereon, appellant, on 2nd December, 1878, served notice of motion for an order to set aside the award; and, after argument, an order was made on 26th March, 1879, setting aside the award with costs. (26 Gr. 375). L. appealed to the Court of Appeal for Ontario, which reversed the order and dismissed the motion to set aside the award, on

the ground that it was made too late. (5 Ont. App. R. 1). *Held*, that the motion was not made within the time allowed by the statute, 9 & 10 Wm. III. c. 15, and as no good reason was given for the delay the judgment of the Court of Appeal should be affirmed. Appeal dismissed with costs. *Bickford v. Lloyd*, 21st June, 1880; Cass. Dig. (2nd ed.) 35.

54. *Railways—Expropriation of land—Defective awards—Signatures of arbitrators—Equity of redemption—Notice of meeting—Amending answer—Objections taken in appellate court—Costs—New trial.*—Bills to enforce awards and recover moneys thereunder for lands taken by the company—(see 41 U. C. Q. B. 195; 28 U. C. C. P. 309; 5 Ont. App. R. 13, and 9 Ont. App. R. 310). In the Supreme Court, counsel for the appellants for the first time contended that, in the Norvell case, the award was bad because the arbitrators had dealt only with the equity of redemption of the land-owner, and in the other cases, that the awards were bad on their face, being signed by only two of the three arbitrators without shewing a notice to the third arbitrator.—*Held*, in the Norvell case, that the company should be allowed to amend the answer in the Court of Chancery to shew that the award was in respect only of the equity of redemption and not the fee simple, and that upon such amendment being made the award should be declared null and void; and, in the other cases, that the company should be at liberty to amend the answers to shew that the awards were made by two of the arbitrators in the absence of, and without notice of the meeting of said two arbitrators to the third arbitrator, with liberty to the plaintiffs to file, with the registrar of the Supreme Court, signification of their desire for new trials, when such new trials should be granted without costs; in default of such signification in any case the award was declared null and void.

Appeals allowed without costs, objections having been taken for the first time on appeal. *Canada Southern Ry. Co. v. Norvell*; *Canada Southern Ry. Co. v. Cunningham*; *Canada Southern Ry. Co. v. Duff*; *Canada Southern Ry. Co. v. Gutfield*. Cass. Dig. (2 ed.), 34; Cass. S. C. Prac. (2 ed.), 83.

55. *Expropriation—35 Vict. c. 32, s. 7 (Que.)—Interference with award of arbitrators.*—In a matter of expropriation the decision of a majority of arbitrators, men of more than ordinary business experience, upon a question merely of value should not be interfered with on appeal. *Lemoine v. City of Montreal*; *Allan v. City of Montreal*, xxiii., 390.

56. *Award—Appeal—Questions of fact—Second Award—Arbitrator functus officio.*—S. and P. were engaged in business together, under a written agreement, in the packing and selling of fruit, and a dispute having arisen as to the state of accounts between them, a third person was chosen to enable them to effect a settlement. S. claimed that the person so chosen was only to go over the accounts and make a statement, while P. contended that the whole matter was left to him as an arbitrator. This person, having gone over the accounts, made out a statement shewing \$235 to be due to S., and some time afterwards he presented a second statement shewing the amount due to be \$286. S. was given a cheque for the latter amount, which, he asserted, was

taken only on account, and he afterwards brought an action for the winding-up of the partnership affairs. *Held*, affirming the decision of the Court of Appeal for Ontario, that whether or not there was a submission to arbitration was a question of fact as to which the Supreme Court of Canada would not, on appeal, interfere with the finding of the trial judge that all matters were submitted, affirmed as it was, by a Divisional Court and the Court of Appeal. *Held*, further, that there was a valid award for \$235; that having made his award for that amount, the arbitrator was *functus officio*, and that the second award was a nullity; and that the Divisional Court was wrong in holding that, as P. relied only upon the second award, the judgment should be against him on the case as claimed by S. *Snetsinger v. Peterson*, 23rd May, 1894.

ARCHITECT.

1. *Contract, construction of—Inconsistent conditions—Dismissal of contractor—Architect's powers—Arbitrator—Disqualification—Probable bias—Rejection of evidence—Judge's discretion as to order of evidence.*

See CONTRACT, 63.

2. *Contract—Public work—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.*

See CONTRACT, 100.

ARTIFICE.

See FRAUD.

ASSESSMENT.

See ARBITRATIONS—ASSESSMENT AND TAXES—DAMAGES—MUNICIPAL CORPORATION.

ASSESSMENT AND TAXES.

1. APPEALS, 1-5.
2. BUSINESS TAX, 6-16.
3. COLLECTION AND DISTRESS, 17-26.
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6. EXEMPTIONS, 37-47.
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8. LOCAL IMPROVEMENTS, 49-58.
9. SALE OF LANDS, 59-61.
10. SCHOOL RATES, 62-64.

1. APPEALS.

1. *Appeal from assessment—Judgment confirming—Payment under protest—Res judicata.*—J., having been assessed in 1896 on personal property as a resident of St. John, N. B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Bruns-

wick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. In 1897 he was again assessed under the same circumstances, and took the same course with the exception of appealing to the Supreme Court of Canada from the judgment refusing a certiorari, and that court held the assessment void and ordered the writ to issue for quashing. J. then brought an action for repayment of the amount paid for the assessment in 1896. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was *res judicata* against J., and he could not recover the amount so paid. *Jones v. City of St. John*, xxi., 320.

2. *Want of notice—New objection taken on appeal.*

See No. 49, *infra*.

3. *Business tax—Setting aside by-law—Supreme Court Act, s. 24 (g)—Jurisdiction.*

See APPEAL, 40.

4. *Appeal—Jurisdiction—52 Vict. c. 37, s. 2 (D.)—Appointment of presiding officers—County Court judges—55 Vict. c. 48 (Ont.)—57 Vict. c. 51, s. 5 (Ont.)—58 Vict. c. 47 (Ont.)—Construction of statute—Appeal from assessment—Final judgment—Court of last resort.*

See APPEAL, 114.

5. *Appeal—Jurisdiction—Annulment of process-verbal—Matter in controversy.*

See MUNICIPAL CORPORATION, 174.

2. BUSINESS TAX.

6. *Foreign corporation—Branch bank—Gross income—31 Vict. c. 3, s. 4 (N.B.)*—L., manager of a foreign banking corporation, having a branch in St. John, derived during the year 1875 an income of \$46,000, but, sustained losses in the bank's business beyond that amount. The bank, having made no gain, disputed the assessment under 22 Vict. c. 37; 31 Vict. c. 36; and 34 Vict. c. 18, on an income of \$46,000. *Held*, Henry, J., dissenting, that under the Acts relating to rates and taxes in the City of St. John, foreign banking corporations doing business in St. John are liable to be taxed on the gross income received by them during the fiscal year; and that L. had been properly assessed. *Larocess v. Sullivan*, iii., 117.

[On appeal to the Privy Council the judgment was reversed: 6 App. Cas. 373.]

7. *Taxation within City of Halifax—37 Vict. c. 30, s. 1—27 Vict. c. 81 (N.S.)—Ships not registered in Halifax.*—K. resided and did business in the City of Halifax, and owned ships always sailing abroad not registered at Halifax, and which had never visited the Port of Halifax. Under 37 Vict. c. 30, s. 1, and 27 Vict. c. 81, ss. 340, 347, 361 (N.S.), the assessors in rating the property of K. included the value of these vessels. *Held*, that the shipping in question did not come within the meaning of the words "whether such ships or vessels be at home or abroad at the time of assessment," in said s. 347, and therefore were not liable to be assessed for city rates. *City of Halifax v. Kenny*, iii., 497.

8. *St. John City Assessment Act, 1882, 45 Vict. c. 59 (N.B.)*—Chartered bank—Assessment on capital—Par value—Real and personal property—Payment—Protest—Waiver—Quashing roll.]—Section 25, *St. John City Assessment Act* of 1882, provides that all rates and taxes levied and imposed upon the city shall be raised by an equal rate upon the value of the real estate in the city, upon the personal estate of the inhabitants, and of persons deemed and declared to be inhabitants and residents of the city, and upon the capital stock, income, or other thing, of joint stock companies, corporations, or persons associated in business, and after providing for the levying of a poll tax, "that the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income, and joint stock, according to the true and real value and amount of the same as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof." Section 28 provides that, "all joint stock companies and corporations shall be assessed, under this Act, in like manner as individuals; and for the purposes of such assessment, the president, or any agent, or manager, of such joint stock companies shall be deemed and taken to be the owner of the real and personal estate, capital stock and assets of such company or corporation, and shall be dealt with, and may be proceeded against accordingly." The president of the Bank of New Brunswick, was assessed, under the Act, on real and personal property of the bank, valued at \$1,100,000. The capital stock at the time of assessment was \$1,000,000, and he offered to pay taxes on that amount which was refused. It was not disputed that the bank was possessed of real and personal property of the value assessed. The Supreme Court (N.B.) refused *certiorari* to quash the assessment (23 N. B. Rep. 591.) *Held*, Fournier, J., dissenting, that the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, \$1,000,000.—The chamberlain may summarily issue execution for taxes not paid within a certain time after notice, and to avoid execution the bank paid the taxes under protest. *Held*, that such payment did not preclude them from afterwards taking proceedings to have the assessment quashed. *Ex parte Lewin*, xi., 484.

9. *Municipal tax — Railway — Statutory statement—Departure from form—52 Vict. c. 27, s. 125 (N.B.)—Appeal—Arbitrary rating.*]—By 52 Vict. c. 27, s. 125 (N.B.), the agent or manager of any joint stock company or corporation established out of the limits of the province who had an office in the City of St. John, N.B., therefore, may be assessed upon the gross and total income received for his principals with specified deductions therefrom and to enable the assessors to rate the company, etc., the agent or manager is required on 1st May each year to furnish to the assessors a statement under oath in a form prescribed shewing the gross income for the year preceding and details of the deductions; and in event of neglect to furnish such statement the assessors may fix the rate according to their best judgment, and there shall be no appeal from such rate. The general superintendent of the Atlantic division of the Canadian Pacific Railway has an office for the company in the city, and was furnished by the assessors with a printed form to fill up as required by the Act, i. e.:—Gross and total income received

for his company during the preceding year, as to which he stated that no such income had been received and he erased the clause, "this amount has not been reduced or off set by any loss," etc., the other items were not filled in. This was handed to the assessors as the statement required, and they treated it as neglect to furnish any statement and rated the superintendent on a large amount as income received. A rule for a *certiorari* to quash the assessment was refused. *Held*, reversing the judgment appealed from, Fournier and Taschereau, JJ., dissenting, that it was sufficiently shewn that the company had no income from its business in St. John liable to assessment; that the superintendent was justified in departing from the prescribed form in order to shew the true state of the company's business; and that the assessors had no authority to disregard the statement furnished and arbitrarily assess the superintendent in any sum they chose without making inquiry into the business of the company as the statute authorizes. *Held*, that the provision that there shall be no appeal from an assessment where no statement is furnished only applies to an appeal against over-valuation under C. S. N. B. c. 100, s. 60, and not to an appeal against the right to make any assessment. *Held*, per Gwynne, J., that s. 125 of the Act, 52 Vict. c. 27 (N.B.), does not apply to railway companies. *Timmerman v. City of St. John*, xxi., 691.

10. *Insurance company — Net profits—Deposit with government—Statement to assessors—Variance from form—52 Vict. c. 27, s. 126 (N.B.)*]—By *St. John City Assessment Law, 1889, 52 Vict. c. 27, s. 126*, the agent or manager of any life insurance company doing business out of the province is liable to be assessed upon the net profits made by him as such agent or manager from premiums received on all insurances effected by him; and to assist in assessment of such company, the agent or manager is required to furnish at a certain time in each year a statement under oath, in a prescribed form, setting forth the gross income and particulars of the losses and deductions claimed therefrom, and shewing the ratable net profits for the preceding year.—By the form, deductions to be made from the gross income consist of reinsurance, rebate, etc., actually paid and accounts paid on matured claims on policies issued by such agent or manager. In the form presented by the agent, there was no amount entered for deductions of the latter class, but instead thereof, an item was inserted, of "75 per cent. of premiums deposited with government for protection of policy holders," which was an addition to the form. The statement shewed that the deductions exceeded the gross income, leaving no net profits to be taxed. The assessors disregarded the result shewn, and assessed the agent on net profits for the year. A rule *nisi* for a *certiorari* to quash the assessment was obtained, in support of which it was shewn by affidavit that the amount required to be deposited with the Dominion Government was about 75 per cent. of the premiums received, and that the amount of such deposits from time to time returned to the company was applied for the benefit of policy-holders and formed no part of the income or profits of the company. The Supreme Court (N.B.) discharged the rule and refused to quash the assessment on the grounds that the government deposit was part of the income of the company held in reserve for certain purposes and formed

no part of the expenditure, and that the agent had no right to strike out certain requirements of the form prescribed and substitute different statements of his own. *Held*, reversing the judgment appealed from, Fournier and Taschereau, J.J., dissenting, that the agent was justified in departing from the form to shew the real state of the business of the company, and the deposit was properly classed with the deductions, and the assessors had no right to disregard the statement and arbitrarily assess the company as they did.—Appeal allowed with costs. *Peters v. City of St. John*, Cass. Dig. (2 ed.) 56.

11. *Assessment and taxes—Tax on railway—Nova Scotia Railway Act—Exemption—Mining company—Construction of railway by—R. S. N. S. (5 Ser.) c. 53.*—By R. S. N. S. (5 ser.) c. 53, s. 9, s.-s. 30, the roadbed, etc., of all railway companies in the province is exempt from local taxation. By s. 1 the first part of the Act, from s. 5 to 33 inclusively, applies to every railway constructed and in operation, or thereafter to be constructed under the authority of any Act of the legislature, and by s. 4, part two applies to all railways constructed or to be constructed under the authority of any special Act, and to all companies incorporated for their construction and working. By s. 5, s.-s. 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway. *Held*, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that part one of this Act applies to all railways constructed under provincial statutes and is not exclusive of those mentioned in part two; that a company incorporated by an Act of the legislature as a mining company, with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act (49 Vict. c. 45 [N.S.]) to hold and work the railway "for general traffic, and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part two of c. 53, R. S. N. S. (5 ser.), entitled 'Of Railways,'" is a railway company within the meaning of the Act; and that the reference in 49 Vict. c. 145, s. 1, to part two does not prevent said railway from coming under the operation of the first part of the Act. *International Coal Co. v. County of Cape Breton*, xxii., 305.

12. *Street railway—Contract—Municipal corporation—Taxes.*—By a by-law of the City of Montreal a tax of \$2.50 was imposed upon each working horse in the city. By s. 16 of the appellant's charter it is stipulated that each car employed by the company shall be licensed and numbered, etc., for which the company shall pay "over and above all other taxes, the sum of \$20 for each two-horse car, and \$10 for each one-horse car." *Held*, affirming the judgment of the court below, that the company was liable for the tax of \$2.50 on each and every one of its horses. *Montreal Street Ry. Co. v. City of Montreal*, xxiii., 259.

13. *Exemptions—Real property—Chattels—Furniture—Gas pipes—Highway—Title to portion—Legislative grant of soil—11 Vict. c. 14*

(*Can.*)—55 Vict. c. 48 (O.)—"Ontario Assessment Act, 1892."—Gas pipes which are the property of a private corporation laid under the highways of a city, are real estate within the meaning of the "Ontario Assessment Act, 1892," and liable to assessment as such, as they do not fall within the exemptions mentioned in s. 6 of that Act. The enactments effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vict. c. 14), operated as a legislative grant to the company of so much of the land of the streets, squares, and public places of the city as might be found necessary to be taken and held for the purposes of the company, and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation.—The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares, and public places in a city ought to be separately in the respective wards, of the city in which they may be actually laid, as in the case of real estate. *Consumers Gas Co. of Toronto v. City of Toronto*, xxvii., 453.

14. *Municipal corporation—Railways—Taxation—By-laws—Construction of statute—Voluntary payment—Action en répétition—29 Vict. c. 57, s. 21 (Can.)—30 Vict. c. 57 (Can.)*—The statute, 29 Vict. c. 57 (Can.), consolidating and amending the Acts and Ordinances incorporating the City of Quebec, by s.-s. 4 of s. 21, authorizes the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactures, occupations, business, arts, professions, or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised or in operation in the city; and all persons by whom the same are or may be carried on, exercised or put in operation therein, either on their own account or as agents for others; and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation." *Held*, that the general words of the statute quoted are sufficiently comprehensive to authorize the imposition of a business tax upon railway companies; and, further, that the power thus conferred might be validly exercised in the same general terms as those expressed in the statute. *Held, per Strong, C.J.*, that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality. Judgment of the Court of Queen's Bench (O. R. 8 Q. B. 246) affirmed. *Canadian Pacific Ry. Co. v. City of Quebec; Grand Trunk Ry. Co. v. City of Quebec*, xxx., 73.

15. *Tax on ferries—Navigation—Jurisdiction of Montreal Harbour Commissioners—Double tax—39 Vict. c. 52 (Que.)*

See CONSTITUTIONAL LAW, 53.

16. *Repair of roadway—Local improvements—Termination of franchise.*

See No. 50, *infra*.

3. COLLECTION AND DISTRESS.

17. *Notice of assessment—Alteration without notice by Court of Revision.*—The plain-

tiffs, in 1874, being liable to assessment, were served by the assessors of a municipality with a notice in the form prescribed by 32 Vict. c. 36, s. 48 (Ont.), as then in force, stating the amount of personality, other than income at \$2,500, but on the roll, as finally revised by the Court of Revision, the amount was put down at \$25,000, thereby changing, without further notice, the total value of real and personal property and taxable income from \$20-900 to \$43,400. *Held*, reversing the judgment appealed from (25 U. C. C. P. 169; 26 U. C. C. P. 323) that the want of proper notice under the statute invalidated the roll and that the rate calculated on the amount of the assessment so increased could not be collected. *Nicholls v. Cumming*, i., 395.

18. *Levy under execution—Void assessment—Arrest—Liability of municipal corporation—Damages.*—A collector of taxes who issued a warrant founded upon a void assessment and caused an arrest to be made, was guilty of trespass, and being at the time a servant of the municipal corporation, under their control specially appointed to collect and levy the amount so assessed, the maximum of *respondent superior* applied, and a verdict in favour of the person aggrieved against both the collector and the corporation was ordered to stand. Judgment of the Supreme Court of New Brunswick (20 N. B. Rep. 479), reversed. *Ritchie, C.J.*, and *Taschereau, J.*, dissenting. *McSorley v. City of St. John*, vi., 531.

19. *Injunction — Prohibition — Municipal corporation—Assessment roll—Arts. 716, 746a, Municipal Code (Que.)—Art. 1031 C. C. P.—Costs.*—The county of H. made a triennial assessment roll in 1875, and in 1876, without declaring that it was an amendment of the roll of 1875, the corporation made an increased assessment. The appellants, assessed upon both rolls took proceedings by *requête libellée* to have the new roll declared invalid, null and void, and for a writ of *prohibition* against the sale of their lands for delinquent taxes. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits, held the roll of 1876 valid as an amendment of the roll of 1875. The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially a new roll, and therefore null and void. On appeal to the Supreme Court, upon equal division of opinion the judgment appealed from stood affirmed, but without costs, and it was—*Held*, *per Henry, Taschereau, and Gwynne, JJ.*, affirming the Court of Queen's Bench, that the roll of 1876, not being a triennial assessment roll, or an amendment of such a roll, was illegal and null, and that respondents were entitled to an injunction to restrain the corporation from selling their lands, and that the writ which issued, whether or not it was correctly styled "writ of prohibition," was properly issued and should be maintained. — *Per Ritchie, C.J.*, and *Strong and Fournier, JJ.*, that a writ of prohibition issued under art. 1031 C. C. P., as was the writ issued in this case, will only lie to an inferior tribunal, and was, in the present case, an entirely inappropriate remedy. *Coté v. Morgan*, vii., 1.

20. *Rating lands — Name of occupier—Description as to persons and property—C. S. N. B. c. 109, s. 16—Several assessments in one*

warrant — One illegal assessment — Warrant vitiated.—Section 16 of c. 100, C. S. N. B., provides that, "real estate, where the assessors cannot obtain the names of any of the owners, shall be rated in the name of the occupier or person having ostensible control, but under such descriptions as to persons and property . . . as shall be sufficient to indicate the property assessed, and the character in which the person is assessed." G. died leaving a widow who administered to his estate and resided on the land. The property was assessed for several years in the name of the estate of G., and in 1878 it was assessed in the name of "Widow G." *Held*, affirming the judgment appealed from, that the last assessment was illegal, as not comprising such description of persons and property as would be sufficient to indicate the property assessed, and the character in which the person was assessed.—Where a warrant for the collection of a single sum for rates of several years, included the amount of an assessment which did not appear to be against either the owner or the occupier of the property; *Held*, affirming the judgment appealed from, that the inclusion of such assessment would vitiate the warrant. *Flanagan v. Elliott*, xii., 435.

21. *Ontario Assessment Act — R. S. O. (1887) c. 193—Construction of statute—Arrears of taxes—Distress.*—The provisions of s. 135 of the Ontario Assessment Act (R. S. O. (1887) c. 193) in respect to taxes on the roll being uncollectable, providing for what the account of the collector in regard to the same shall shew on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative.—Taxes on the roll not collected cannot be recovered by distress in a subsequent year unless such arrears have accrued while the land in respect of which they were imposed was unoccupied. Judgment of the Court of Appeal (26 Ont. App. R. 459) affirming the judgment of the Divisional Court (30 O. R. 16) affirmed. *City of Toronto v. Caston*, xxx., 390.

22. *Voluntary payment—Pressure—Mistake—Répétition de l'indu.*

See No. 49, *infra*.

24. *Collection of taxes—Delivery of roll—Statute—Directory or imperative provision—55 Vict. c. 48 (O.)*

See STATUTE, 120.

25. *Voluntary payment — Mistake — Construction of statute—Business tax on railways.*

See No. 14, *ante*.

26. *Payment under protest—Appeal from assessment—Res judicata.*

See No. 1, *ante*.

4. DOMICILE.

27. *Ontario Assessment Act, R. S. O. (1887) c. 193, ss. 15, 65—Illegal assessment—Court of Revision—Business carried on in two municipalities.*—[Section 65 of the Ontario Assessment Act (R. S. O. [1887] c. 193) does not enable the Court of Revision to make valid an assessment which the statute does not authorize.—Section 15 of the Act provides that "where any business is carried on by a per-

son in a municipality in which he does not reside, or in two or more municipalities. the personal property belonging to such person shall be assessed in the municipality in which such personal property is situated."—*W.*, residing and doing business in Brantford, had certain merchandise in London, stored in a public warehouse, used by other persons as well as *W.* He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for *W.*, residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at Loudon. *Held*, affirming the decision of the Court of Appeal, that *W.* did not carry on business in London within the meaning of the said section, and his merchandise in the warehouse was not liable to be assessed at London. *City of London v. Watt*, xxii., 300.

28. *Municipal assessment — Domicile — Change of domicile*—*Intention*—59 Vict. c. 61 (N.B.)—By the St. John City Assessment Act (59 Vict. c. 61) s. 2 "for the purposes of assessment, any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment, or profession, within the City of St. John, shall be deemed . . . an inhabitant and resident of the said city." *J.* carried on business in St. John as a brewer up to 1893, when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York where he carried on the business of buying and selling stocks and securities having offices for such business and living at a hotel paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John visiting his children and taking recreation. He had no business interests there but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John he appealed against the assessment unsuccessfully and then applied for a writ of *certiorari* with a view to having it quashed. *Held*, reversing the judgment of the Supreme Court of New Brunswick, that as there had been a long continued actual residence by *J.* in New York, and as on his appeal against the assessment he had avowed his *bonâ fide* intention of making it his home permanently or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicile, and that in St. John had been abandoned within the meaning of the Act. *Jones v. City of St. John*, xxx., 122.

29. *Inhabitant of the City of St. John—Tax on land — Wife's separate property—Income tax—Arrest—Damages.*—*E.*, a resident of St. John up to June, 1877, went with his family to Nova Scotia. In 1878, he returned to New Brunswick with his family, and leaving them in Portland, went to Boston in search of employment, where he remained until 1880, employed in business, and paid taxes there. Whilst *E.* was absent, his wife's father gave her a lot of leasehold property in St. John. In the fall of 1878 she removed the family into

the city and resided on her property until *E.* returned and lived with his wife. For the taxes for 1879, assessed against him in respect of his wife's property, and an income tax against himself, both included in one assessment, he was arrested and imprisoned for two days, when he paid under protest, and was released. In an action for false imprisonment, he obtained a verdict for \$150.—The full court set it aside, and granted a new trial, a majority being of opinion that *E.* was constructively an inhabitant of St. John, and as such liable to be assessed, and that there ought to be a new trial, as it did not very distinctly appear that objections were taken at the trial, or upon what the motion for a nonsuit was to depend. *Held*, that *E.* was not liable to assessment, and that the verdict should stand. Appeal allowed with costs. *Edwards v. Mayor of St. John*, Cass. Dig. (2 ed.) 48.

5. DRAINAGE.

30. *Drainage — Adjoining municipalities—Finding outlet — Petition.*—In a drainage scheme for a single township, the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen v. McGillivray* (18 Ont. App. R. 516), and *Nissouri v. Dorchester* (14 O. R. 294), distinguished. *Township of Ellice v. Hiles; Township of Ellice v. Crooks*, xxiii., 429.

31. *Municipal by-law — Special assessments—Drainage — Powers of council as to additional necessary works — Ultra vires resolutions—Executed contract.*—Where a municipal by-law authorized the construction of a drain, benefiting lands in an adjoining municipality which was to pass under a railway, where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity, the construction of such culvert was a matter within the provisions of s. 573 of the Municipal Act (R. S. O. [1887] c. 184), and a new by-law authorizing it was not necessary. *Taschereau, J.*, dissenting. *The Canadian Pacific Railway Co. v. The Township of Chatham*, xxv., 608.

32. *Intermunicipal drainage—Initiation and contribution—By-law—Ontario Drainage Act of 1873—Ontario Consolidated Municipal Act, 1892.*—The provisions of the Ontario Municipal Act (55 Vict. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet, or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged.—If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law or taking any steps towards that end, by an action brought before

the passing of such contributory by-law. *Broughton v. Grey and Elma*, xxvii., 495.

33. *Drainage works continued into adjoining municipality—Lands and roads benefited—Surveyor's report—Defective award.*

See DRAINAGE, 1.

34. *Drainage — Extra cost of works—Repairs — Misapplication of funds — Intermunicipal works — Negligence — Damages — By-law — Re-assessment — R. S. O. (1877) c. 175—46 Vict. c. 18 (Ont.).*

See WATERCOURSES, 2.

35. *Local improvements—Ontario Drainage Acts — Assessment of wild lands — "Benefit"—"Outlet liability"—"Injuring liability"—Construction of statute.*

See DRAINAGE, 7.

36. *Intermunicipal works — Drainage—Removal of obstruction — Municipal Act, 1883, s. 570 (Ont.) — Municipal Amendment Act, 1886, s. 22 (Ont.) — Report of engineer.*

See MUNICIPAL CORPORATION, 96.

6. EXEMPTIONS.

37. *Indian lands — Surrender — Crown grant — Sale of lands for taxes—Lists attached to warrant — 32 Vict. c. 36, s. 128 (O.), R. S. O. (1877) c. 108, s. 156.]—In 1857, a lot, forming part of a tract surrendered to the Crown by the Indians, was sold, and in 1869, the Dominion Government issued a patent therefor to the plaintiff. In 1870, the lot, less two acres, was sold to one D. K., for taxes assessed and accrued due for 1864 to 1869, who sold to defendant, and defendant purchased the two acres at a sale for taxes in 1873. The warrants for sale of the lands were signed by the warden with the seal of the county, and authorized the treasurer "to levy upon the various parcels of land hereinafter mentioned for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands in question. The lists and the warrant were pasted together by the whole length of the top, but the lists were not authenticated by the signature of the warden nor the seal of the county. By the Assessment Act, 32 Vict. c. 36, s. 128 (O.), the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, etc., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county.—*Held*, affirming the judgment appealed from, (4 Ont. App. R. 159), Fournier and Henry, JJ., dissenting, that upon the surrender the lands became ordinary unpatented Crown lands, and upon being granted became liable to assessment; that the list and warrant may be regarded as one entire instrument and, as the substantial requirements of the statute had been complied with, any irregularities had been cured by R. S. O. (1877) c. 180, s. 156. *Church v. Fenton*, v., 239.*

38. *School tax — Exemptions — Objects of incorporation — Educational institution — Farm — Revenue—32 Vict. c. 16, s. 13 (Q.)—C. S. L. C. c. 15, s. 77 — 41 Vict. c. 26 (Q.)]—Action for \$808.50, school taxes on property occupied by respondents as a farm,*

in one municipality, the products of which, except a portion sold to cover working and cultivating, were consumed at the mother house in another municipality. *Held*, reversing the judgment appealed from, that as the property was not occupied by the respondents for the objects for which they were incorporated, but was held for reserve purposes, it did not come within the exemptions from taxation for school rates by 32 Vict. c. 16, s. 13, (Que.). *Held*, also, that said s. 13 does not, as regards exemptions, extend s. 77 of c. 15 C. S. L. C., which has not been repealed, but which has been amended by the addition of 41 Vict. c. 6, s. 26 (Que.). *Commissaires d'Ecoles de St. Gabriel v. Les Sœurs de la Congregation de Notre Dame de Montreal*, xii., 45.

39. *Educational institution — C. S. L. C. c. 15—41 Vict. c. 6, s. 26 (Que.)—Art. 712 Mun. Code (Que.)—Exemption.]—Action for \$408, taxes on property occupied and used as a private boarding and day school for girls, by defendant, who employed teachers, and had, on an average, for their education, as pupils, 85 girls per annum. The institution never received any grant from the plaintiff.—*Held*, Gwynne, J., dissenting, that the institution was an educational establishment within the meaning of 41 Vict. c. 6, s. 26, (Que.), and exempt from municipal taxation. *Wylie v. City of Montreal*, xii., 384.*

40. *Lands leased to the Crown—Occupation for Crown purposes — Municipal taxation — Prerogative — Exemptions — 10-11 Vict. c. 17—23 Vict. c. 61, s. 53—C. S. L. C. c. 4, s. 2—37 Vict. c. 51, s. 237 (Que.)—Mun. Code L. C. Art. 712—36 Vict. c. 21, s. 18, (Que.)]—The Dominion Government leased property in Montreal for the use of Her Majesty, with the condition that the government should pay all taxes and assessments which might be levied and become due on the premises during the term of the lease. The corporation sued the owners of the property for municipal taxes accrued during the time the property was so leased to and occupied by the government. On intervention filed by the Attorney-General of Canada praying that the action be dismissed; *Held*, reversing the judgment appealed from, Strong, J., dissenting, that the property in question was exempt from taxation under C. S. L. C. c. 4, s. 2. *Corporation of Quebec v. Leacycraft*, (7 Q. L. R. 56) distinguished. *Attorney-General of Canada v. City of Montreal*, xiii., 352.*

41. *Exemptions—Railway bridge and railway track—40 Vict. c. 29, ss. 326, 327—Injunction — Extension of town limits — Navigable river—Powers of legislature—43 & 44 Vict. c. 62 (Q.)]—*Held*, reversing the judgment appealed from (Fournier and Taschereau, JJ., dissenting) that the portion of the railway bridge built over the Richelieu river, and the railway track belonging to the company within the limits of the Town of St. Johns, are exempt from taxation under 40 Vict. c. 29, ss. 326, 327 (Que.), although no return had been made to the council by the company of the actual value of their real estate in the municipality. 2. That a warrant to levy the rates upon such property for the years 1880-83, is illegal and void, and that a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same.*

As to whether the clause in the Act of incorporation of the town extending the limits to

the middle of the Richelieu, a navigable river, is *intra vires* of the Legislature of Quebec, the holding of the court below that it was *intra vires* was affirmed. *Central Vermont Ry. Co. v. Town of St. Johns*, xiv., 288.

[This judgment was affirmed by the Privy Council, 14 App. Cas. 590.]

42. *Municipal taxes—Special assessments—Exemption*—41 Vict. c. 6, s. 26 (Que.)—*Educational institution—Tax.*]—By 41 Vict. c. 6, s. 26 (Que.) all educational houses or establishments which do not receive any subvention from the corporation or municipality in which they are situated are exempt from municipal and school assessments "whatever may be the Act in virtue of which such assessments are imposed, and notwithstanding all dispositions to the contrary." *Held*, reversing the judgment appealed from and restoring the judgment of the Superior Court (M. L. R. 2 S. C. 265). Ritchie, C.J., dissenting, that the exemption from municipal taxes enjoyed by educational establishments under 41 Vict. c. 6, s. 26, extends to taxes imposed for special purposes, e.g., the construction of a drain in front of their property.—*Per Strong, J.* Every contribution to a public purpose imposed by superior authority is a "tax." *Ecclésiastiques de St. Sulpice v. City of Montreal*, xvi., 399, 407.

[The Privy Council refused leave to appeal.]

43. *Manitoba added territory—Lands of the C. P. Ry. Co.—Exemptions from taxation—Grant from Crown—Sale—Occupation.*]—By the charter of the C. P. Ry. Co., the lands of the company in the North-West Territories, until they are either sold or occupied, are exempt from Dominion, provincial or municipal taxation for 20 years after the grant thereof from the Crown. *Held*, affirming the judgment appealed from, (7 Man. L. R. 1), that lands which the company have agreed to sell and as to which the conditions of sale have not been fulfilled are not lands "sold" under this charter. And further, that the exemption attaches to lands allotted to the company before the patent is granted by the Crown.—Lands which were in the N. W. Territories when allotted to the company did not lose their exemption on becoming, afterwards, a part of the Province of Manitoba. *Municipality of Cornwallis v. Canadian Pacific Ry. Co.*, xix., 702.

44. *R. S. N. S. (4 ser.) c. 32, s. 52—Town of Dartmouth—City of Halifax—Exemption from County taxes.*

See MANDAMUS, 1.

45. *Crown lands—Beneficial interest—Exemption.*

See CONSTITUTIONAL LAW, 21.

46. *Tax on railways—Mining company's railway—R. S. N. S. (5 ser.) c. 53.*

See No. 11, ante.

47. *Sale of lands for delinquent taxes—Validating Act—Crown lands.*

See No. 51, infra.

7. INTEREST.

48. *Arrears of taxes—Adding percentages—"Interest"—Legislative power—Constitu-*

tional law—B. N. A. Act, 1867, ss. 91, 92—Manitoba Municipal Act, 1886.

See MUNICIPAL CORPORATION, 2.

8. LOCAL IMPROVEMENTS.

49. *Frontage tax—Local improvements—Répétition de l'indu—Error of law—35 Vict. c. 51 s. 192—Onus probandi—Voluntary payment—Notice—Actio conductio indebiti—Quashing roll.*]—Under 37 Vict. c. 51, s. 192, the council of the City of Montreal, by resolution, adopted a report recommending the construction of permanent sidewalks, with estimates indicating the quality and approximate cost of the work. The city, in 1877, caused the sidewalks to be made, and assessed the cost according to frontage upon the proprietors on each side of the streets, and a statement to be deposited with the treasurer for collection. B., an owner of real estate on these streets, did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving a notice to pay within fifteen days certain sums, in default whereof execution would issue, she paid, without protest, \$946.25; on the 29th October, 1878, she paid a further sum of \$438.90, and on the 14th November, 1878, without notice, paid \$700 on account of 1877 assessment. She afterwards sued the city, to recover the said sums as paid in error, believing the said assessment valid. *Held*, affirming the judgment of the court below, Henry and Gwynne, JJ., dissenting, that B. had failed, both in her allegations and proof, to make out a case for the recovery of the assessment paid, either as a voluntary payment in ignorance of its illegality or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might, in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of a void assessment illegally extorted. 2. That the city council, in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict. c. 51, s. 192. 3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal. *Bain v. City of Montreal*, viii., 252.

50. *Street railway company—Repair of roadway—Local improvements—Termination of franchise.*]—A street railway company in Toronto was to be assessed in respect of repairs to the roadway traversed by the railway, as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon owners or occupiers after they have ceased to be such.—*Held*, that after the termination of its franchise the company was not liable for these rates. *City of Toronto v. Toronto St. Ry. Co.*, xxiii., 198.

51. *Special tax—Ex post facto legislation—Warranty.*]—Assessment rolls were made by the City of Montreal under 27 & 28 Vict. c. 60 and 29 & 30 Vict. c. 56, apportioning the cost of certain local improvements on lands

benefited thereby. One of the rolls was set aside and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed. New rolls were made assessing the lands for the same improvements, and the purchaser paid the taxes, and brought suit *en garantie* to recover the amount from the vendor.—*Held*, affirming the judgment of the courts below, Gwynne, J., dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were, therefore, the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had ceased to be owner of the lands, and that she was not obliged by her warranty and declaration that taxes had been paid to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale. *Banque Ville Marie v. Morrison*, xxv., 289.

52. *Municipal corporation—Assessment—Montreal harbour improvements—Widening streets—Construction of statute—57 Vict. c. 57 (Que.)—52 Vict. c. 79, s. 139 (Que.)*—A by-law passed in 1889 under the Quebec statute, 52 Vict. c. 79, s. 139, provided for a special loan in aid of the Montreal harbour improvements, and appropriated \$163,750 thereof for the construction of a tunnel with approaches as shewn on a plan annexed from Craig street, in a line with Beaudry street to the tunnel, passing by the side of W.'s land, and subsequently a resolution was passed to open, alongside the open-cut approach, a high level roadway to give communication from Craig street to Notre-Dame street, on the surface of the ground. These works constituted, in fact, an extension of Beaudry street, from the line of Craig street, 77 feet in width, of which 42 feet constituted an open-cut approach to the tunnel and the remainder, the high-level roadway, as shewn on the plans, this prolongation being 42 feet wider than Beaudry street. The resolution provided that a portion of the expense should be paid by the parties interested and benefited as for local improvements made by the "widening" of Beaudry street. Upon proceedings to quash the assessment, the Superior Court held that it was authorized and legalized as an "existing roll," by the Act, 57 Vict. c. 57, s. 1. (Que.), and this judgment was affirmed by the Court of Review. *Held*, reversing the decision of both courts below, that notwithstanding the reference therein to "existing rolls," the application of the latter Act should be restricted to the cost of the "widening" only of the streets therein named in cases where there were, at the time of its enactment, existing rolls prepared by the commissioners fixing the limits for that purpose, and these words could not have the effect of extending the nature and character of such works so as to include works manifestly forming part of the harbour improvement scheme and chargeable against the special loan. *White v. City of Montreal*, xxix., 677.

53. *Municipal institution—Expropriation—Local improvement—Rating in proportion to benefit—Trivial objections first taken in appeal—52 Vict. c. 79, ss. 209, 213, 243 (Que.)—54 Vict. c. 78, s. 2 (Que.)—55 & 56 Vict. c. 49, s. 22 (Que.)—57 Vict. c. 57 (Que.)*—Where a statute for the widening of a street directs that part of the cost shall be paid by the
s. c. D.—6

owners of property bordering on the street, the apportionment of the tax should be made upon a consideration of the enhancement in value accruing to such properties respectively and the rate levied in proportion to the special benefit each parcel has derived from the local improvement.—Where an assessment roll covering over half a million dollars has been duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trivial amount, he cannot be permitted afterwards to urge that objection before the courts upon an application to have the assessment roll set aside. Judgment appealed from (Q. R. 9 Q. B. 142) reversed; judgment of the Superior Court, (Q. R. 15 S. C. 43) restored; Gwynne, J., dissenting. *City of Montreal v. Bélanger*, xxx., 574.

54. *Repair of streets—Pavements—Assessment on property owner—Double taxation—24 Vict. c. 39 (N.S.)—53 Vict. c. 60, s. 14 (N.S.)*

See MUNICIPAL CORPORATION, 172.

55. *Municipal corporation—By-law—Assessment—Local improvement—Agreement with owners of property—Construction of subway—Benefit to lands.*

See MUNICIPAL CORPORATION, 126.

56. *Municipal corporation—Highway—Private way—Widening street—Local improvement—Special assessment.*

See RES JUDICATA, 12.

57. *Appeal—Expropriation of lands—Local improvements—Future rights.*

See APPEAL, 51.

58. *Municipal corporation—Expropriation—Widening streets—Assessments—Excessive valuation—52 Vict. c. 79, s. 228 (Que.)*

See MUNICIPAL CORPORATION, 128.

9. SALE OF LANDS.

59. *Halifax Assessment Act, 1833—Lien—Priority—Mortgage made before statute—Construction of Act—Healing clauses—Evidence—Curing irregularities—Notice—Land tax sales.*—The Halifax City Assessment Act, 1833, made taxes assessed on real estate a first lien thereon except as against the Crown.—*Held*, affirming the judgment appealed from, (21 N. S. Rep. 155, 279, *sub nom. Cogswell v. Holland*), that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed.—The Act provided that in case of non-payment of taxes assessed upon any lands thereunder the city collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which the mayor should affix his signature and the seal of the corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed, and in any suit or other proceeding relating to the assessment on any real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessments, etc. In a suit to foreclose a mortgage on land which had been sold for taxes under the Act the legality of the assessment and sale

was attacked.—*Held, per Strong, Taschereau, and Gwynne, JJ.*, that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section it was necessary for defendants to shew, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the Act, and the production and proof of one of such statements was not sufficient.—*Per Ritchie, C.J., and Patterson, J.*, that it was sufficient to produce the statement returned to the collector signed and sealed as required, with the warrant annexed, and in the absence of evidence to the contrary it must be assumed that all proceedings were regular and that the provisions of the statute requiring duplicate statements had been complied with.—The Act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.—*Held, per Strong, Taschereau and Gwynne, JJ.*, that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be imposed.—*Per Ritchie, C.J., and Patterson, J.*, that the deed could not be invoked in the present case to cure any defects in the proceedings, as it was not delivered to the purchaser until after the suit commenced; therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the Act, rendered the sale void. *O'Brien v. Cogswell*, xvii., 420.

60. *Levy of rates—By-law—Tax sale—Irregular proceedings—Validating acts—Nullity—Crown lands—Exemptions—45 Vict. c. 16, s. 7 (Man.)—51 Vict. c. 27, s. 53 (Man.)*—Lands in Manitoba assessed for 1880-81, were sold in 1882 for unpaid taxes. The statute authorizing the assessment required the municipal council, after the final revision of the assessment roll in each year, to pass a by-law for levying a rate on all real and personal property mentioned in said roll, but no such by-law was passed in either 1880 or 1881. The lands so assessed and sold were formerly Dominion lands which were sold and paid for in 1879, but the patent did not issue until April, 1881. The patentee sold the lands, and after the tax sale a mortgage thereon was given to R. who sought to have the tax sale set aside as invalid. 45 Vict. c. 16, s. 7 (Man.) provides that every deed made pursuant to a sale for taxes shall be valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from its execution, and 51 Vict. c. 27, s. 58 (Man.) provides that "all assessments heretofore made and rates struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby."—*Held*, affirming the judgment appealed from. (6 Man. L. R. 565), Patterson, J., dissenting, that the assessments for the years 1880-81 were illegal for want of a by-law, and the sale for taxes thereunder was void. If the lands could be taxed the defect in the assessments was not cured by 45 Vict. c. 16, s. 7, or by 51 Vict. c. 27, s. 58, which would cure irregularities, but could not make good a deed that was a nullity, as was the deed here.—*Held, per Gwynne, J., Patterson, J., contra*, that the patents for the lands not having issued until April, 1881, the taxes accrued while the lands were vested in the Crown, and exempt from taxation.—*Held*,

per Strong, J., following *McKay v. Chrysler*, (3 Can. S. C. R. 436), and *O'Brien v. Cogswell*, (17 Can. S. C. R. 420), that the operation of 45 Vict. c. 16, s. 7 (Man.), is restricted to curing defects in sale proceedings as distinguished from proceedings in assessing and levying the taxes, which led to the sale, *Whelan v. Ryan*, xx., 65.

61. *Sale of land for delinquent taxes—Arrears—Nullity—32 Vict. c. 36, s. 155.*
See SALE, 99.

10. SCHOOL RATES.

62. *County of Halifax—School rates—Liability of Town of Dartmouth—Assessing present ratepayers for previous year—Mandamus—Jurisdiction.*—The Town of Dartmouth is not liable to contribute to the assessment for the support of schools in the municipality of the County of Halifax. Ritchie, C.J., dissenting.—If so liable, a writ of mandamus could not issue to enforce the payment of such contribution as the amount of the same would be uncertain and difficult to be ascertained.—The ratepayers of 1886 could not be assessed for school rates leviable in previous years.—*Per Ritchie, C.J.*, dissenting, that only the City of Halifax is exempt from such contribution, and the Town of Dartmouth is liable. *Dartmouth v. The Queen*, xiv., 45.
See 9 Can. S. C. R. 509; 5 Russ. & Geld. 311, and Cass. Dig. (2 ed.), 285, 515.

63. *Exemption from taxation—Educational institution—Revenue from farm.*
See No. 38, ante.

64. *By-law—Exemption from municipal rates—School taxes.*
See BY-LAW, 6.

ASSIGNMENTS.

1. FRAUDULENT CONVEYANCES AND PREFERENCES, 1-12.
2. MORTGAGES AND SECURITIES, 13-19.
3. EFFECT OF ASSIGNMENTS GENERALLY, 20-38.

1. FRAUDULENT CONVEYANCES AND PREFERENCES.

1. *Power to sell on credit—Fraudulent preference—R. S. O. (1877), c. 118, s. 2.*—An assignment for benefit of creditors provided that the assignee should, as soon as convenient, collect all outstanding credits, sell the real and personal property assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he should deem best or suitable, having regard to the object of these presents. No fraudulent intention of defeating or delaying creditors was shewn.—*Held*, affirming the judgment appealed from (8 Ont. App. R. 402), that the authority to sell upon credit did not, *per se*, invalidate the deed, and it could not on that account be impeached as a fraudulent preference within the Act, R. S. O. (1877) c. 118, s. 2. *Slater v. Badenach*, x., 296.

2. *Setting aside deed — Right of action — Assignee—Voluntary assignment—Arts. 13, 19 C. C. P.—Pleading.*—In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not by a plea in his own name ask to have a conveyance, made by the debtor to the plaintiff, prior to the assignment under which defendant claimed, rescinded or set aside as fraudulent against creditors.—The nullity of a deed should not be pronounced without putting all the parties to it *en cause en déclaration de jugement commun*.—*Semble*, The plaintiff, being a second purchaser in good faith and for value, acquired a valid title to the property in question which he could set up even against an action brought directly by the creditors. *Burland v. Moffatt*, xi., 76. NOTE. Overruled in *Porteous v. Reynar*, (13 App. Cases 120).

3. *For benefit of creditors—Fraudulent preference — Statute of Elizabeth — Resulting trusts—Unreasonable conditions.*—An assignment for benefit of creditors provided for distribution of assets by the assignee as follows: 1. To pay certain named creditors in full; 2. If sufficient assets remained after such payment, to pay certain other named creditors in full, or, if the assets should not be sufficient, to distribute the same *pro rata* among such second preferred creditors; 3. To divide the remaining assets among all creditors not preferred in equal proportions according to their respective claims, and, 4. To pay the balance remaining after distribution to the assignor. The deed required all creditors executing it to release the assignor from any and every claim of the executing creditor against him, and provided that the assignee should not be liable to account for more money and effects than he should actually receive, nor be responsible for any loss or damage to the trust, except such as should happen through his own wilful neglect. In an action to set aside the deed; *Held*, affirming the judgment appealed from, (20 N. S. Rep. 194), Gwynne and Patterson, J.J., dissenting, that the deed was one to which it was unreasonable to except unpreferred creditors to become parties, and therefore, and because it contained a resulting trust in favour of the debtor, it was void under the statute, 13 Eliz. c. 5. *Whitman v. Union Bank of Halifax*, xvi., 410.

4. *For benefit of creditors—Preferences—R. S. N. S. c. 92, ss. 4, 5, 10—Chattel mortgage—Statute of Elizabeth — Fraud.*—Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors it is "an assignment for the general benefit of creditors" under s. 10 of the Nova Scotia Bills of Sale Act (R. S. N. S. c. 92), and does not require an affidavit of *bona fides*. *Durkee v. Flint* (19 N. S. Rep. 487), approved and followed; *Archibald v. Hubley* (18 Can. S. C. R. 116), distinguished.—A provision in an assignment for the security and indemnity of makers and indorsers of paper not due, for accommodation of the debtor, does not make it a chattel mortgage under s. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it.—An assignment is void under the Statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to

a firm of which the assignee is a member, and provides for allowance of interest on a claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of the business as he previously had, though no one of these provisions taken by itself would have such effect.—A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part," will also avoid the assignment under the Statute of Elizabeth.—Authority to the assignee not only to prefer parties to accommodation paper, but also to pay all "costs, charges and expenses to arise in consequence" of such paper is a badge of fraud. *Kirk v. Chisholm*, xxvi., 111.

5. *Debtor and creditor—Payment by debtor — Appropriation — Preference — R. S. O. (1887), c. 124.*—A trader carrying on business in two establishments, mortgaged both stocks to R. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances, and a portion of overdue notes, and there were some notes not matured and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under the execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods, under an order of the court, the balance remaining due on his mortgage. *Horsfall v. Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against C. to recover the amount representing the unsecured part of his debt which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors.—*Held*, affirming judgment appealed from (23 Ont. App. R. 230), that there was no preference to B. within R. S. O. [1887] c. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue, and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens v. Boisseau*, xxvi., 437.

6. *Assignment for benefit of creditors—Preferred creditors—Moneys paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors.*—In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor, on the ground that it is void under the Statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor, or persons claiming under him can

be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox v. Worral* (26 N. S. Rep. 366), questioned. *Taylor v. Cummings*, xxvii., 589.

7. *Assignment for benefit of creditors—Fraudulent preference—Bribery—Promissory note—[Illegal consideration—Nullity—Costs.]*—A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantage given to a particular unsecured creditor is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business.—A promissory note given to secure the amount of the preferences payable under such an arrangement is wholly void.—An agreement for a payment to an inspector of an insolvent estate to influence his consent to an arrangement which is not for the general benefit of the creditors is a bribe which is, in itself, sufficient reason to adjudge the transaction, to induce which it was given, corrupt, fraudulent and void. *Brigham v. Banque Jacques-Cartier*, xxx., 429.

8. *Pressure by creditors—Criminal process—Stifling criminal charge—Extortion.*
See DURESS, 1.

9. *For benefit of creditors—R. S. O. (1887) c. 124, s. 2—Preference—Pressure—Criminal liability.*

See FRAUDULENT CONVEYANCES, 1.

10. *Book debts—Insolvent debtor—Fraudulent preference.*

See FRAUDULENT PREFERENCE, 5.

11. *Expected profits—Statute of Elizabeth—Assets exigible in execution—Pressure.*

See FRAUDULENT PREFERENCES, 10.

12. *Insolvency—Preference—Payment in money—Cheque of third party—R. S. O. c. 124, s. 3.*

See FRAUDULENT PREFERENCES, 11.

2. MORTGAGES AND SECURITIES.

13. *Right of action—Conveyance subject to mortgage—Obligation to indemnify—Assignment—Principal and surety—Implied contract.*—The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt, and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same. *Maloney v. Campbell*, xxviii., 228.

14. *Banking—Collateral security—R. S. C. c. 120, Schedule "C"—53 Vict. c. 31, ss. 74, 75—Renewals.*—An assignment made in the form "C" to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note is not valid as a security under the seventy-fourth section of the "Bank Act." The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 152), affirmed. *Bank of Hamilton v. Halstead*, xxviii., 235.

15. *Assignment for benefit of creditors—Registration—Defective jurat—R. S. N. S. (5 ser.) c. 92—Chattel mortgage.*

See BILL OF SALE, 1.

16. *Assignment in trust for creditors—Prior chattel mortgage—Possession of goods—Delivery.*

See CHATTEL MORTGAGE, 11.

17. *Mortgage—Loan to pay off prior encumbrance—Interest—Assignment of mortgage—Purchase of equity of redemption—Accounts.*

See MORTGAGE, 64.

18. *Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease.*

See MORTGAGE, 20.

19. *Mortgage—Assignment of equity—Covenant to indemnify—Assignment of covenant—Right of mortgage on covenant in mortgage.*

See MORTGAGE, 2.

3. EFFECT OF ASSIGNMENTS GENERALLY.

20. *Assignment for benefit of creditors—Creditor attacking trust deed—Right to participate in benefits.*—A creditor is not barred from participating in the benefits of an assignment in trust for the general benefit of creditors, by an unsuccessful attempt to have such deed set aside as defective. *Gardner v. Klæpfer*, xv., 390.

21. *Assignment for benefit of creditors—Description of property—Change of possession—R. S. O. c. 119, ss. 5, 23—Interpleader—Ont. Judicature Act, ss. 28, 35—Appeal—Company—Powers.*—The decision of a judge of the High Court of Justice (which by s. 28, Jud. Act, is the decision of the court) on an interpleader issue to try the title to property taken under execution on a final judgment in the suit in which it is issued, is not an interlocutory order within the meaning of that expression in s. 35, Jud. Act, or if it is, it is such an order as was appealable before the passing of that Act, and in either case it is appealable now to the Court of Appeal for Ontario.—An assignment by the directors of a joint stock company of all the property of the company to trustees for the benefit of creditors is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.—*Quære*, Is such an assignment within the provisions of the Chattel Mortgage Act of Ontario, R. S. O. c. 119?—Where such an assignment was made, and the property formally handed over by the directors to the trustees, who took possession and subsequently advertised and sold the property under the deed of assignment: *Held*, that if the assignment did come within the terms of the Act its provisions were fully complied with, the deed being duly registered and there being an actual and continued change of possession as required by s. 5.—In such deed of assignment the property was described as "all the real estate, lands, tenements and hereditaments of the said debtors (company) whatsoever and whosoever, of or to which they are now seized or entitled, or of or to which they have any estate, right or interest of any kind or description, with the appurtenances, the particulars of

which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock in trade, goods, chattels, . . . and all other the personal estate and effects whatsoever and wheresoever, whether upon the premises where the debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever." The schedule annexed specifically designated the real estate and included the foundry, erections and buildings thereon erected, and all articles such as engines, etc., in or upon said premises.—*Held*, that this was a sufficient description of the property intended to be conveyed to satisfy R. S. O. c. 119, s. 23; *McCall v. Wolff* (13 C. S. C. R. 130), approved and distinguished. The judgment appealed from (13 Ont. App. R. 7), was affirmed. *Hovey v. Whiting*, xiv., 515. NOTE.—48 Vict. c. 26, s. 12, was passed since this decision.

22. *Transfer of mortgage—Assignment of rights under policy—Signification of transfer—Art. 1571 C. C.—Right of action.*—In the Province of Quebec, an assignment of rights under a policy of insurance is ineffectual unless signification thereof has been made in compliance with the provisions of article 1571 of the Civil Code.—A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss. *Guerin v. Manchester Assurance Company*, xxix., 139.

23. *Assignment of chose in action—Suit by assignee—Notice to debtor—R. S. N. S. (4 ser.) c. 94, ss. 355, 357.*—R. S. N. S. (4 ser.) c. 94, s. 355, authorizes the assignee of a chose in action in certain cases to sue thereon in the Supreme Court as his assignor might have done, and s. 357 provides that before such action is brought a notice in writing, signed by the assignee, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall be served on the party to be sued. Pursuant to this section the assignee of a debt served the following notice:—"Pictou, Nov. 21st, 1878. Alex. Grant, Esq.: Admr. Estate of Alexander McDonald, deceased.—Dear Sir,—You are hereby notified in accordance with c. 94 of the Revised Statutes, s. 357, that the debt due by the above estate to Finlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of twelve hundred dollars, the amount of the said debt so assigned to him. S. H. Holmes, Att'y. of Alex. D. Cameron.—*Held*, affirming the judgment appealed from (23 N. S. Rep. 50), that the notice was a sufficient compliance with the statute. *Grant v. Cameron*, xviii., 716.

24. *Lien for costs—Costs of execution creditor—Construction of statute—48 Vict. c. 26, s. 9—49 Vict. c. 25, s. 2—R. S. O. (1887) c. 124, s. 9.*—Under 48 Vict. c. 26, s. 9 (Ont.), as amended by 49 Vict. c. 25, s. 2, an assignment for the general benefit of creditors has precedence of executions not completely executed by payment subject to the lien of any execution creditor for his costs where there is but one execution in the sheriff's hands, or of the creditor who has first placed his execution in the sheriff's hands when there are more than one.—*Held*, Gwynne and Patterson, JJ., dis-

senting, that the lien created by this statute is not confined to the costs of issuing the execution, but covers all the costs of the action.—Judgment appealed from (16 Ont. App. R. 311) affirmed. *Clarkson v. Ryan*, xvii., 251.

25. *Partnership—Judicial abandonment—Dissolution—Composition—Subrogation—Confusion of rights—Compensation—Arts. 772 and 778 C. C. P.*—A partner in a commercial firm which made a judicial abandonment, was indebted to the firm at the time of the abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm and, with the approval of the court, the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," . . . "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect of the partnership. *Held*, affirming the decision of the court below, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estates of each partner as well as the partners' individual rights as between themselves.—*Held*, reversing the decision of the court below, Strong, C.J., and Taschereau, J., dissenting, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that in consequence any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion. *McLean v. Stewart*, xxv., 225.

26. *Fraudulent preference—Clause in deed—Authority to sell on credit.*

See No. 1, ante.

27. *Insolvent Act of 1875—Default in accounting—Sureties.*

See INSOLVENCY, 6.

28. *Policy of insurance—Transfer to married woman—Locus standi of assignee—Art. 183 C. C.*

See INSURANCE, LIFE, 3.

29. *Deed of composition—Execution—Ratification—Discharge—Estoppel.*

See DEBTOR AND CREDITOR, 5.

30. *Equitable assignment—Evidence—Attachment by garnishment.*

See ESTOPPEL, 8.

31. *Insurance against fire—Condition of policy—Fraudulent statement—Proof of fraud—Presentation—Assignment of policy—Fraud by assignor.*

See INSURANCE, FIRE, 67.

32. *Assignment for benefit of creditors—Judicial abandonment—Subrogation—Confusion of rights—Compensation—Arts. 772 and 778, C. C. P.—Composition and discharge.*

See PARTNERSHIP, 6.

33. *Chattel mortgage—Mortgagee in possession—Negligence—Willful default—Sale under powers—"Slaughter sale"—Practice—Revocation of assignment.*

See SALE, 40.

34. *Assignment of debt—Confidential relations—Knowledge of bookkeeper.*

See PRINCIPAL AND AGENT, 23.

35. *Assignment of lease—Mortgage—Discharge—Abandonment of security.*

See LEASE, 6.

36. *Assignment for benefit of creditors—Composition and discharge—Release of debtor.*

See PARTNERSHIP, 42.

37. *Assignment for benefit of creditors—Lease—Forfeiture—Company—Shareholder—Personal liability under covenant—Waiver.*

See LANDLORD AND TENANT, 3.

38. *Money paid—Voluntary payment—Insolvency of debtor—Action by assignee—Status.*

See PAYMENT, 3.

ATTORNEY.

1. *Power of attorney—Authority to settle and adjust claim—Right to receive award.]—A crew of sailors claiming salvage from the owners of a vessel picked up at sea gave a power of attorney to P. authorizing him to bring suit or otherwise settle and adjust any claim which they might have for salvage services, etc. Held, affirming the local judge in admiralty, that P. was not authorized to receive payment of the sum awarded for salvage or to apportion the respective shares of the sailors therein. Taschereau, J., took no part in judgment, entertaining doubts as to the jurisdiction of the court to hear the appeal. Churchill v. McKay —In re "The Quebec," xx., 472.*

2. *Lien for costs—Money in court—Sub-collocation—Opposition en sous ordre—Art. 753 C. C. P.,*

See OPPOSITION, 16.

3. *Compromising client—Agreement not to appeal—Estoppel.*

See APPEAL, 412.

4. *Admission—Jurisdiction of Supreme Court.*

See APPEAL, 178.

AND *see* BAR—MANDATORY—POWER OF ATTORNEY—PRINCIPAL AND AGENT—SOLICITOR.

ATTORNMENT.

See MORTGAGE.

AVERAGE.

See INSURANCE, MARINE.

AVEU JUDICIAIRE.

Dividing admission, art. 231, C. C. P.
See EVIDENCE, 219.

AVOIDANCE OF CONTRACTS.

See CONTRACT—DEBTOR AND CREDITOR—DURESS—FRAUDULENT CONVEYANCES—FRAUDULENT PREFERENCES—MISTAKE.

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See ARBITRATIONS.

BAIL.

Capias—Special bond—Exoneretur—Parties.

See APPEAL, 3.

BAIL BOND.

See BOND.

BAILIFF.

Election petition—Preliminary objections—Service of petition—Bailliff's return—Cross-examination—Production of copy—Arts. 56 & 78 C. C. P.]—A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified.—Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. Beauharnois' Election Case, xxvii., 232.

BAILMENT.

1. *Consignment of goods against supplies advanced—Sale of fish in storage—Right to hold for unpaid purchase money—Part delivery—Warehouseman's lien—Trover.]—Appellant was supplying S., who was connected with the fishing business, and who in return sent him all his fish, to be sold and proceeds placed to credit of account. In October, 1877, S. forwarded in the usual manner 77 bbls. herring and 236 bbls. mackerel, and in November personally sold all the fish, including the mackerel, to R., when some were delivered, leaving 236 bbls. in appellant's store, and in part payment received a note for \$4,000 at four months, which he transferred to appellant on general account. R. became insolvent, and respondent, as assignee, brought an action of trover to recover the 236 bbls. of mackerel. After issue joined, the appellant proved against the estate of R. on the note and received a dividend. The Chief Justice at the trial gave judgment for plaintiff and found that the plaintiff had knowledge that the fish were included by the insolvent in his statement of assets and made no objection to the*

assignee or creditors.—*Held*, Strong, J., dissenting, that as the appellants had failed to prove any right of property in themselves, the respondent had as against them a right to immediate possession; that S. had not stored the fish by way of security for a debt due by him, and as the appellants had knowledge that the fish were included by the insolvent in his statement of assets, to which statement they made no objection, but proved against the estate for the whole amount of the note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon. *Troop v. Hart*, vii., 512.

2. *Bill of lading — Conditions — Carriage by connecting lines — Delivery — Loss after transit—Warehousing—Notice of claim.*

See RAILWAYS, 3.

3. *Fraudulent appropriation — Unlawful receiving — Simultaneous Acts.*

See CRIMINAL LAW, 13.

4. *Common carriers — Express company — Receipt for money parcel — Conditions precedent — Notice of claim — Pleading—Money counts — Special pleas.*

See CARRIERS, 12.

5. *Carriers — Shipping — Chartered ship—Perishable goods — Excepted perils — Transshipment — Obligation to tranship — Repairs — Reasonable time.*

See CARRIERS, 7.

6. *Construction of contract — Agreement to secure advances — Sale — Pledge — Delivery of possession — Arts. 434, 1025, 1026, 1027, 1472, 1474, 1492, 1994c, C. C. — Bailment to manufacturer.*

See CONTRACT, 214.

BANKRUPTCY.

See INSOLVENCY.

BANKS AND BANKING.

1. CHEQUES AND ORDERS, 1-3.
2. DEPOSITS, 4-6.
3. DISCOUNTING BILLS, ETC., 7-10.
4. MISTAKE, 11.
5. PRINCIPAL AND AGENT, 12, 13.
6. SECURITIES FOR LOANS, ETC., 14-29.
7. SET-OFF, 30, 31.
8. SURETIES, 32-34.
9. TRANSFER OF SHARES, 35.
10. WINDING-UP, 36-47.

1. CHEQUES AND ORDERS.

1. *Cheque payable at future date—Powers of manager—Acceptance—Discount in course of business.*—In 1881 G., having business transactions with the Exchange Bank, agreed with C., president and manager of the bank, that in lieu of further advances, the bank would accept his cheque made payable at a future date.

On 19th October, 1881, G. drew a cheque on the Exchange Bank, and after having it accepted as follows: "Good on 19th February, 1882, T. Craig, president," got the cheque discounted by the People's Bank, and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on 23rd May, presented at the Exchange Bank and paid. Thereupon another cheque for the same amount was accepted in the same way and discounted by the People's Bank on 7th September, 1883. At the time of the suspension of payment by the Exchange Bank, the People's Bank had in its possession four cheques signed by G. and accepted by T. Craig, President of the Exchange Bank, which were subsequently presented for payment and duly protested. The total of these cheques was \$66,020.64, and one of them, dated 7th September, 1883, for \$31,000, was a renewal of the cheque the proceeds of which had been paid to the credit of G. in the Exchange Bank.—On action for \$66,020.64 on the four cheques, the Exchange Bank pleaded, *inter alia* that C. had not acted within the scope of his duties and within the limits of his powers, and that the bank had never authorized or ratified his acceptance of G.'s cheques.—*Held*, per Ritchie, C.J., and Fournier and Henry, JJ., affirming the judgment appealed from (M. L. R. 3 Q. B. 232). (Strong, Taschereau and Gwynne, JJ., *contra*), that under the circumstances the Exchange Bank was liable for the acceptance by their president and manager of G.'s cheques discounted by the People's Bank in good faith and in due course of business. *Exchange Bank of Canada v. People's Bank*, 23 C. L. J. 391; Cass. Dig. (2 ed.) 79.

2. *Payment of cheques — Joint payees — Indorsement by partner — Estoppel.*

See PARTNERSHIP, 16.

3. *Marked cheque — Fraudulent alteration — Recovery of money paid by mistake.*

See No. 11, *infra*.

2. DEPOSITS.

4. *Insolvent bank—Liquidation — Deposit after suspension.*—A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit. *Ontario Bank v. Chaplin; in re Exchange Bank of Canada*, xx., 152.

5. *Deposit for special purpose — Promissory note — Misapplication of funds — New trial—Evidence — Verdict.*—S. Bros. effected a composition under the Insolvent Act of 1875, for thirty-three and one-third per cent. By deed of composition and discharge the insolvents covenanted to pay the composition in four payments, and to give each creditor notes for the several payments falling due 4th November, 1876, 4th May, 1877, 4th November, 1877, and 4th May, 1878.—The first notes were to be secured by the indorsement of H. and D. and all the notes were to be further secured by the assignee, holding in trust as security real estate, which formed part of the assets.—The notes were given, and the first series paid, except two held by the Ontario

Bank.—The gross composition was \$11,931.89; each instalment being \$2,982.97. The two unpaid notes for \$260.84, and \$1,036.30 were charged at maturity to the account of S. B. in the bank, and a renewal taken from them with the same indorsers for two months, the original notes being cancelled.—The note was three times again renewed, always with the same indorsers, for 20, 10 and 30 days, the last due 1st May, 1877, for \$1310.97. In 1876, S. B. being unable to meet the composition payments, applied to the trust and loan company for a loan of \$9,000—and subsequently for an additional \$5,000—on the security of their real estate, which the company agreed to advance. The firm of S. C. & G., solicitors (of which plaintiff was the senior partner) was employed by the company to see that title was made satisfactory, and complete the loan. A mortgage for \$9,090 was executed and registered in December, 1876, and a mortgage of \$5,000 was given in March, 1877. The title was found vested in the assignee as security for the composition notes, and it became necessary to pay the whole composition and to obtain from the assignee a re-conveyance to S. B. to protect the title of the company, as mortgagees, before the loan could be carried out. Plaintiff was instructed to purchase or pay all the notes unpaid, and for that purpose, on 3rd May, 1877, the company, inclosed two cheques to plaintiff for \$8,599.90 and \$4,780.70, with direction to pay the notes falling due the following day. On 4th May plaintiff deposited in the bank the following cheque:

“OTTAWA, May 4th, 1877.

“THE CANADIAN BANK OF COMMERCE.

“Pay Manager Ontario Bank or order \$4,500 to purchase composition notes of S. B. for T. and L. Co. of Canada.

STEWART, CHRYSLER & GORMULLY.”

which was indorsed by the manager: “Credit S. B. composition account. (Sd.) J. H. W., Mgr.”—The second instalment of composition notes due on that day, with the note for \$1,310.97, was paid and charged against this deposit. The bank manager who held the one note then three days overdue, and at whose office all the notes falling due that day were payable, had been assured by S. B. in the previous October or November that the overdue note should be the first thing paid out of the loan they had then in contemplation, and he was therefore prepared to find that that note was being provided for. H., bookkeeper for S. B., had been their agent in procuring that note to be held in expectation of payment from the loan and did not know that the loan was to pay the latter notes only, and he had that very day a statement shewing notes to the amount of \$4,100 to be paid, including the \$1,310.97 note. But while the manager and H. were thus depending on having this particular note paid, the plaintiff was ignorant of its existence.—As soon as plaintiff became aware that the note had been charged to this account he protested against the right of the defendant to do so. He afterwards paid in other moneys to meet the third and fourth instalments, and at last he signed the formal confirmation of his account, required by some banks when the customer's cheques are returned to him. This was an oversight and was corrected by a tender of the note in question, and a demand of the money.—This action was instituted to recover the \$1,310.97, and at the trial the only question left to the jury was:—“Was this \$1,310 a composition

note or was it not? Was it a composition note of S. B.?” And the jury was directed that if it was not such, the bank was not justified in charging it against the deposit of \$4,500, and the plaintiff entitled to recover. The jury found for plaintiff for \$1,503.50; the judge reserving leave to move to enter nonsuit. Defendants obtained a rule *nisi* to shew cause why the verdict should not be set aside and a new trial had or a nonsuit pursuant to leave reserved, or why a new trial should not be had, on the ground that the verdict was contrary to law and evidence, and against the weight of evidence. Judgment made absolute the rule and ordered that the verdict be set aside and a new trial had without costs, on the ground that the note was a composition note and that the only question left to the jury, being whether this note was or was not a composition note, and the jury, having found a verdict for the plaintiff, must have been of the opinion that it was not, and consequently the finding of the jury was contrary to the evidence.—The Court of Appeal for Ontario allowed an appeal with costs, and directed that the rule should be discharged with costs, on the ground that the question as to whether the note in question was a composition note or not was immaterial, and that there was no evidence proper to leave to the jury on behalf of defendants, and the defence set up was not maintainable in law upon the undisputed facts in evidence.—*Held*, affirming the judgment appealed from (Ritchie, C.J., doubting, and Gwynne, J., dissenting), that the deposit was for the specific purpose of meeting the notes due that day, and the manager was not authorized to apply the money to take up the note in question, and there was no ratification by plaintiff of his act. The whole case being before the court on undoubted evidence it was unnecessary to refer it to another jury.—*Per* Gwynne, J. The case having been tried only upon a question wholly irrelevant as to whether the note in question was a composition note or not, and nothing else having been submitted to the jury, the verdict was the result of a defective proceeding and there was a total miscarriage which could only be rectified by a new trial.—The Supreme Court of Canada has been given by special statute jurisdiction in its discretion to order a new trial if the ends of justice may seem to require it, although such new trial may be deemed necessary upon the ground that the verdict is against the weight of evidence—that is to say, upon a ground for which it would have been competent for the court of first instance in the mere exercise of its discretion to have ordered a new trial. But that the court should prevent a trial, which the court of first instance had thought fit to order, purely in the exercise of its discretionary power, is an assertion of jurisdiction which is wholly beyond the powers vested in the Supreme Court of Canada. Appeal dismissed with costs. *Ontario Bank v. Stewart*, Cass: Dig. (2 ed.) 571.

6. Deposits — Special account — Agency-Payment — Art. 1143 C. C.

See PRINCIPAL AND AGENT, 20.

3. DISCOUNTING BILLS, ETC.

7. Agent's excess of authority — Dealings contrary to instructions — Liability to bank—

Discounting for his own accommodation — Parties on accommodation paper.—K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank which he discounted as such agent, and without indorsing the drafts, used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty as creating a debt due to it from his firm, the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment—*Held*, affirming the Supreme Court (N.S.), Gwynne, J., dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.—*Per Ritchie, C.J.* K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm and when the firm received that money they became debtors to the bank for the amount. — *Per Strong and Patterson, J.J.* The agent being bound to account to the bank for the funds placed at his disposal, he became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. Whether or not the bank had a right to elect to treat the act of the agent as a tort was not important as in any case there was a debt due. — *Per Gwynne, J.* The evidence does not establish that these drafts were anything else than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper and were not obliged to look to any other for payment. *Merchants Bank of Halifax v. Whidden*, xix, 53.

8. *Company—Bills of exchange and promissory notes—Discount by president—Credit to company's account—Payments out to company's creditors—Liability of company upon note given without authority—Bona fides.*—Where the president of an incorporated company made a promissory note in the company's name without authority, and discounted it with the company's bankers, the proceeds being credited to the company's account and paid out by cheques in the company's name to its creditors whose claims should have been paid by the president out of the funds which he had previously misappropriated, the bankers, who had taken the note in good faith are entitled to charge the amount thereof at maturity against the company's account.—Judgment of the Court of Appeal for Ontario (23 Ont. App. R. 66), affirmed. *Bridgewater Cheese Factory Co. v. Murphy*, xxvi., 443.

9. *Collateral security—Assignment—"Bank Act," Sch. "C."*

See No. 20, *infra*.

10. *Bills and notes — Conditional indorsement—Principal and agent — Knowledge by agent—Constructive notice—Deceit by bank manager.*

See PRINCIPAL AND AGENT, 34.

4. MISTAKE.

11. *Recovery of money paid by mistake—Marked cheque—Fraudulent alteration—Payment by third party — Liability for loss — Negligence.*—A person dealing with others is under no duty to take precautions to prevent loss to the latter by the criminal acts of third persons and the omission to do so is not, in itself, negligence in law.—B. having a small account in the Bank of H. had his cheque for \$5 marked "good," and altering it to \$500, had it cashed by the Imperial Bank. The same day it went through the clearing house and was paid by the Bank of H. to the Imperial Bank. The error was discovered next day by the Bank of H., and repayment demanded from the Imperial Bank and refused. The Bank of H. brought action to recover from the Imperial Bank \$495, overpaid on the cheque. Defendant contended that the note as presented to be marked good was so drawn as to make the subsequent alteration an easy matter, and the plaintiff's act in marking it in that form was negligence which prevented recovery.—*Held*, affirming the judgment appealed from (27 Ont. App. R. 590), which affirmed that at the trial (31 O. R. 100), that there was nothing in the circumstances to take the case out of the rule that money paid by mistake can be recovered back, and the Bank of H. was therefore entitled to judgment. *Imperial Bank of Canada v. Bank of Hamilton*, xxxi., 344. Affirmed by Privy Council ([1903] A. C. 49).

5. PRINCIPAL AND AGENT.

12. *Principal and agent—Agent's authority—Representation by agent—Principal affected by—Advantage to other than principal—Knowledge of agent—Constructive notice.*—Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else other than his principal, such representation cannot be called that of the principal.—In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it.—The local manager of a bank having received a draft to be accepted, induced the drawee to accept by representing that certain goods of his own were held by the bank as security for the draft.—In an action on the draft against the acceptor; *Held*, affirming the decision of the Supreme Court of New Brunswick, that the bank was not bound by such representation; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it, which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank. *Richards v. Bank of Nova Scotia*, xxvi., 381.

13. *Advances by bank—Payment to release hypothecs—Security taken in name of third party.*

See No. 17, *infra*.

6. SECURITIES FOR LOANS, ETC.

14. *Transfer of hypothec—The Banking Act—34 Vict. c. 5, s. 40—Advances on real estate—Nullity.*—B. transferred a hypothec on real estate to the bank, as collateral security for a note which was discounted and the proceeds placed at B.'s credit on the day of the transfer. In an action against the assignee of the insolvent estate of the mortgagee to set aside a prior hypothec, *Held*, affirming judgment appealed from (1 Dor. Q. B. 357), that the transfer to the bank was not given to secure a past debt, but to cover a contemporaneous loan, and was, therefore, null and void, as being a contravention of the Banking Act, 34 Vict. c. 5, s. 40. *Bank of Toronto v. Perkins*, viii., 603.

15. *The Banking Act—R. S. C. 120, s. 53 et seq.—Warehouse receipts—Parol agreement—Surplus—Arts. 1031, 1981, C. C.—Privileged Lien.*—The bank took warehouse receipts from H. as collateral for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of goods represented by the receipts, after paying debts for which they were immediately pledged, claimed under parol agreement to hold that surplus in payment of other debts due by H. H. having become insolvent, a creditor brought action claiming that the surplus must be distributed ratably among the general body of creditors. H. was not made party to the suit. *Held*, affirming the court of Queen's Bench, that the parol agreement was not contrary to the provisions of the Banking Act, and that, after the goods were lawfully sold, the money that remained, after applying the proceeds of each sale to its proper note, could properly be applied by the bank under the terms of the parol agreement. (Ritchie, C.J., doubting, and Fournier, J., dissenting).—*Per Taschereau, J.* That H. ought to have been made party to the suit. *Thompson v. Molsóns Bank*, xvi., 664.

16. *Bank stock pledged to another bank as collateral security—Bank Act, 34 Vict. c. 5, s. 40—42 Vict. c. 45, s. 2—Exchange Bank charter—35 Vict. c. 51 (D.)—43 Vict. c. 22, s. 8—46 Vict. c. 20, ss. 9 & 10—Arts. 14, 1970, 1973, 1975 C. C.—Loss of thing pledged—Restitution.*—The Exchange Bank in advancing money to F. on the security of Merchants Bank shares caused them to be assigned to their managing director and an entry made in their books that he held the shares on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on the managing director pledged these shares to another bank for his own personal debt and absconded. *Held*, affirming the judgment appealed from (M. L. R. 7 Q. B. 11), that upon repayment by F. of the loan, the Exchange Bank was bound to return the shares or pay their value.—The prohibition to advance upon security of shares of another bank contained in the amendment to the general Banking Act applies to the bank and not to the borrower.—*Per Patterson, J.* Assuming that the subsequent

amendment of the general Bank Act forbade the taking of such security by any bank, the amendment did not alter the charter of the Exchange Bank, under which it had power to take the shares in question in its corporate name as collateral security.—To take such security may have become an offence against the banking law, punishable from the beginning as a misdemeanour and subject to a pecuniary penalty, but it was not *ultra vires*.—The declaration of art. 14 C. C. that prohibitive laws import nullity has no application to such a case. *Exchange Bank v. Fletcher*, xix., 278.

17. *Advances—Security in name of third person—Prête-nom—Lien on shares—Claim in insolvency—Mal-administration—Interest—Commencement of proof in writing—Payments to release hypothecs—Evidence—Accounts.*—In 1875 the plaintiff, Lamoureux, became insolvent and made an assignment of his estate to one Auger, an official assignee. The claims filed against the estate amounted in all to the sum of \$93,105.78 of unprivileged debts, and \$895.92 of privileged debts. Among other claims was one by the Bank of St. Johns, defendant, sworn to by L'Ecuier, their cashier, on 5th February, 1876, for \$41,431.41, and it was stated that the bank held no security except certain shares owned by the plaintiff of the stock of said bank, valued at \$18,000. The claim was based entirely upon promissory notes, eighteen of which, amounting to \$11,788.71, had not then matured, the remainder being overdue. A large number of these notes, amounting to \$24,500., were indorsed by the cashier, who held a hypothec on property of plaintiff to the extent of \$30,000 to secure him against his said indorsements.—Plaintiff compounded for twenty-five cents in the dollar, and the defendant, the Bank of St. Johns, was placed on his dividend sheet for the amount of the alleged unsecured debt, viz., \$23,431, the composition on which would be \$5,857.86. Plaintiff, not having the amount required to pay the composition to his creditors, in all \$24,173.63, entered into negotiations with defendant Molleur to procure it. The extent and nature of the negotiations form the subject of the present contention. They resulted in the execution of a deed dated 16th May, 1876, between plaintiff, his assignee, and Molleur, whereby it was recited that plaintiff had received from Molleur \$25,251.55 to pay the composition and to secure repayment of this sum, with a bonus of \$4,000, one of the considerations of the advance. At plaintiff's request the assignee thereby assigned and transferred to Molleur all the property belonging to the plaintiff. Molleur was also to be paid the costs and expenses connected with the administration of the property, and continued to deal with the property of plaintiff until 1879, when plaintiff brought this action, alleging the above facts, and further that at the time of the execution of the deed of 16th May, 1876, Molleur was acting as *prête-nom* or *locum tenens* of the other defendant, the Bank of St. Johns; that the bank and not Molleur had advanced the \$25,251.55 mentioned in the deed; that although it had been agreed between plaintiff and Molleur that only the \$25,251.55, with a bonus of \$4,000, should be paid to the bank, and upon such payment being made Molleur should re-transfer to plaintiff the property remaining in his possession, Molleur had wrongfully paid to the bank the claim against his estate in full, and had also so improperly managed the estate as to cause plaintiff consider-

able loss. Plaintiff asked that Molleur should render an account of his administration, that the bank might be declared to be equally responsible with Molleur, who should be held to be merely the *locum tenens* of the bank, that defendants jointly should be obliged to repay to him the balance of moneys which they had received, after paying the amounts which were authorized by the deed of 16th May, 1876, and that Molleur should also be obliged to re-assign to plaintiff the balance of the plaintiff's property then unsold.—In the course of the proceedings Molleur by his pleas denied that the properties belonging to plaintiff were assigned to him to pay only the sums mentioned by plaintiff; denied that he was *locum tenens* of the bank; and alleged that at the time of the execution of said deed it was agreed between plaintiff and him, that besides the said sums he should pay the bank the full balance remaining due to said bank on the claim filed against plaintiff beyond the amount of the composition, such balance, amounting to \$35,573.56, having necessarily to be paid to discharge the hypothecs held by the indorsers of plaintiff's notes. Thus the total amount which, by Molleur's contention, would have to be paid out of the proceeds of plaintiff's property would be \$64,825.11, with expenses of management, and he also claimed that plaintiff agreed to pay interest on the various sums at 9 per cent. per annum. He stated that up to that time he had paid to the bank, and on hypothecary claims on the property and for expenses of management, \$62,977.85; he admitted having received from the revenues and sale of portions of the property \$49,633.09, and having sold another portion for \$1,000 not yet received. He went into particulars with respect of his dealings with certain portions of the property and filed certain statements of account. The result would have been that a considerable balance would still have appeared owing to the bank if the contention of Molleur was correct. Plaintiff objected to the statements of account as not having been sworn to, as required by law, and reiterated his contentions with respect to the agreement between him and Molleur. — On 20th May, 1882, the Superior Court, District of Irberville, by interlocutory judgment, *Held*, that the defendant Molleur was the *locum tenens* of the bank, and ordered him to render a proper sworn account. This Molleur did, not only of his dealings with the property up to the time of the institution of the action, but also up to the date of rendering said accounts (15th August, 1882), and claimed that a balance was still due him of \$3,814.18.—On 29th January, 1883, Chagnon, J., delivered judgment re-affirming his previous finding, that Molleur was the *prête-nom* or *locum tenens* of the bank; held, also, that Molleur was justified in paying to the bank the amount of the notes for which they held the indorsement of L'Ecuyer, there being no evidence that the hypothec held by L'Ecuyer was not a *bona fide* security of which the bank had a right to the benefit; that the bank was justified in retaining the shares of the plaintiff to be applied on the balance of its claim; that the bank was entitled also to \$25,251.55, with the bonus of \$4,000, and to interest on all the amounts it was thus declared entitled to at the rate of 6 per cent. per annum, with the exception of the bonus, upon which the judge considered no interest should be paid; that, as regards the amount alleged to have been improperly paid the assignee, plaintiff must be left to his recourse against the assignee, or his estate, he being then dead;

that, as regards any questions of mal-administration, the recourse of plaintiff, if any, should be reserved to him; and the court directed the accounts to be submitted to an auditor to ascertain the balance on the principles laid down in the judgment, and also directed that, if a balance should be payable by defendants, the defendant Molleur should re-assign to plaintiff the balance of property remaining unsold.—The auditor found a balance in favour of plaintiff of \$3,200.60.—On appeals by both parties, the Court of Queen's Bench reversed the findings of Chagnon, J., that Molleur was *locum tenens* of the bank, and with respect to the rate of interest. In other respects it practically affirmed the judgment of the Superior Court, and sent the case back to that court to have the account rectified in accordance with suggestions in their judgment. *Held*, that the judgment of Chagnon, J., should be affirmed, with the exception hereafter mentioned. The evidence was ample to lead to the conclusion, beyond any reasonable doubt, that the defendant Molleur was acting as the *prête-nom* or *locum tenens* of the bank. The only difficulty with regard to this point was created by the fact that there was no writing to connect the bank with the deed of 16th May, 1876, no *commencement de preuve par écrit*. But this difficulty was not insuperable.—1st. Because, if held as a bar to considering the bank as the real party liable, the bank would be enabled to commit a fraud upon the plaintiff and to receive and retain monies to which it was not entitled. And secondly, because the bank, by its actions and conduct throughout, had shewn ample ratification of the acts of Molleur, and an acceptance of the deed of 16th May, 1876, and of everything done under it. Whether as the principal party concerned, acting through its *locum tenens*, or by reason of its having received moneys by collusion with Molleur to which it was not entitled, the bank should be held equally responsible with Molleur.—With reference to the L'Ecuyer notes, the bank did not, these notes being overdue, treat the hypothec taken by L'Ecuyer as any security to it when filing its claim, nor did it appear that plaintiff ever contended at the meeting of his creditors, or in any of the insolvency proceedings, that this hypothec given to L'Ecuyer was in reality held for the bank. Nor was there any evidence to the effect that plaintiff subsequent to the insolvency proceedings, and up to the time of the institution of this action, ever contended that this hypothec was held by the bank, or held otherwise than as a *bona fide* security by L'Ecuyer himself, and as a security, therefore, which Molleur was bound to pay off to release the properties. On the other hand, there was considerable evidence that plaintiff acknowledged his liability on this hypothec, and wished Molleur to pay off the indebtedness for which it was given. The judge of the Superior Court was justified in holding that Molleur had properly paid the amount of the promissory notes indorsed by L'Ecuyer in order to obtain the discharge of his hypothec.—Further, the bank in filing its claim, was justified in alleging that it held as security only the shares of plaintiff, and that it was further justified in applying the proceeds of these shares to any balance remaining due on the notes of plaintiff after payment of the L'Ecuyer notes.—The Court of Queen's Bench should not have raised the rate of interest to eight per cent., no rate having been mentioned in the deed of 16th May, 1876.—There was one point, however, in the judgment of the Su-

perior Court from which the court dissented. At the time the deed of 16th May, 1876, was executed, there were certain claims being contested before the assignee. The amount of these claims should not have been paid to the assignee before the result of the contestations was declared, or, if paid, the defendants should have taken proceedings in the interest of plaintiff to recover back this amount from the assignee. This amount plaintiff was entitled to, in addition to the sum found by the auditor on the basis of the judgment of the Superior Court.—In all other respects the judgment of the Superior Court was affirmed and the appeal of plaintiff allowed with costs; the cross-appeals were dismissed with costs, plaintiff to receive his costs on the appeal and cross-appeals in the Court of Queen's Bench. *La-moureux v. Molleur*, Cass. Dig. (2 ed.) 71.

[The Privy Council refused leave to appeal.]
NOTE.—On settlement of the minutes an appeal to a judge in chambers on the ground that the amount ordered to be paid to appellant (\$8,655.13) ought to have been only \$3,200.60, was dismissed.—For judgment by Fournier, J. (in chambers), see Cass. Dig. (2 ed.) 692.

18. "*Letters of credit*"—*Negotiable instrument*—"*Bills of Exchange Act, 1890*"—"The Bank Act"—*Powers of executive councillors—Ratification by legislature.*]—A bank cannot deal in such securities as a "letter of credit" signed by an executive councillor, without the authority of an order in council, which is dependent upon the vote of the legislature, and therefore not a negotiable instrument within the Bills of Exchange Act, 1890, or The Bank Act, R. S. C. c. 120, ss. 45 and 60. *Jacques Cartier Bank v. The Queen*, xxv., 84.

19. *Debtor and creditor—Security for debt—Security realized by creditor—Appropriation of proceeds—Res judicata—Practice.*]—If a bank agrees to give a customer a line of credit, accepting negotiable paper as collateral security, it is not obliged, so long as the paper remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once, as payment of the customer's debt and must be credited to him.—Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded. *Cooper v. Molsons Bank*, xxvi., 611.

(Affirmed in Privy Council, (14 Times L. R. 276.)

20. *Collateral security*—R. S. C. c. 120, schedule "C"—53 Vict. c. 31, ss. 74, 75—*Renewals—Assignments.*]—An assignment made in the form "C" to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note is not valid as a security under s. 74 of the "Bank Act."—The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 152), affirmed. *Bank of Hamilton v. Halstead*, xxviii., 235.

21. *Bank making advances—Security—Bank Act s. 74—Chattel mortgage.*]—H. held a chattel mortgage on a sawmill belonging to G., with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent incumbrancers. Two months later G. gave H. a second mortgage on said property to secure a note for \$794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes,

G. being unable to purchase the logs asked the bank for an advance. The bank, knowing G. to be financially embarrassed, refused the advances to him but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of \$3,500, G. assigned the contractor's order to the bookkeeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the bank all moneys to accrue in respect to the contract, which assignment was agreed to by the contractor, and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under s. 74 of "The Bank Act." Two or three days later G. made an assignment for benefit of his creditors, previous to which, however, the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage. *Held*, affirming the judgment appealed from (7 B. C. Rep. 465), that no property in the logs assigned to the bank had passed to G., and that H. having no higher right than his mortgagor, could not claim them under his mortgage.—Shortly before G.'s assignment for benefit of creditors his bookkeeper transferred to the bank a chattel mortgage given him by G. to secure payment of \$800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due on said mortgage. *Held*, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent. *Houston v. Merchants Bank of Halifax*, xxxi., 361.

22. *Warehouse receipt—Indorsement as security—Right to property*—34 Vict. c. 5 (D.)

See WAREHOUSEMEN, 1.

23. *Indorsement of warehouse receipt—Owner acting as warehouseman—Constitutionality of 34 Vict. c. 5, ss. 46, 47, 48 (D.)*

See WAREHOUSEMEN, 2.

24. *Bond to secure advances—Literate obligee—Misrepresentation.*

See DEED, 13.

25. *Mandate—Pledge of stock—Notice of trust—Security for debt of trustee—Precarious title—Insolvency—Arts. 1755, 2268 C. C.*

See TRUSTS, 2.

26. *Advances on shares of another bank—Collateral security—Restitution.*

See No. 16, ante.

27. *Insolvent bank—Lien on assets—Priority of note-holders.*

See No. 40, infra.

28. *Security for advances—Hypothecation of bonds—Collateral security—Sale by mortgagees—Trusts.*

See PLEDGE, 6.

29. *Debtor and creditor—Preference—Collusion—Pressure*—R. S. B. C. cc. 86, 87—*The Bank Act, s. 80—Company law—Mortgage by directors—Ratification*—B. C. Companies Acts, 1890, 1892, 1894.

See DEBTOR AND CREDITOR, 31.

7. SET-OFF.

30. *Insolvent bank—Contributories—Draft purchased by shareholder to off-set against calls.*

See No. 36, *infra*.

31. *Insolvent bank—Calls on shares—Double liability—Setting-off debts due by bank.*

See No. 38, *infra*.

8. SURETIES.

32. *Surety—Misconduct of officer—Illegal transactions—Banking affairs.*

See SURETYSHIP, 2.

33. *Mortgage—Continuing security—Promissory notes—Dealings by bank—Forged renewals—Release of surety.*

See SURETYSHIP, 3.

34. *Suretyship—Recourse of sureties inter se—Rateable contribution—Action of warranty—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts. 1156, 1959, C. C.*

See ACTION, 166.

9. TRANSFER OF SHARES.

35. *Shareholders—Transfers of stock—The Banking Act, 34 Vict. c. 5, ss. 19, 58—Resolutions not binding on absent shareholders—Equitable plea.*—In an action against the appellant as shareholder, to recover a call of 10 per cent. on twenty-five shares held by him in a bank, he defended on equitable grounds, that before call or notice thereof he made, in good faith for valid consideration, a transfer of all the shares to a person authorized and qualified to receive the same, and he and the transferee of the shares did all things necessary for the valid and final transferring of the shares; but the plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And he prayed that the bank be compelled to complete and make the transfer valid and effectual, and enjoined from further prosecution of the suit. —The plaintiffs filed no replication to this plea, but at the trial before James, J., without a jury, attempted to justify the refusal upon the ground that at a special general meeting of the shareholders of the bank, it was resolved "that the bank should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when re-

quired, a bond to that effect."—The defendant was not present when this resolution passed, and it appeared that the bank effected a loan of \$80,000 from the Bank of N. S. upon the security of one B., who, to secure himself, took bonds for lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares in 1877 to persons then in good standing, and powers of attorney, executed by defendant and the purchasers respectively, were sent to the manager of the bank, in whose favour they were drawn, to enable him to complete the transfer. The directors of the bank refused to permit the transfer, but the defendant was not notified of their refusal, nor did they make any claim against him for any indebtedness on his part to the bank; and it appeared also from the evidence that subsequently to the resolution, and prior to the sale of defendant's shares, a large number of other shares had been transferred in the books of the bank. In October, 1879, the bank became insolvent, and the Bank of N. S. obtained leave to intervene and carry on the action.—A verdict was found by the judge in favour of the appellant; but the Supreme Court (N. S.), James, J., dissenting, made absolute a rule nisi to set it aside.—*Held*, reversing the judgment appealed from (4 N. S. Rep. 146), that the resolution could not bind shareholders not present at the meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right under the Banking Act to transfer his shares, and to have the transfer recorded in the books of the bank; and the plea was therefore a good equitable defence to the action.—*Per* Strong and Gwynne, JJ. It is doubtful whether the strict rules applied in England to equitable defences pleaded under the C. L. P. Act, could be adopted with reference to such pleas in Nova Scotia, where both legal and equitable remedies are administered by the same court and in the same form of procedure. *Smith v. Bank of Nova Scotia*, viii., 558.

10. WINDING-UP.

36. *Insolvency—Winding-up—Contributories—Set-off*—45 Vict. c. 23, ss. 75, 76—*Construction of statute—Retrospective legislation.*—In an action by the bank on a promissory note, defendant pleaded set-off of a draft made by the bank and indorsed to him. Replication, that the defendant was a contributory on the stock book of the bank, and knew that the bank was insolvent when the draft was purchased. Demurrer, that replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory.—*Held*, reversing the Supreme Court of P. E. I., that the replication was bad in law.—Appellant gave his note for \$6,000 which was indorsed to the Bank of P. E. I. The Union Bank held a draft, made by the Bank of P. E. I. for nearly the same amount, which appellant purchased for about \$200 less than its face value on 5th May, 1882. Being sued on the note he set off the amount of the draft and paid the difference. He admitted purchase for the purpose of off-set to the claim on his note, which he had made non-negotiable and also that, if he could succeed in his set-off, and another party could succeed in a similar transaction, the Union Bank would get

in full their claim against the Bank of P. E. I., which had become insolvent. The trial judge charged that if the draft was indorsed to defendant to enable him to use it as a set-off, he could not do so, because he was a contributory within the meaning of s. 76 of the Winding-up Act, which came into force 17th May, 1882, and was retrospective as regards indorsements before it was passed, but within 30 days before the commencement of winding-up proceedings. The jury, under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb.—*Held*, reversing the judgment appealed from, that the appellant having purchased the draft for value and in good faith prior to the commencement of winding-up proceedings, the Winding-up Act was not applicable, and, therefore, the appellant was entitled to the benefit of his set-off.—That the Winding-up Act was not retrospective as to this indorsement.—*Held*, also, that ss. 75 and 76 in respect to claims acquired by contributories within 30 days of winding-up proceedings for use as a set-off, only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory. *Ings v. Bank of P. E. I.*, xi., 265.

37. *Liquidation of insolvent bank*—45 Vict. c. 23 — 47 Vict. c. 39—*Winding-up*.]—An insolvent bank can only be wound up with the preliminary proceedings provided by 45 Vict. c. 23, ss. 99 to 120, as amended by 47 Vict. c. 39, s. 2, whether or not it may be in process of liquidation at the time. *Mott v. Bank of Nova Scotia*, xiv., 650.

38. *Insolvent bank — Winding-up Act — Shareholders — R. S. C. c. 129 — Contributory — Calls — Double liability — Set-off — Bank Act — R. S. C. c. 120.*]—A contributory of an insolvent bank, who is also a creditor, cannot set-off the debt due to him by the bank against calls made in the course of winding-up proceedings in respect of the double liability imposed by the Bank Act. *Maritime Bank v. Troop*, xvi., 456.

39. *Insolvent bank — Priority of note-holders — Deposit by insurance company — Prerogative of Crown — R. S. C. c. 120, s. 79.*]—The Crown prerogatives can only be taken away by express statutory enactment. Therefore, Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors is not interfered with by the provisions of the Bank Act (R. S. C. c. 120, s. 79), giving note-holders a first lien on such assets, the Crown not being named in such enactment. *Gwynne and Patterson, JJ., contra. Maritime Bank v. The Queen*, xvii., 657.

40. *Insolvent bank — Bank Act, R. S. C. c. 120, s. 79 — Lien on assets — Priority of note-holders — 53 Vict. c. 31, s. 53.*]—Under s. 79 of the Bank Act, (R. S. C. c. 120), note-holders have the first lien on the assets of an insolvent bank in priority to the Crown, Strong and Taschereau, JJ., dissenting. Judgment appealed from (27 N. B. Rep. 379) varied. *Liquidators Maritime Bank v. Receiver-General of New Brunswick*, xx., 695.

41. *Insolvency — Winding-up — Increased capital — Contributories — Shareholders — Double liability — 45 Vict. c. 23 (D.)*]—The

Bank of P. E. I. was incorporated by 18 Vict. c. 10, capital stock fixed at £30,000 P. E. I. Cy., (£97,333.33) in shares of £10, (\$32.44), power to increase this capital by the issue of additional shares, of same value, was given by ss. 39, 40, 41 & 42, which prescribed the manner of effecting this increase, and the sale of the new stock by auction, s. 43 provided that "the said additional shares shall be subject to all the rules, regulations and provisions to which the original stock is subject, or may hereafter be subject, by any law of this island." Section 19 of the Act was repealed, and re-enacted by s. 3 of 19 Vict. c. 11, as follows:—"The holders of the stock of the said bank shall be chargeable in their private and individual capacity, and shall be holden for the payment and redemption of all bills which may have been issued by the said corporation, and also for the payment of all debts at any time due from the said corporation, in proportion to the stock they respectively hold, provided, however, that in no case shall any one stockholder be liable to pay a sum exceeding twice the amount of stock actually then held by him, over and above, and in addition to the amount of stock actually by him paid into the bank, provided nevertheless that nothing in this Act, or in the said hereinbefore recited Act contained, shall be construed to exempt the joint stock of the said corporation from being also liable for, and chargeable with, the debts and engagements of the same."—No increase to capital was made. In 1872, the bank having a balance of net profits on hand of \$27,286.41, pursuant to resolution at the general annual meeting of shareholders, on application to the legislature, 35 & 36 Vict. c. 23 was passed, enacting:—1. "It shall and may be lawful for the board of directors of the Bank of P. E. I. at any time, and from time to time, to enlarge the capital stock of the said bank by applying to each individual share of the capital a portion of the rest or surplus profits, lying at the time at the credit of the said bank." 2. "Such mode of enlarging the capital stock of the said bank shall not prevent the enlargement of the same by the mode pointed out in the 39th, 40th, 41st, 42nd and 43rd sections of the Act of incorporation." In 1872, the sum of \$10,666.67 was taken out of the profits and added to the capital stock, raising the value of shares by \$3.55 or to a total par value of \$36. In 1875, \$12,000 profits was carried to credit of capital stock, making the capital \$120,000, and the par value of shares \$40.

On 19th June, 1882, an order was made for winding up the bank, which had become insolvent within the meaning of the Act, 45 Vict. c. 23 (D.). Liquidators were appointed. Subsequently an order *nisi* was granted by Peters, J., calling upon all shareholders to shew cause why they should not pay calls to the amount of \$80 per share, which he made absolute after hearing counsel for contributories. This order was confirmed by the full court, two judges thinking themselves disqualified from hearing the appeal other than in a merely formal manner.—On appeal, *Held*, reversing this decision, Gwynne, J., dissenting, that the shareholders were not liable to pay more than \$64.89 per share, or twice the amount of their original stock. The Act of 1872, which authorized the alleged increase, had no provision creating any double liability, as was imposed on original stock, and new stock created under 18 Vict. c. 10, and the fair inference from the omission of any express enactment with reference to the increased

stock was that the legislature did not intend to clothe it with double liability. *Morris v. Liquidators Bank of P. E. I.*; Cass. Dig. (2 ed.) 68.

42. *Winding-up Act — Moneys paid out of court — Order made by inadvertence — Jurisdiction to compel repayment — R. S. C. c. 129, ss. 40, 41, 94—Locus standi of Receiver-General — 55 & 56 Vict. c. 28, s. 2. — Construction of statute.*—The liquidators of an insolvent bank passed their final accounts and paid a balance remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened, and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.—*Held*, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene, although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.—*Held*, also, that even if he was not so entitled to intervene, the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out. *Hogaboom v. Receiver-General of Canada*; *In re Central Bank of Canada*, xxviii., 192.

43. *Winding up insolvent bank — Priority of Crown claims — 45 Vict. c. 23 (D.) — Waiver — Acceptance of dividend.*

See CROWN, 73.

44. *Insolvent bank — Priority of note-holders — Prerogative of the Crown.*

See No. 39, ante.

45. *Insolvency — Appointment of liquidator — Discretion of judge.*

See WINDING-UP ACT, 7.

46. *Winding-up Bank of Upper Canada — Legislative jurisdiction — Assessment and taxes — Beneficial interest of Crown.*

See CONSTITUTIONAL LAW, 21.

47. *Insolvent bank — Deposit after suspension — Privileged lien.*

See No. 4, ante.

BARRISTERS.

1. *Bar—Prohibition—Advocate—Bar of Province of Quebec—Discipline—Jurisdiction—Irregular procedure—Domestic tribunal—Powers — Arts. 3504 et seq. R. S. Q.—58 Vict. c. 36 (Que.)*—In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath during the inquiry and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the General Council of the Bar of the Province of Quebec. *Held*,

affirming the judgment appealed from (Q. R. S. Q. B. 26), that the local Council of the Bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the bar, is a matter over which the Council of the Bar had complete jurisdiction; and further, that the omission to preserve a complete record of the proceedings upon the inquiry held by the council, or to take written notes of the evidence of witnesses adduced, constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition. *Honan v. Bar of Montreal*, xxx., 1.

2. *Call—Appeal from order of provincial court—Jurisdiction of Supreme Court.*

See APPEAL, 4; 178.

AND see COUNSEL.

BARRATRY.

Exceptions in policy of insurance—Proximate cause of loss—Perils of the seas.

See INSURANCE MARINE, 11.

BENEFIT SOCIETY.

1. *Diocesan fund—Support of clergymen—Condition as to participation.*—The Diocesan Church Society (N. S.), hold a fund for distribution among Church of England clergymen of the province, and one of the rules governing its distribution is that no clergyman receiving an income of \$1,000 and upwards from certain named sources shall be entitled to participate. *Held*, affirming the judgment appealed from (21 N. S. Rep. 309), that a rector was not debarred from participating in this fund because the salary paid to his curate, if added to his own salary, would exceed \$1,000, his individual income being less than that amount. *Diocesan Synod N. S. v. Ritchie*, xviii., 705.

2. *Rules—Construction—Suspension of payment—53 Vict. c. 39 (Ont.)*—In 1889 the Police Force of Hamilton established a benefit fund, to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, and to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, and one of the rules provided as follows: "No money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand (\$8,000) dollars." *Held*, that in case of a member of the force dying before the fund reached the said sum, the gratuity to his family was merely suspended, and was payable as soon as that amount was realized. *Miller v. Hamilton Police Benefit Fund*, xxviii., 475.

3. *Appeal—Special leave—60 & 61 Vict. (D.) c. 34, s. 1 (e)—Benevolent society—Certificate of insurance.*—An action in which less than the sum or value of one thousand dol-

lars is in controversy, and wherein the decision involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance, and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates is not a matter of such public importance as would justify an order by the court granting special leave to appeal under the provisions of sub-section (e) of the first section of the statute 60 & 61 Vict. c. 34. *Fisher v. Fisher*, xxviii., 494.

4. *Expulsion of member — Prior notice — Mandamus — Point not urged in trial court — Pleading.*

See APPEAL, 347.

5. *Life insurance — Benefit association — Payment of assessments — Forfeiture — Waiver — Pleadings.*

See INSURANCE, LIFE, 31.

BETTING.

1. *Criminal law — Betting on election — Stakeholder — R. S. C. c. 159, s. 9 — Accessory — R. S. C. c. 145, s. 7 — Action for money staked — Parties in pari delicto.* — R. S. C. c. 159, s. 9, provides *inter alia* that "every one who becomes the custodian or depositary of any money . . . staked, wagered or pledged upon the result of any political or municipal election . . . is guilty of a misdemeanour" and a sub-section says that "nothing in this section shall apply to . . . bets between individuals." *Held*, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the sub-section is not to be construed as meaning that the main section does not apply to a depositary of money bet between individuals on the result of an election; such depositary is guilty of a misdemeanour, and the bettors are accessories to the offence, and liable as principal offenders. *Reg. v. Dillon* (10 Ont. P. R. 352), overruled. — After the election, when the money has been paid to the winner of the bet, the loser cannot recover from the stakeholder the amount deposited by him, the parties being *in pari delicto*, and the illegal act having been performed. *Walsh v. Trebilcock*, xxiii., 695.

2. *Controverted election — Wager by agent with voter — Bribery — Corrupt practice.*

See ELECTION LAW, 29.

BIDDING.

Sale of land — Device to exclude purchasers — Separate lots put up en bloc — Art. 714, C. C. P.

See SHERIFF, 3.

BIGAMY.

Constitutional law — Criminal Code, ss. 275, 276 — Canadian subjects marrying abroad — Jurisdiction of Parliament. — Sections 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. *Strong, C.J., contra.*

Criminal Code, 1892, Sections Relating to Bigamy, xxvii., 461.

BILLS AND NOTES.

1. ACCOMMODATION NOTES, 1-4.
2. COMPANIES AND PARTNERSHIPS, 5-9.
3. COMPOSITION NOTES, 10.
4. CONSIDERATION, 11-14.
5. EXECUTORS AND ADMINISTRATION, 15, 16.
6. FORM OF NOTE, 17, 18.
7. FRAUDULENT INSTRUMENTS, 19, 20.
8. GARNISHMENT, 21.
9. HUSBAND AND WIFE, 22.
10. INDORSEMENTS, 23-28.
11. JOINT AND SEVERAL MAKERS, 29.
12. LETTER OF CREDIT, 30.
13. LIMITATION OF ACTIONS, 31.
14. NEGOTIABLE NOTES, 32.
15. NOTICE, 33-37.
16. PAYEE, 38.
17. PAYMENT, 39.
18. PATENT RIGHTS, 40.
19. STAMP-DUTIES, 41-43.
20. SURETYSHIP, 44-49.
21. TRANSFER, 50.
22. THEFT OF NOTE, 51.

1. ACCOMMODATION NOTES.

1. *Accommodation note — Bank agent's excess of authority — Discounting on personal account.*

See BANKS AND BANKING, 7.

2. *Accommodation note made by partner — Want of authority — Notice.*

See No. 35, *infra*.

3. *Consideration — Accommodation — Evidence — New trial.*

See EVIDENCE, 22.

4. *Consideration — Accommodation — Discharge of liability.*

See JURY, 44.

2. COMPANIES AND PARTNERSHIPS.

5. *Unincorporated company — Promissory note — Manager's signature — Liability of members — Evidence of intention.* — R., manager of an unincorporated lumbering company, gave a promissory note for logs purchased by him as such manager, commencing, "Sixty days after date we promise to pay," etc., and signed it "R., manager O. L. Co." An action on this note against the individual members of the company was defended on the ground that it was the personal note of R.: that the words "manager," etc., were merely descriptive of R.'s occupation, and that the defendants were not liable. *Held*, affirming the judgment appealed from (1 N. W. T. Rep., part 3, p. 41), that as the evidence shewed that when the note was given, both R. and the creditor intended it to be the note of the company, and as

R., as manager, was competent to make a note on which the members of the company would be liable, and as the form of the note was sufficient for that purpose, plaintiffs were entitled to recover. *Fairchild v. Ferguson*, xxi., 484.

6. *Partnership—Judgment against firm—Liability of reputed partner—Action on judgment—Agreement with indorser.*—Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker. —In an action upon a promissory note against M. I. & Co., as makers, and J. I. as indorser, judgment was rendered by default against the firm, and a verdict was found in favour of J. I. as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note. *Held*, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as maker or indorser. *Isbester v. Ray, Street & Co.*, xxvi., 79.

7. *Company—Banking—Discount by president—Credit to company's account—Payments out to company's creditors—Liability of company upon note given without authority—Bona fides.*—Where the president of an incorporated company made a promissory note in the company's name without authority, and discounted it with the company's bankers, the proceeds being credited to the company's account and paid out by cheques in the company's name to its creditors, whose claims should have been paid by the president out of funds which he had previously misappropriated, the bankers, who had taken the note in good faith, are entitled to charge the amount thereof at maturity against the company's account. Judgment of the Court of Appeal for Ontario (23 Ont. App. R. 66), affirmed. *Bridgewater Cheese Factory Co. v. Murphy*, xxvi., 443.

8. *Dissolution of firm—Separate partnership under same style—Ante-dated note—Debt of subsisting firm.*

See PARTNERSHIP, 37.

9. *Note in firm name—Liability of retired partner.*

See PARTNERSHIP, 26.

3. COMPOSITION NOTES.

10. *Notes given on composition—Renewals.*

See BANKS AND BANKING, 5.

4. CONSIDERATION.

11. *Promissory note—Illegal consideration—Election law—38 Vict. c. 7, s. 266 (Que.)—R. S. Q. art. 425—Nullity.*—S. (appellant's husband) brought an action against St. L. on a promissory note for \$4,000, a renewal of a note for the same amount made by S., endorsed by him and handed to St. L., alleging that the original note had been made and dis-
s. c. D.—7

counted for the accommodation of St. L. The evidence shewed that the proceeds were paid over to D., as agent for S., to be used as a portion of a provincial election fund controlled by S. *Held*, affirming the judgment appealed from (M. L. R. 5 Q. B. 332), that the plaintiff could not recover, even assuming a promise to pay on the part of St. L., the transaction being illegal under 38 Vict. c. 7, s. 266 (now R. S. Q. art. 425), which makes void any contract, promise or undertaking, in any way relating to an election under the said Act. *Dansereau v. St. Louis*, xviii., 587.

12. *Promissory note—Release from obligation—Failure of consideration—Discharge of maker.*—C. purchased Y.'s interest in lands upon which there was a mortgage, and gave his notes to Y. for the balance of the price. Subsequently C. failed and Y. being liable on the mortgage, C. agreed to obtain Y.'s discharge from the mortgagees on payment of \$1,000, and Y. signed a document agreeing that all parties should be in the same position as if the deed of sale had never been passed. The mortgagees subsequently gave a discharge to Y. in conformity with the above agreement. In an action by Y. against C. on his notes; *Held*, affirming the judgment appealed from (33 L. C. Jur. 106), that there was no consideration given for the notes and that C. was discharged from all liability. *Yon v. Cassidy*, xviii., 713.

13. *Promissory note—Duress—Verdict of jury.*—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager. *Held*, that the jury having believed the defendant's account and given him a verdict which the evidence justified, such verdict ought to stand. *Western Bank of Canada v. McGill*, xxiii., 581.

14. *Composition notes—Renewals.*

See BANKS AND BANKING, 5.

5. EXECUTORS AND ADMINISTRATION.

15. *Powers of executor—Administration of estate—Indorsement of accommodation notes.*—Notwithstanding that most extensive powers and discretion may be conferred upon a testamentary executor for the purposes of execution and administration, yet, unless there be express provision to that effect in the will, he cannot pledge the credit of the estate contingently or conditionally, by cautionary obligations, such as the indorsement of accommodation notes, under pretence of establishing, or advancing the interests of, beneficiaries under the will. *Lionais v. Molsons Bank*, x., 526.

16. *Powers of executors—Advancing legatee's share.*

See WILL, 50.

6. FORM OF NOTE.

17. *Note payable "in currency"—Validity of form.*—It is no objection to the validity of

a promissory note that it is for payment of a certain sum in currency. Currency must be held to mean "United States Currency," when the note is payable in the United States. (Judgment appealed from, 20 N. S. Rep. 509, affirmed). *Wallace v. Souther*, xvi., 717.

18. *Unincorporated company—Note signed by "manager"—Liability of members.*

See No. 5, ante.

7. FRAUDULENT INSTRUMENTS.

19. *Forgery—Ratification—Estoppel—Fraud—Breach of trust.*—Y., who had been in partnership with defendants, under the name of the H. C. Co., retired from the firm and became general manager of the company, but with no power to sign drafts, drew a bill for his private purposes in the name of defendants on a firm in Montreal, which was discounted by the bank. Before the bill matured, Y. wrote defendants informing them of having used their name, but that they would not have to pay the draft. The bill purported to be indorsed by the company per J. M. Y. (one of defendants), and the other defendant having seen it in the bank examined it carefully, and remarked that "J. M. Y.'s signature was not usually so shaky." J. M. Y. afterwards called at the bank, and examined the bill very carefully, and in answer to a request from the manager for a cheque he said that it was too late that day but he would send a cheque the day following. No cheque was sent, and a few days before the bill matured the manager and solicitor of the bank called to see J. M. Y., and asked why he had not sent the cheque. He admitted that he had promised to do so and at the time he thought he would. Y. afterwards left the country, and in an action against defendants on the bill they pleaded that the signature of J. M. Y. was forged. The jury found that it was forged and judgment was given for defendants. *Held*, affirming the decision appealed from (15 Ont. App. R. 573), which reversed that of the Divisional Court (13 O. R. 520), that though fraud or breach of trust may be ratified forgery cannot, and the bank could not recover on the forged bill against the defendants. *La Banque Jacques-Cartier v. La Banque d'Epargne* (13 App. Cas. 118), and *Barton v. London & N. W. Ry. Co.* (6 L. R. 70), followed. *Merchants' Bank of Canada v. Lucas*, xviii., 704. *James H. R.*

20. *Promissory note—Illegal consideration—Nullity.*—A promissory note to secure the amount of a fraudulent preference given by an insolvent to a particular creditor is wholly void. *Brigham v. Banque Jacques-Cartier*, xxx., 429.

8. GARNISHMENT.

21. *Overdue note in hands of payee—Attachment—Payment by garnishee—Com. Law Procedure Act, P. E. I.—Discharge of maker.*—Under the garnishee clauses of the Common Law Procedure Act (P. E. I.), an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor, and payment by the garnishee of the amount to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge. *Roblee v. Rankin*, xi., 137.

9. HUSBAND AND WIFE.

22. *Husband and wife—Separate property of wife—Married Woman's Property Acts (N. S.)—Transfer of note—Action by wife against husband.*

See ACTION, 85.

10. INDORSEMENTS.

23. *Secretion—Remedy by indorser—Capias*—Art. 1953 C. C.—Art. 798 C. C. P.]—An indorser on a note discounted by a bank may under art. 1953 C. C. avail himself of the remedy by *capias*. *Mackinnon v. Keroack*, xv., 111.

24. *Action—Suretyship—Qualified indorsement.*—D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action, some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm. *Held*, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Held*, further, *per Sedgewick, J.*, that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself. *Robertson v. Davis*, xxvii., 571.

25. *Promissory note—Indorser—Bills of Exchange Act, 1890, s. 56—Chattel mortgage—Consideration.*—Under s. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorsee to the latter.—The provisions of the Ontario Chattel Mortgage Act requiring the consideration of a mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect. *Robinson v. Mann*, xxxi., 484.

26. *Banking—Bills and notes—Conditional indorsement—Principal and agent—Knowledge by agent—Constructive notice—Deceit.*—A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled. *Pym v. Campbell* (6 B. & B. 370), followed.—The principal is affected by notice to the agent unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the holder to shew that the

agent had an interest in deceiving his principal. *Kettlewell v. Watson* (21 Ch. D. 685), and *Richards v. The Bank of Nova Scotia* (26 Can. S. C. R. 381) referred to. *Commercial Bank of Windsor v. Morrison*, xxxii., 98.

27. *Revendication—Right of action to recover back securities pledged—Interest of acceptor.*

See PRINCIPAL AND AGENT, 19.

28. *Non-negotiable note—Indorsement—Liability of maker—Estoppel.*

See No. 32, *infra*.

11. JOINT AND SEVERAL MAKERS.

29. *Joint and several note—Security—Release of co-maker.*

See MORTGAGE, 62.

12. LETTER OF CREDIT.

30. *"Letter of credit"—Negotiable instrument—"Bills of Exchange Act, 1890"—"The Bank Act," R. S. C. c. 120.*—A bank cannot deal in such securities as a "letter of credit" signed by the Provincial Secretary of Quebec, without the authority of an order in council, which is dependent on the vote of the legislature, and therefore not a negotiable instrument within the Bills of Exchange Act of 1890, or the Bank Act, R. S. C. c. 120, ss. 45 and 60. *Jacques-Cartier Bank v. The Queen*, xxv., 84.

13. LIMITATION OF ACTIONS.

31. *Security by deed—Novation—Arts. 1169 and 1171 C. C.—Prescription.*

See PRESCRIPTION, 6.

14. NEGOTIABLE NOTES.

32. *Promissory note—Non-negotiable—Indorsement—Liability of maker—Estoppel.*—H., a director of a company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the bank, who discounted it and paid over the proceeds of the company. H. knew the note was discounted, and before it fell due he had in writing acknowledged his liability on it. *Held*, affirming the Court of Appeal, and the Divisional Court (9 O. R. 655), Strong, J., dissenting, that although, in fact, the note was not negotiable, the bank in equity was entitled to recover, it being shewn that the note was intended by the makers to have been made negotiable, and was issued by them as such, but, by mistake or inadvertence, it was not expressed to be payable to the order of the payees. *Harvey v. Bank of Hamilton*, xvi., 714.

15. NOTICE.

33. *Holder of note—Death of indorser—Notice of dishonour—37 Vict. c. 47, s. 1 (D.)*

—The plaintiffs discounted a note indorsed by S. to a bank, and S. died before maturity. When the note fell due and was protested for non-payment, the bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the note was dated. The plaintiffs, who knew of S.'s death before maturity, subsequently took up the note from the bank, and, relying upon the notice of dishonour given by the bank, sued S.'s executor. *Held*, reversing the Court of Appeal for Ontario, that the holders of the note sued upon when it matured, not knowing of S.'s death, and having sent him a notice in pursuance of the statute (37 Vict. c. 47), had given good and sufficient notice to bind S. and the defendant as his executor, and that the notice so given enured to the benefit of the plaintiffs as holders of the note. *Cosgrave v. Boyle*, vi., 165.

34. *Dishonour—Notice—Mailing in post office—37 Vict. c. 47, s. 1 (D.)*—The bank sued on notes indorsed by McN., which were dated at S., and payable at the agency of the bank there. McN. resided at S. and his place of business was there. Notices of dishonour were given to McN. by posting such notices, addressed to him at S., at 1 o'clock p.m. on the day after that on which the notes matured, postage prepaid. There is no local delivery by carriers from the post office in S. No evidence was given by McN. that he did not receive the notices, nor was evidence given that he had received them. The jury found for the defendant, contrary to the charge of the judge. A rule nisi to set aside this verdict, and for a new trial was discharged on the ground that the posting of the notices was not sufficient notice of dishonour, as both plaintiff and defendant resided in the same town, and the notices should have been delivered to the defendant personally, or left at his residence or place of business. *Held*, reversing the judgment appealed from, that since the passing of 37 Vict. c. 47, s. 1 (D.), the notices given in the manner above set forth were sufficient. *Merchants' Bank of Halifax v. McNutt*, xi., 126.

35. *Accommodation—Note made by partner without authority—Renewal—Notice.*—In an action on a promissory note the defence was that the note of which it was a renewal was given for accommodation of the payee by defendant's partner who had no authority to make it, and that the plaintiffs when they took the renewal knew of its defective character. *Held*, that as it did not appear that such knowledge attached when the original note came into plaintiff's possession it was entitled to recover. *Union Bank of Lower Canada v. Bulmer*, 23 C. L. J. 390; Cass. Dig. (2 ed.) 88.

36. *Accommodation—Bad faith of holder—Conspiracy.*—P. indorsed a note for the accommodation of the maker, who did not pay it at maturity, but having been sued with P. he procured the latter's indorsement to another note agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount, who took it to M., a solicitor, between whom and the broker there was an agreement by which they purchased the notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note and an agreement was made with the broker by which the latter was to delay paying over the money

so that proceedings could be taken for garnishment. This was carried out; the broker received the proceeds of the discounted note while pretending to pay it over was served with the garnishee process and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note which was refused. P., the indorser, then brought an action to restrain M. and the broker from dealing with the discounted note, and for its delivery to himself.—*Held*, affirming the decision of the Court of Appeal, that the broker was aware that the note was indorsed by P. for the purpose of settling the suit on the former note; that the broker and M. were partners in the transaction of discounting the note and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker and M. could only take it subject to the conditions under which the broker held it; that the broker not being the holder of the note there was no debt due from him to the maker and the garnishee order had no effect as against P.; and that the note was held by M. in bad faith and P. was entitled to recover it back. *Miller v. Plummer*, xxii., 253.

37. *Promissory note made in fraud of partners — Notice to indorsee — Inquiry.*

See PARTNERSHIP, 36.

16. PAYEE.

38. *Action by holder — Identity of payee—Evidence of intention.*—A promissory note made payable to J. S. & Son was sued on by J. S. & Co.—*Held*, it being clear by the evidence that the plaintiffs were the persons designated as payees, that they could recover.—Judgment appealed from, (20 N. S. Rep. 509), affirmed. *Wallace v. Souther*, xvi., 717.

17. PAYMENT.

39. *Promissory notes — Acceptance held by bank as indorsee — Payment to cashier—Presumption.*—Where an acceptance had been indorsed to a bank, and the cashier of the bank had put it in suit, in his own name, and the acceptor subsequently paid the amount thereof to the cashier; it was held by the Supreme Court of Nova Scotia, that it was a fair inference that payment to the cashier was payment to the bank of which he was cashier (28 N. S. Rep. 210).—On appeal to the Supreme Court of Canada the judgment was affirmed. *Cow v. Seeley*, 6th May, 1896.

18. PATENT RIGHTS.

40. *Consideration—Transfer of patent right —Bills of Exchange Act, 53 Vict. c. 33, s. 30, s.-s. 4 (D.).*—C. & F. were partners in the manufacture of certain articles under a patent owned by F. A creditor of F. for a debt due prior to the partnership induced C. to purchase a half interest in the patent for \$700, and join with F. in a promissory note for \$1,000 in favour of said creditor who also, as an inducement to F. to sell the half interest, gave the latter \$200 for his personal use. In

an action against C. on this note:—*Held*, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the note was given by C. in purchase of the interest in the patent and not having the words "given for a patent right" printed across its face it was void under the Bills of Exchange Act, 53 Vict. c. 33, s. 30, s.-s. 4 (D.). *Craig v. Samuel*, xxiv., 278.

19. STAMP DUTIES.

41. *Unstamped bill — 42 Vict. c. 16, s. 13—"Knowledge" — Double stamping — Question for judge — Pleading.*—The draft sued on when made and when received by plaintiffs had no stamps; they knew then that bills required to be stamped, but never gave it a thought, and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection, and they immediately put on double stamps. The bill was received in evidence, leave being reserved to the defendant to move for a nonsuit, the judge stating his opinion that though plaintiffs knew the bill was not stamped when they received it, and that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission. *Held*, affirming the Supreme Court of New Brunswick, (22 N. B. Rep. 199), that the question as to whether or not the holder of a bill or draft has affixed double stamps upon an unpaid bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 Vict. c. 17, s. 13, is a question for the judge at the trial and not for the jury. (Gwynne, J., dissenting); that the "knowledge" referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case shewed that plaintiffs acquired this knowledge for the first time on the day they affixed stamps for the amount of the double duty; that the want of proper stamping in due time is not a defence which need be pleaded. (Gwynne, J., dissenting.) *Chapman v. Tufts*, viii., 543.

42. *Bill of exchange — Not stamped by drawer — Stamps affixed by drawee before discount—Double duty affixed at trial—Knowledge of law — 42 Vict. c. 17—Pleading—C. S. (N. B.) c. 37, s. 83, s.-s. 4, 5—Evidence—Special plea — Non fecit — Issue.*—R. remitted by mail to V. a draft in payment of an account which, when received by V., was unstamped. V. affixed stamps required by the amount of the draft, and initialed them as of the date the draft was drawn, which was at least two days prior to the date on which they were actually affixed. In an action on the draft R. pleaded "that he did not make the draft," according to provisions of C. S. (N. B.), c. 37, s. 83, s.-s. 4. On the trial the draft was offered in evidence and objected to as not sufficiently stamped, the plaintiff having previously testified as to the affixing of the stamps, and that he knew the law relating to stamps at the time. The draft was admitted, leave reserved to defendant to move for a nonsuit, and at a later stage of the trial, it was again offered with the double duty affixed, counsel agreeing that a nonsuit should be entered, with leave reserved to plaintiffs to move for verdict, court to have power to draw inferences of fact.—On motion pursuant to such leave reserved, the Supreme Court (23

N. B. Rep. 343) set aside the non-suit and ordered a verdict to be entered for the plaintiffs on the ground that the defect in the draft of want of stamp should have been specially pleaded. *Held*, 1. Reversing the judgment appealed from, Strong and Gwynne, JJ., dissenting, that double duty should have been placed on the note as soon as it came into the hands of the drawee unstamped, and that it was too late at the trial to affix such double duty, the plaintiff having sworn that he knew the law relating to stamps, which precluded the possibility of holding that it was a mere error or mistake.—2. That under the plea that defendant did not make the draft, he was entitled to take advantage of the defect for want of stamps.—*Per* Strong, J. That the note was sufficiently stamped and plaintiffs were entitled to recover.—*Per* Gwynne, J. That if the note was not sufficiently stamped the defence should have been specially pleaded. *Roberts v. Vaughan*, xi, 273.

43. *Insufficient stamps — Actual notice — Knowledge of holder — Double stamping.*—If a note is insufficiently stamped, the double duty may be affixed as soon as the defect comes to the actual knowledge of the holder. The statute does not intend that implied knowledge should govern it.—(Judgment appealed from 20 N. S. Rep. 509), affirmed. *Wallace v. Souther*, xvi., 717.

20. SURETYSHIP.

44. *Note indorsed as security — Discharge of surety — Giving time to principal.*—The appellant claimed that he was only surety for his co-defendant, and was discharged by time being given to the principal to pay the note. *Held*, that the fact of time being so given being negated by the evidence, it was immaterial whether appellant was principal or surety.—Judgment appealed from (20 N. S. Rep. 509), affirmed. *Wallace v. Souther*, xvi., 717.

45. *Promissory note — Maker or indorser — Evidence.*—W. agreed to become security for a debt, and wrote his name across the back of a promissory note in favour of the creditors signed by the debtor. The note was not indorsed by the payees, and no notice of dishonour was given to W. when it matured and was not paid. Action was brought against W. as maker jointly with the debtor, and non-suit was entered with leave reserved to plaintiffs to move for a judgment if there was any evidence to go to the jury as to W.'s liability.—*Held*, affirming the Supreme Court (N. B.) that there was no evidence to go to the jury that W. intended to be liable as a maker of the note, and plaintiffs were rightly nonsuited. *Ayr American Plough Co. v. Wallace*, xxi., 256.

46. *Indorsement of note—Release of maker —Reservation of rights — Satisfaction of principal debt—Release of debtor—Release of surety.*

See PRINCIPAL AND SURETY, 1.

47. *Substitution of debtor on note — Discharge of maker — Reservation of rights against indorser — Surety.*

See SURETY, 3.

48. *Joint and several — Security for mortgage debt — Release of co-maker.*
See MORTGAGE, 62.

49. *Qualified indorsement — Action on note given as security.*

See No. 24, ante.

21. TRANSFER.

50. *Transfer—Overdue note — Equities attaching — Agreement between vendor and payee — Holder for value without notice — Evidence.*—An agreement between the maker and payee of a promissory note that it shall only be used for a particular purpose, constitutes an equity which, if the note is used in violation of that agreement, attaches to it in the hands of a *bonâ fide* holder for value who takes it after dishonour.—Strong, C.J., and Taschereau, J., dissenting. *MacArthur v. MacDowell*, xxiii., 571.

22. THEFT OF NOTE.

51. *Larceny — 32 & 33 Vict. c. 21 (D.)—Unstamped note — Valuable security — Form of indictment.*

See CRIMINAL LAW, 1.

BILL OF LADING.

1. *Rights of assignee — Instructions to hold until payment of bill of exchange — Evidence — Consignee obtaining goods without bill of lading and without paying for goods—Liability of auctioneers to assignees of bill of lading for selling the goods on consignee's account — Trover — Interest.*—The plaintiffs doing business in Charleston, S. C., were assignees of a bill of lading for 100 casks of spirits of turpentine and 501 barrels of rosin, for which they had discounted the shipper's draft on R., of St. John, N. B., the consignee. They forwarded the draft to their agents with instructions to deliver the bill of lading to R. when the draft was paid. The draft was dated 2nd August, 1875, and payable twenty days after date. R. accepted the draft, but did not pay it, and the bill of lading was retained by plaintiffs' agents. The invoice was sent from Charleston to R., to whom the captain of the vessel delivered the goods without production of the bill of lading. Subsequently R. delivered 90 barrels of the turpentine to the defendants, who were auctioneers for sale on account of R., upon which they advanced R. \$1,000. The defendants advertised the sale, sold the turpentine at public auction and paid balance of net proceeds to R. on 24th September, 1875. The turpentine had been taken out of the vessel and landed and warehoused several days before delivery to defendants, and they did not know that R. had not possession of the bill of lading until 21st October, 1875, when plaintiffs demanded the turpentine of them. *Held*, affirming the Supreme Court (N. B.) (3 Pugs. & Bur. 268), that the plaintiffs were entitled in an action of trover to recover from defendants the value of the turpentine, and interest from the date demand was made, and that the instructions from plaintiffs to their agents to deliver the bill of lading upon

payment of the draft, was admissible evidence in an action by plaintiffs against the defendants. *Stewart v. People's National Bank of Charleston*; Cass. Dig. (2 ed.) 81.

2. *Contract — Correspondence—Carriage of goods — Transportation company — Carriage over connecting lines.*—Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent. *Taschereau, J., dissented on the facts. N. W. Transportation Co. v. McKenzie*, xxv., 38.

3. *Transshipment of grain in transit—Custom of trade — Original bills of lading continued—Bulk of cargo delivered and freight exacted from transferee—Transfer by indorsement—The Bank Act, 53 Vict. c. 31—Estoppel.*—Grain was shipped from Chicago to Montreal, the bills of lading being made only from Chicago to Kingston, where it was, according to the usual custom of trade, transhipped into barges belonging to the defendants, and thence conveyed by them to Montreal, without the issue of new bills of lading. It appeared, however, to have been the custom that such bills of lading were in cases of the kind, treated as continuing. The bills had been transferred by indorsement, and delivery to the plaintiff, upon whose order the defendant had delivered the greater part of the cargo, after exacting payment of full freight upon the shipment. The defendant had also recognized the custom of the grain trade as to the bills of lading continuing.—In an action to recover an undelivered balance of the grain so shipped; *Held*, affirming the decision of the Superior Court, sitting in Review, at Montreal, that under the circumstances, the defendant was estopped from questioning the validity of the transfer of the bills of lading under the provisions of "The Bank Act," or objecting that they had become extinct upon delivery of the cargoes at Kingston. *The St. Lawrence and Chicago Forwarding Co. v. The Molsons Bank* (28 L. C. Jur. 127), referred to. *Kingston Forwarding Co. v. Union Bank of Canada*, 9th December, 1895.

4. *Railway company—Carriage of goods—Connecting lines—Special contracts—Loss by fire in warehouse—Negligence—Pleading.*—In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G. T. R. Co., and the rest to the C. P. R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, etc., Co., for carriage to Merlin, and that on receipt by the Lake Erie Co. of the goods it became their duty to carry them safely to Merlin, and deliver them to S. There was also an allegation of a contract by the Lake Erie Co. for storage of the goods and delivery to S., when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co., at Merlin. *Held*, reversing the decision of the Court of Appeal, that as to the goods delivered

to the G. T. R. Co. to be transferred to the Lake Erie Co. as alleged, if the cause of action stated was one arising *ex delicto*, it must fail, as the evidence shewed that the goods were received from the G. T. R. Co. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G. T. R. Co. to the consignors, and if it was a cause of action founded on contract, it must also fail as the contract under which the goods were received by the G. T. R. Co. provided among other things, that the company would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier.—*Held*, further, that as to the goods delivered to the companies, other than the G. T. R. Co., to be delivered to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G. T. R. Co., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., and such finding should not be interfered with.—*Held*, also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one, as the company only undertakes to warehouse goods of necessity and for convenience of shippers. *Lake Erie and Detroit River Ry. Co. v. Sales*, xxvi., 663.

5. *Shipping—Ship's agent—Mandate—Custom of port—Delivery—Carriers.*—A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests required them to have knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. Judgment appealed from reversed, the Chief Justice dissenting. *Parsons v. Hart*, xxx., 473.

6. *Fraud by railway agent—False bills issued when no goods shipped—Draft with bills attached—Advances on consignment.*

See PRINCIPAL AND AGENT, 2.

7. *Commission merchant—Shipment of grain—Condition of prepayment — Principal and agent—Delivery—Vesting of ownership—Loss on damaged cargo.*

• See CONTRACT, 210.

8. *Goods consigned for sale—Assignment of bill of lading — Replevin — Interest of transferee—Stoppage in transitu.*

See SALE, 34.

9. *Option to re-weigh goods—Notice to seller—Acceptance of bill—Delivery—Estoppel.*

See ACTION, 128.

AND see CARRIERS.

BILL OF SALE.

1. *R. S. N. S. (5 ser.) c. 92—Registration—Defective jurat—Evidence—Assignment for*

benefit of creditors—Chattel mortgage.—An assignment of personal property in trust to sell same and apply the proceeds to the payment of debts due certain named creditors of the assignor is a bill of sale within s. 4 of the Nova Scotia Bills of Sale Act, not being an assignment for the general benefit of creditors and so excepted from the operation of the Act by s. 10.—The omission of the date and words "before me" from the jurat of an affidavit accompanying a bill of sale under s. 4 of the said Act makes such affidavit void and the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods. *Gwynne, J.*, dissenting.—*Per Gwynne, J.* Section 4 of the Act only applies to bills of sale by way of chattel mortgage and not to an assignment absolute in its terms and upon trust to sell the property assigned. *Archibald v. Hubley*, xviii., 116.

2. *Affidavit of bona fides—Adherence to statutory form—Proof of execution—Attesting witness.*—Where an affidavit of *bona fides* to a bill of sale stated that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, while the form given in the statute uses the words "against any creditors of the bargainor," such violation did not avoid the bill of sale as against execution creditors, the two expressions being substantially the same. *Gwynne, J.*, dissenting.—The statute requires the affidavit to be made by a witness to the execution of the bill of sale but as attestation is not essential to the validity of the instrument its execution can be proved by any competent witness.—Judgment appealed from (1 N. W. Terr. Rep. No. 2, p. 36), affirmed. *Emerson v. Bannerman*, xix., 1.

3. *Chattel mortgage—Description—Bills of Sale Act—R. S. O. (1887) c. 125—Appeal—Order to amend pleadings—Interference with—Debtor and creditor—Purchaser by creditor—Consideration—Existing debt.*—In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Co. (describing the premises), on the north side of King street, in the City of London; and in a schedule referred to in the mortgage was this additional description: "And all machines . . . in course of construction or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor . . . or which are now or shall be on any other premises in the said City of London." *Held*, affirming the decision of the Court of Appeal, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient within the meaning of the Bills of Sale Act (R. S. O. [1887] c. 125), to cover machines so manufactured.—The Supreme Court will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the court below.—A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt is a purchaser for valuable consideration

within s. 5 of the Bills of Sale Act. *Williams v. Leonard & Sons*, xxvi., 406.

4. *Affidavit of bona fides—Statutory form—Description of grantor—R. S. N. S. (5 ser.) c. 92, ss. 4 and 11.*—The Act relating to bills of sale, R. S. N. S. (5 ser.) c. 92, requires by s. 4, that every such instrument shall be accompanied by an affidavit by the grantor, and s. 11 provides that the affidavit shall be, as nearly as may be, in the form given in a form prescribed, beginning: "I, A. B., of . . . in the county of . . . (occupation) make oath and say," etc. An affidavit omitted to state the occupation of the grantor. *Held, per Strong, Gwynne, and Patterson, JJ.*, reversing the Supreme Court (N. S.), that as the affidavit referred in terms to the instrument itself, in which the occupation of the deponent was stated, the statute was complied with.—*Per Taschereau, J.* The onus was upon the persons attacking the bill of sale to prove, by direct evidence, that the grantor had no occupation, which they had failed to do. *Smith v. McLean*, xxi., 355.

5. *Chattel mortgage—Affidavit of bona fides—Compliance with statutory forms—Change of possession—Levy under execution—Abandonment.*

See CHATTEL MORTGAGE, 6.

6. *Mortgage—Mining machinery—Registration—Fictures—Interpretation of terms—Personal chattels—Delivery—R. S. N. S. (5 ser.) c. 92, ss. 1, 4, 10 (Bills of Sale)—55 Vict. (N. S.), c. 1, s. 143 (The Mines Act)—41 & 42 Vict. (N. S.), c. 31, s. 4.*

See REGISTRY LAWS, 25.

BOND.

1. *Action on bail bond—Alteration of after execution—Proof of—Form of bond—Objection first taken on appeal.*—In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute. *Held*, affirming the judgment appealed from (19 N. S. Rep. 96), that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed.—*Held*, also, that the objection as to the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this court. *Woodworth v. Dickie*, xiv., 734.

2. *Appeal—Security for costs—Prosecution—Practice—Objection to form—Waiver.*—The bond as security for costs of appeal to the Supreme Court should provide for prosecution of the appeal. Objection to the form of the bond should be taken by application in chambers to dismiss and will be considered waived if this procedure is not adopted. *Whitman v. Union Bank*, xvi., 410.

3. *Execution—Seal—Onus probandi—Defects.*

See EVIDENCE, 152.

4. *By Government official—Signature in blank—Certificate of magistrate—Execution—Weight of evidence—Proximate cause of acceptance—Estoppel.*

See EVIDENCE, 153.

5. *Railway aid—Municipal bonus—Condition in bond—Breach.*

See RAILWAY, 90.

6. *Security to sheriff—Price of adjudication—Nullity—Fraud—Requête civile.*

See SHERIFF, 10.

7. *Municipal bond—Form of contract—Statute authority—Construction of statute.*

See MUNICIPAL CORPORATION, 84.

BOOKS OF REFERENCE.

Expropriation of land—Tenants in common—Propriétaires par indivis—Construction of agreement—Misdescription—Plans and books of reference—Surveys—Registry laws—Satisfaction of condition as to indemnity.

See RAILWAYS, 32.

BORNAGE.

See BOUNDARY.

" BOSTON CLAUSE."

Marine insurance—Abandonment—Repairs—Findings of jury—Setting aside verdict.

See INSURANCE, MARINE, 4.

BOUNDARY.

1. *Surveyed line—Standing by without objection—Trespass—Conventional boundary—Licensed use—Estoppel in pais—Mistake—Valuable consideration—Specific performance—Description of land—Reference to plan—Courses and distances—Computed area—Construction of deed—Evidence of boundaries—Parol testimony—Statute of Frauds.*—G. was owner of lot 9, and C. the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T. employed a surveyor to ascertain the boundary, who asked C. where he claimed his northern boundary was. C. pointed out the line of a fence produced to a post as his boundary line. The surveyor then staked the average line of the fence produced till it met the post, C. not objecting. T., with his architect and builder, went on the ground, and, in the presence of C., the builder again marked out the boundary by a line connecting the stakes, C. not objecting, and a house was built according to the line on the extreme verge of T.'s land. C. first raised objection to this boundary when the walls were up and considerable money had been expended in building. Held, that C. was estopped from disputing that the line run by the surveyor was the true line.—When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description.—In construing a deed of land not subject to special sta-

tutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents, which do not agree with those in the deed.—An agreement to establish a conventional boundary line between contiguous lands is not within the Statute of Frauds and such mutual agreements constitute valuable consideration to support a decree in the nature of one for specific performance, although such a decree might be withheld in such a case on the ground of mistake in regard to the direction of the line or in properly laying it out upon the ground.—In the absence of measurements on a level street to shew that the true boundary as laid out formerly on the ground when in a rough state coincided with the limits as measured from a defined point in existence when the plan was made, that point cannot be accepted as the true point of commencement of the description of the actual boundary.—A second plan of subdivision of land cannot be invoked as evidence of the limits of lands conveyed by description according to a first plan.—Where there is a direct conflict of testimony the finding of the judge at the trial must be regarded as decisive and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *Grassett v. Carter*, x., 105.

2. *Agreement—Whether executed or executory—Plan, signed by proprietors—Statute of Frauds—Purchaser for value without notice—Discretionary jurisdiction of Court of Equity.*—Plaintiff alleged that in March, 1844, the Crown granted in fee to S. the east part and the south-west part of lot F., he went into and remained in possession thereof until his death; one K. was then in possession of part of lot G., immediately adjacent on the south to the land granted to Stewart; disputes having arisen respecting the boundary, it was agreed to have it surveyed and defined on the ground by a provincial land surveyor, whose survey was to be the settled and permanent boundary, and who accordingly in Sept., 1854, made a survey, and prepared a map shewing the boundary line; thereupon, about 20th Oct., 1854, the boundary line having been so defined, it was mutually agreed to by them, and memorandum written upon the map signed by them: "We, the undersigned, interested in this survey, agree to it as shewn by this plan, as witness our hands." Thereupon the parties shifted their occupation so as to accord with the line surveyed and so agreed to. K. afterwards applied for the patent of lot G., which was issued to P. as trustee for him. The survey commenced from the west side of G. at a point then mutually agreed upon between S. and K. and the other persons interested, as the north-west angle of the lot; S. and K. then removed to and thence continued in possession of their respective lands as aforesaid, as so separated and defined; S. died in 1856; plaintiff, to whom he devised lot F., did not attain his majority until 1870; in 1862, defendant obtained possession of a strip of the land in possession of plaintiff and S. under the agreement, being about 70 feet in width, to the north of the boundary, which had been agreed upon, and refused to restore possession, or to recognize the agreement; plaintiff was unable to recover

possession at law, inasmuch as the legal title of plaintiff under the patent would be determined by the mode of survey which prevailed according to the general law; the defendant had notice of the agreement and settlement of the boundary; that the true boundary line was difficult to ascertain in 1854, and that the agreement was a compromise and settlement of disputed and doubtful rights. The prayer was that the agreement might be specifically enforced, and the boundary established accordingly, and that defendant might execute a deed to confirm the strip of land to plaintiff, and be ordered to deliver up possession.—The defendant denied that S. ever had actual possession of the disputed strip, which he alleged was in a state of nature at the time of his purchase from K.; he alleged that he had had the line run by Sparks, P.L.S., and erected an expensive fence along the line and a dwelling house, the whole or greater part of which was on the land claimed by plaintiff; that he had made other valuable improvements; that K. was an illiterate man, and if his name was procured to the agreement it was through fraud. He also set up the registry laws, the Statute of Frauds, laches, that he was a *bonâ fide* purchaser for value without notice, and that the agreement was not one which the court in its discretion would enforce against him.—Spragge, C., made a decree in accordance with the plaintiff's contentions; (reported on a point which arose with reference to the proof of S.'s will: 24 Grant, 433); the Court of Appeal reversed this decree, from a view that plaintiff was appealing to the discretionary jurisdiction of the court, and that the ordinary principles upon which it was administered were applicable; that the court had seen no case in which a mere verbal agreement, unattested by acts, had been sufficient under the Statute of Frauds, although it had been held in a number of cases in the courts of the United States that where two adjoining proprietors employ a surveyor to define their boundary line, and possession is taken and held in accordance therewith, the objection of the want of a writing shall not be allowed to prevail. That the plaintiff had failed to shew anything done on the faith of the agreement, or a change of position in reliance upon the boundary line settled. That the proof of the agreement was not of that clear and unambiguous kind the court requires when asked to exercise its discretionary jurisdiction. That there was no sufficient evidence to countervail the defendant's oath denying that he had actual notice of the alleged agreement, and that it was a case in which specific performance would inflict a grievous hardship upon the defendant without any benefit to the plaintiff which he had a right to expect, and without the plaintiff having any equity which the court was bound to respect.—*Held*, that plaintiff had failed to establish the agreement alleged in his bill, of which he sought specific performance, and upon which he rested his application for the interference in his favour of the equitable jurisdiction which he invoked. That if plaintiff contended that the evidence established that S. and K. agreed upon and adopted as the boundary line between them the line surveyed, and that for this purpose and to give effect to this agreement they signed the map, and that in pursuance of such agreement and in adoption of this line as the boundary line between them they moved their fences to conform to the agreement and occupied up to such fences until after S.'s death when defendant entered upon the possession then held by the devisee, then, the case assuming the com-

pletion of the agreement and presenting a purely legal claim, and the bill having been filed before the Administration of Justice Act, the Court of Chancery would have no jurisdiction. Appeal dismissed with costs. *Stewart v. Lees*, Cass. Dig. (2 ed.), 93.

3. *Action en bornage*—*R. S. Q. arts. 4153, 4154, 4155—Straight line.*—Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown lands department, the proper course is to run a straight line between the two certain points. *R. S. Q. art. 4155. Bell's Asbestos Co. v. Johnson's Co.*, xxiii, 225.

4. *Encroachment—Mistake of title—Good faith—Common error—Res judicata—Arts. 412, 413, 429 et seq., 1047, 1241 C. C.—Indemnity—Demolition of works.*—Where, as the result of a mutual error respecting the division line, a proprietor had in good faith, and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property, and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of a reasonable indemnity.—In an action for re-vedication under such circumstances the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.—An owner of land need not have the division lines between his property and contiguous lots of land established by regular *bornage* before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary. *Delorme v. Cusson*, xxviii, 66.

5. *Concession line—Survey—Evidence.*—In an action *en bornage* between E. the owner of lots 7, 8 and 9, in the tenth concession of the Township of Eardley, Que., and S., the owner of like numbered lots, in the ninth concession, the question to be decided was the location of the line between the two concessions, E. claiming that it should be one straight line, to be traced from the southeasterly angle of lot 14, in the tenth concession easterly on a course S. 87° 30' E. to the town line between Eardley and Hull, while S. claimed that as to the lots in question it was about a quarter of a mile north of where the straight line would place it. A survey of part of the line was made in 1828 and the remainder in 1850, and in 1892 the whole line was surveyed again, and the result was held by the court below to establish it in accordance with the claim of E. In 1867 there was a private survey which established the line further north as claimed by S., who contended that it, and not the survey in 1892, was a retracing of the original line. *Held*, affirming the judgment of the Court of Queen's Bench, Strong, C.J., dissenting, that the original surveys were made in accordance with the instructions to the surveyors and established the straight line as the true concession line; that the survey in 1892 was the only one which retraced the

original line in an efficient and legal manner; and that the evidence failed to support the contention that it was retraced in 1867, such contention depending on assumptions as to the manner in which the original surveys were made which the courts would not be justified in acting upon. *Spratt v. E. B. Eddy Co.*, xxix., 411.

6. *Title to land — Trespass — Overhanging roof — Right of view — Evidence — Boundary line — Servitude.*] — In 1844 the defendants constructed a toll-house close to or on the boundary of their land with windows overlooking an adjoining vacant lot, and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable and defendants paid the costs of the necessary alteration. In 1900 the plaintiff instituted the present action against defendants to have the remaining projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty. *Held*, affirming the judgment appealed from, Strong, C.J., dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute and consequently that his action could not be maintained. *Parent v. Quebec North Shore Turnpike Road Trustees*, xxxi., 556.

7. *Railways — Construction of deed — Location of permanent way — Laying out boundaries — Fencing — Riparian rights — Notice of prior title — Registry laws — Possession — Acquisitive prescription.*] — In the conveyance of lands for the permanent way the deed described lands sold to the railway company as bounded by an un-navigable stream, as "selected and laid out" for the railway. Stakes were planted to shew the side lines, but the railway fences were placed inside the stakes above the water's edge and the vendor was allowed to remain in possession of the strip of land between the fence and the middle of the bed of the stream. The deed was duly registered, and subsequently, the vendor sold the rest of his property including water rights, mills, and dams constructed in the stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, etc." *Held*, 1. that the description in the deed included, *ex jure nature*, the river *ad medium filum aquæ*, and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them; 2. that the failure of the vendor to deliver the full quantity of land sold by him to the company, and their abstention from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the property conveyed so as to exclude the strip outside the fences, or the bed of the stream *ad medium filum*; and 3. that such possession by

the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

8. *Riparian rights — Plan of subdivision — Specific description — Evidence to explain plan.*
See TITLE TO LAND, 129.

9. *Title to land — Old grant — Metes and bounds — Starting point.*

See SURVEY, 1.

10. *Trespass — Title to land — Easement — Agreement at trial — Estoppel.*

See USER, 1.

11. *Reference to surveyors — Formal proceedings — Old line.*

See SURVEY, 2.

12. *Matter in controversy — Injunction — Jurisdiction.*

See APPEAL, 46.

13. *Sale of land — Representation as to boundaries — Description — Executed contract — Deficiency — Fraud — Compensation.*

See VENDOR AND PURCHASER, 21.

14. *Title to land — Boundaries — Road allowance — Evidence — Appreciation of testimony.*

See TITLE TO LAND, 101.

15. *Agreement respecting lands — Boundaries — Referee's decision — Arbitration — Arts. 941-945 and 1341 et seq. C. C. P.*

See ARBITRATIONS, 18.

16. *Title to land — Action en bornage — Surveyor's report — Judgment on — Acquiescence in judgment — Chose jugée.*

See TITLE TO LAND, 135.

17. *Appeal — Action en bornage — Future rights — Title to lands — R. S. C. c. 135 s. 29 (b) — 54 & 55 Vict. c. 25, s. 9 — 56 Vict. c. 29, s. 1.*

See APPEAL, 72.

18. *Boundary marks — Possessory action — Delivery of possession — Vacant lands.*

See EVIDENCE, 172.

19. *Description of lands — Construction of deed — Cadastral plans — Metes and bounds — Possession.*

See TITLE TO LAND, 87.

20. *Municipal corporation — Construction of sidewalk — Trespass — Action en bornage — Petitory action — Amendment of pleadings — Practice — Ceasing litigation — R. S. C. c. 135, s. 65.*

See ACTION, 171.

BREACH OF PRIVILEGE.

Trespass — Assault — Legislative assembly — Powers — Punishment for contempt — Removal of member from his seat — Action against speaker and members — Damages.] — *W.*, a member of the Legislative Assembly of

Nova Scotia, on the 16th April, 1874, charged the provincial secretary, without being called to order for doing so, with having falsified a record. The charge was subsequently investigated by a committee of the House, who reported that it was unfounded. Two days after the House resolved, that, in preferring the charge without sufficient evidence to sustain it, W. was guilty of a breach of privilege. On the 30th April, W. was ordered to make an apology dictated by the house, and, having refused to do so, was declared, by another resolution, guilty of a contempt of the House, and requested forthwith to withdraw until such apology should be made. W. declined to withdraw, and thereupon another resolution was passed ordering the removal of W. from the House by the sergeant-at-arms, who, with his assistant, enforced such order and removed W. W. brought an action of trespass for assault against the speaker and certain members of the House, and obtained a verdict of \$500 damages. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, that the Legislative Assembly of the Province of Nova Scotia has, in the absence of express grant, no power to remove one of its members for contempt, unless he is actually obstructing the business of the House; and W. having been removed from his seat, not because he was obstructing the business of the House, but because he would not repeat the apology required, the defendants were liable. *Kielley v. Carson* (4 Moo. P. C. 63), and *Doyle v. Falconer* (L. R. 1 P. C. 328), commented on and followed. *Landers v. Woodworth*, ii., 158.

BREWERS.

See LIQUOR LAWS.

BRIBERY.

Fraudulent preference—Illegal consideration—Assignment by insolvent—Payment by inspector.—An agreement for a payment to an inspector of an insolvent estate to influence his consent to an arrangement which is not for the general benefit of the creditors is a bribe which is, in itself, sufficient reason to adjudge the transaction, to induce which it was given, corrupt, fraudulent and void. *Brigham v. Banque Jacques-Cartier*, xxx., 429.

BRIDGES.

1. *Jurisdiction of county council—Streams over one hundred feet wide—Ontario Municipal Act—R. S. O. (1887) c. 184, ss. 532, 534.*

See MUNICIPAL CORPORATIONS, 109.

2. *Toll bridge—8 Vict. c. 90 (Can.)—Liability of Province of Canada—Indemnity—Remedial process.*

See STATUTE, 154.

BRITISH COLUMBIA COUNTY COURTS.

See CONSTITUTIONAL LAW, 22.

BROKER.

1. *Sale of land—Refusal to carry out verbal agreement—Defective title—Instructions to agent—Contract in writing—Commission on sale.*—About 1st Jan., 1882, appellants, real estate agents in Winnipeg, received verbal instructions from respondents to sell land. On 13th Jan., the appellants sold the land at the price named, receiving from the purchasers \$5,000 as deposit on account of purchase money. On the day the appellants sold the land, C., one of respondents, was informed of the sale, and demanded and received from appellants the \$5,000. On 14th Jan., appellants received instructions from the respondents to sell another 10 acres, which on 15th Jan., appellants, as agents sold at the price authorized, but the formal agreement was closed by B. with C., to whom \$1,500 on account of the purchase was paid. Prior to the expiration of 20 days, within which the balance was to be paid, the purchasers discovered that the patent for a portion of the land had not been issued and, on account of want of title in respondents, purchasers refused to complete their purchase and from the absence of a writing signed by them they could not be compelled to do so. Appellants brought action for \$1,365, commission upon the entire purchase money. Respondents pleaded that appellants promised to sell the lands, and complete such sale by preparing the necessary agreement in writing to make a binding contract with purchasers. The jury, following the charge of the Chief Justice, found for plaintiffs for the full claim, $2\frac{1}{2}\%$ upon the entire purchase money of both parcels. This verdict was reduced to \$125, commission at $2\frac{1}{2}\%$ on the \$5,000 actually paid or, alternatively, a new trial was ordered without costs. *Held*, (Strong, J., dissenting) that there had been a mis-trial, and that therefore the order for a new trial should be affirmed.—*Per* Henry, J. It was the duty of the appellants to take from the purchasers a binding agreement under the statute; and having neglected to do so, they were not entitled to any compensation.—*Per* Strong, J., dissenting. The appellants did all they were bound to do, and earned their commission by finding the purchasers, and did nothing and omitted nothing which amounted to misfeasance or nonfeasance disentitling them to the commission which they had earned. *McKenzie v. Champion*, xii., 649.

2. *Principal and agent—Speculating in stocks—Instructions to broker—Money paid for margins—Action.*—S., a speculator in stocks, instructed F., a stock broker, to purchase shares, expecting a profit out of a rise in the value of the stock. *Held*, affirming the judgment appealed from (15 Ont. App. R. 541), that the relation between S. and F. was that of principal and agent, and F. was bound to purchase the stock and hold it as the property of S. He could not rely on his ability to procure a like number of shares when required, as his interest would be to depreciate their value so as to obtain them cheaply, which would conflict with his duty to S.—F. being about to retire from business as a stock-broker, handed over his stock transactions, including that with S. to C., to which S. consented. C. acknowledged to S. having received from F. the amount paid for margins on the stock which F. was instructed to buy, neither F. nor C. having purchased the stock and set it apart as the property of S. *Held*, affirming the judgment appealed from, that

C. was liable in an action for money had and received, to refund to S. the amount so paid for margins. *Cow v. Sutherland*, 18th Nov., 1887, 24 C. L. J. 55; Cass. Dig. (2 ed.), 9.

3. *Principal and agent—Stock exchange custom—Sale of shares—Marginal transfer—Undisclosed principal—Acceptance—“Settlement”—Obligation of purchaser—Construction of contract—“The Bank Act,” R. S. C. c. 120, ss. 70-77—Liability of shareholders.*—The defendant, a broker doing business on the Toronto Stock Exchange, bought from C., another broker, certain bank shares that had been sold and transferred to C. by the plaintiff. At the time of the sale C. was not aware that the defendant was acting for an undisclosed principal and the name of a principal was not disclosed within the time limited for “settlement” of transactions by the custom of the exchange. The transferee’s name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant who, three days after settlement was due according to the custom of the exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions and, the plaintiff’s name being put upon the list of contributories, he was obliged to pay double liability upon the shares so transferred under the provisions of “The Bank Act,” for which he afterwards recovered judgment against C. and then, taking an assignment of C.’s right of indemnity against the defendant, instituted the present action. *Held*, that as the defendant had not disclosed the name of any principal within the time limited for settlement by the custom of the Exchange and the shares had been placed at his order and disposition by the seller, he became legal owner thereof without the necessity of any formal acceptance upon the transfer books, and that he was obliged to indemnify the seller against all consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of “The Bank Act.” *Boulton v. Gzowski*, xxix., 54.

BUILDER'S LIEN.

See LIEN.

BUILDINGS AND ERECTIONS.

Lessor and Lessee—Water lots—Filling in—“Buildings and erections”—“Improvements.”

See LESSOR AND LESSEE, 2.

BUILDING SOCIETY.

1. *Objects and purposes—Powers—Loan transaction—By-law—C. S. L. C. c. 69—Purchase of land—Ultra vires.*—A building society incorporated under C. S. L. C. c. 69, by by-law, declared that its principal object was to purchase building lots, and build on such lots cottages costing about \$1,000 each for every one of its members. The society on 7th Oct., 1874, purchased the lots described and contracted for the cottages at \$1,250

each, the amount that each of the shareholders had agreed to pay. A year elapsed during which the cottages were built and drawn by lot for distribution among the members. On 11th Oct., 1875, the vendors of the lots and contractors for the building of the cottages, being shareholders in the Dominion Building Society, borrowed money from the latter society, and transferred to the same, as collateral security, the moneys due them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some moneys on account, and finally a deed of settlement, (*acte de reglement de compte*), was executed between the two companies, upon which was based the suit against the appellants, brought by H., as assignee of the Dominion Building Society. *Held*, affirming the judgment appealed from (3 Dor. Q. B. 175), Strong and Gwynne, JJ., dissenting, that the transaction in question was within the objects and purposes for which the society was incorporated, and was therefore not *ultra vires*. *Compagnie de Villas du Cap Gibraltar v. Hughes*, xi., 537.

2. *Pledge—Redemption—Transfer of shares—Indebtedness of transferee—Right of society to hold shares—C. S. L. C. c. 69—Arts. 1970, 1981, C. C.]—A by-law of a building society required that a shareholder should satisfy all his obligations to the society before he should be at liberty to transfer his shares. P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to a bank as collateral security for money borrowed, and it was not till P.’s assignment for benefit of creditors that the other directors knew of the transfer. At the time of his assignment P. was indebted to the society in \$3,744, for which, under the by-law, his shares were charged as between him and the society. The society immediately paid the bank and took an assignment of the shares and of P.’s debt. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. claimed the shares as part of the estate, and with action tendered the amount due by P. to the bank. The society claimed the shares were pledged to them for the whole amount of P.’s indebtedness to them under the by-laws. *Held*, reversing the judgment appealed from, (M. L. R. 7 Q. B. 417), Fourrier and Taschereau, JJ., dissenting, that the shares had always remained charged under the by-laws with P.’s debt to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he assigned, viz., to get the shares upon payment of P.’s debt to the society. *Société Canadienne Française de Construction de Montreal v. Daveluy*, xx., 449.*

3. *Participating borrowers—Shareholders—C. S. L. C. c. 69—42 & 43 Vict. c. 32 (Q.)—Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and trustees—Sales to—Prête-nom—Art. 1484 C. C.]—S. applied to a building society for a loan of \$3,500, which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society’s method of carrying on its loaning business and declaring that he had become a subscriber for shares in the company’s stock for an amount corresponding to the amount of the loan, namely*

70 shares of the nominal value of \$50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent. each upon the stock, and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by monthly instalments, and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that class, at which time whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent. upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of \$420 each until 1st May, 1884, making a total of seventy monthly instalments of \$70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 & 43 Vict. c. 32 (Que.), in January, 1884, prior to A.'s last payment and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in the business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently (in 1892), the plaintiff, as transferee of the society, brought action for the two original instalments remaining unpaid, and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares. *Held*, reversing the judgment of the Court of Queen's Bench, that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon amounting together to a rate equivalent to interest at twelve per centum per annum, on the amount of his loan; that the contract made by the building society stipulating that they were to receive such rate of interest and bonus, equivalent to rate of twelve per centum per annum on the amount so loaned by the society, was not a violation of any laws respecting usury in force in the Province of Quebec; that the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed; that under the provisions of the statute, 42 & 43 Vict. c. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes, and to declare deficits therein, and to call for further payments to meet the same, as the directors of the society had while it continued in operation;

that the notice required by the twenty-first section of the Act, 42 & 43 Vict. c. 32, does not apply to cases where liquidators have determined a loss upon the expiration of a class, and required the full amount exigible upon loans to be paid by borrowers; that, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class, and the exactation of further payments when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class and requiring full payment of all sums exigible under his deed of obligation was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation. *Held*, further, affirming the decisions of both courts below that, in an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code. *Guertin v. Sansterre*, xxvii., 522.

BY-LAW.

1. APPEAL, 1, 2.
2. ASSENT, 3-5.
3. ASSESSMENTS, RATING AND TAXATION, 6-12.
4. BONUSES AND FRANCHISES, 13-18.
5. DRAINAGE, 19-21.
6. JOINT STOCK COMPANIES, 22, 23.
7. LOCAL IMPROVEMENTS, 24-26.
8. BY-LAWS GENERALLY, 27-34.

1. APPEAL.

1. *Petition to quash—R. S. Q. art. 4389—Right of appeal—R. S. C. c. 135, s. 24 (g).*
See APPEAL, 60.

2. *Petition to quash by-law—Appeal to Court of Queen's Bench—Judgment quashing—Appeal to Supreme Court—R. S. C. c. 135, s. 24 (g).*

See APPEAL, 66.

2. ASSENT.

3. *Vote on by-law—Construction of statute—Special Act—Repeal by general Act—Repeal by implication.*—A general later statute (and a fortiori a statute passed at the same time) does not abrogate an earlier special Act by mere implication. The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation. *City of Vancouver v. Bailey*, xxv., 62.

4. *Municipal corporation—By-law—Construction of statute—Art. 4529, R. S. Q.—*

Approval of electors—Appeal as to costs.—Under the provisions of art. 4529 R. S. Q. money by-laws for loans by town corporations require the approval of the majority both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls. *Town of Chicoutimi v. Price*, xxix., 135.

5. *Casting vote*—R. S. O. (1887) c. 174, ss. 132, 199.

See MUNICIPAL CORPORATION, 54.

3. ASSESSMENTS, RATING AND TAXATION.

6. *Assessment and taxes—Exemption from municipal rates—School rates.*—By-law No. 148 of the City of Winnipeg, passed in 1881, exempted forever the C. P. R. Co., from "all municipal taxes, rates and levies and assessments of every nature and kind." *Held*, reversing the judgment of the Court of Queen's Bench (12 Man. L. R. 581) that the exemption included school taxes.—The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 Vict. c. 64, it was provided that by-law 148 authorizing the issue of debentures granting by way of bonus to the C. P. R. Co., the sum of \$200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared legal, binding and valid. *Held*, that notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures the whole by-law including the exemption from taxation, was validated. *Canadian Pacific Ry. Co. v. City of Winnipeg*, xxx., 558.

7. *Ultra vires—License tax—Discrimination between residents and non-residents*—33 Vict. c. 4 (N. B.).

See MUNICIPAL CORPORATION, 1.

8. *Municipal council—Power to license, regulate and govern trade—Partial prohibition—Repugnant provisions—Ontario Municipal Act*, R. S. O. (1887) c. 184.

See MUNICIPAL CORPORATION, 47.

9. *City of Toronto—Water supply—Rates to consumers—Discrimination in rates—Government buildings.*

See MUNICIPAL CORPORATION, 199.

10. *Sale of liquor—Cumulative taxes—Special tax.*

See MUNICIPAL CORPORATION, 4.

11. *Railway aid—Debentures—Sale of shares at discount—Trustee—Debtor and creditor—Division of county—Erection of new municipalities—Assessment—Action en reddition de comptes*—Arts. 78, 164, 939 *Mun. Code, Que.*—24 Vict. c. 30 (Que.)—39 Vict. c. 50 (Que.).

See MUNICIPAL CORPORATION, 62.

12. Municipal corporation — Railways — Taxation.

See ASSESSMENT AND TAXES, 14.

4. BONUSES AND FRANCHISES.

13. *Bonus—By-law—Conditions of—Conditional mortgage.*—By a by-law passed by the City of Three Rivers on the 3rd March, 1886, granting a bonus of \$20,000 to a firm for establishing a sawmill and a box factory within the city limits, and a mortgage for a like amount of \$20,000 granted by the firm to the corporation on the 26th of November, 1886, it was provided that the entire establishment of a value equivalent to not less than \$75,000 should be kept in operation for the space of four consecutive years from the beginning of said operation, and that 150 people at least should be kept employed during the space of five months of each of the four years. The mill was in operation in June, 1886, and the box factory on the 2nd November, 1886. They were kept in operation, and at least six hundred men were employed in both establishments during that time. On a contestation, by subsequent hypothecary claimants, of an opposition *afin de conserver*, filed by the corporation for the amount of their conditional mortgage on the proceeds of sale of the property. *Held*, reversing the judgments of the courts below, that even if the words "four consecutive years" meant four consecutive seasons, there was ample evidence that the whole establishment was not in operation as required until November, 1886, when the mortgage was granted, the mill only being completed and in operation during that season, and therefore there had been a breach of the conditions. Fournier, J., dissenting. *City of Three Rivers v. Banque du Peuple*, xxiii., 352.

14. *Municipal corporation—Railway aid—Subscription for shares—Debentures—Division of county—Erection of new separate municipalities*—34 Vict. c. 30 (Que.)—Arts. 78, 164, 639 *Que. Mun. Code*—39 Vict. c. 50 (Que.)—Assessment—Sale of shares at discount—Action en reddition de comptes—Trustee—Debtor and creditor.]—The relation existing between a county corporation and the local municipalities of which it is composed, in respect to money by-laws, is not that of an agent or trustee, but the county corporation is the creditor and the several local corporations are its debtors for the amount of taxes to be assessed upon their ratepayers respectively.—Where several local municipalities formerly constituting part of a county municipality have been detached therefrom and erected into separate corporations they remain in the same position in regard to subsisting money by-laws as they were before the division, having no further rights or obligations than if they had never been separated, and they cannot, either conjointly or individually, institute actions against such county corporation to compel the rendering of special accounts of the administration of funds realized upon the sale of county debentures issued before the separation, their proper method of obtaining necessary information being that provided by article 164 of the Municipal Code and through the other facilities afforded local municipalities by the Code. *Township of Ascot v. County of Compton. Village of Lennoxville v. County of Compton*, xxix., 228.

15. *Railway bonus—Validating statute—Remedy at law—Mandamus.*

See MUNICIPAL CORPORATION, 37.

16. *Municipal corporation—Street railway—Construction beyond limits of municipality—Validating Act.*

See MUNICIPAL CORPORATION, 42.

17. *Construction of statute—By-law—Exclusive rights—Statute confirming—Extension of privilege—C. S. O. c. 65—45 Vict. (Que.) c. 79, s. 5.*

See STATUTE, 144.

18. *Powers of Legislature—License—Monopoly—Highways and ferries—Tolls—Navigable streams—By-laws and resolutions—Inter-municipal ferry—Disturbance of licensee—Club associations, companies and partnerships—North-West Territories Act.*

See CONSTITUTIONAL LAW, 27.

5. DRAINAGE.

19. *Petition for drain—Withdrawal of name—Insufficient names.*

See DRAINAGE, 4.

20. *Municipal by-law—Special assessments—Drainage—Powers of councils as to additional necessary works—Ultra vires resolutions—Executed contract.*

See MUNICIPAL CORPORATION, 90.

21. *Inter-municipal drainage—Initiation and contribution—Ontario Drainage Act—Consolidated Municipal Act—Assessment.*

See DRAINAGE, 5.

6. JOINT STOCK COMPANIES.

22. *Increasing capital stock—Sanction by shareholders—Calls on new stock.*

See COMPANY LAW, 39.

23. *Directors—Ultra vires—Discount shares—Calls for unpaid balances—Contributories—Trustees—Powers—Contract—Fraud—Breach of trust—C. S. M. c. 9, Div. 7—R. S. M. c. 25, ss. 30, 33.*

See COMPANY LAW, 42.

7. LOCAL IMPROVEMENTS.

24. *Local improvement—Notice to ratepayers—Variation from notice.*

See MUNICIPAL CORPORATION, 43.

25. *Special tax—Local improvements.*

See ASSESSMENTS, 51.

26. *By-law—Assessment—Local improvements—Agreement with owners of property—Construction of subway—Benefit to lands.*

See MUNICIPAL CORPORATION, 126.

8. BY-LAWS GENERALLY.

27. *Municipal corporation—Connection with drain—Permission of engineer—Resolu-*

tion of council—Compliance with by-law.]—Where a by-law provided that no connection should be made with a sewer, except by permission of the City Engineer, a resolution of the City Council granting an application for such connection on terms which were complied with, and the connection made, was a sufficient compliance with said by-law. Lewis v. Alexander, xxiv., 551.

28. *Regulations respecting buildings—Effect on prior contracts.*

See CONTRACT, 159.

29. *Regulating and licensing traders—Prohibition against hawkers—Ont. Mun. Act, R. S. O. (1887) c. 184.*

See MUNICIPAL CORPORATION, 48.

30. *High school district—Townships detached—Ultra vires.*

See SCHOOLS, 3.

31. *Registration of by-law—Notice—Registry Act—R. S. O. (1877) c. 114.*

See REGISTRY LAWS, 2.

32. *Municipal corporation—Negligence—Snow and ice on sidewalks—Construction of statute—55 Vict. c. 42, s. 531 (O.)—57 Vict. c. 50, s. 13 (O.)—Finding of jury—Gross negligence.*

See NEGLIGENCE, 191.

33. *Waterworks—Resolution—Agreement in writing—Injunction—Art. 1033a C. C. P.*

See INJUNCTION, 4.

34. *Municipal regulations—Operation of tramway—Use of streets—Crossings—Powers—By-law or resolution—Construction of statute.*

See TRAMWAY, 6.

CADASTRAL PLANS.

1. *Evidence—Admissions—Arts. 1243-1245 C. C.]—Statements entered upon cadastral plans and official books of reference made by public officials, and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made. Durocher v. Durocher, xxvii., 363.*

2. *Description of lands—Plans—Variation of boundary—Possession—Prescriptive title—Notice.*

See TITLE TO LAND, 87.

CALLS.

See COMPANY LAW—WINDING-UP ACT.

CANADA, PROVINCE OF.

See COMMON SCHOOL FUND—DOMINION ARBITRATORS.

CANADA TEMPERANCE ACT.

1. *Scrutiny of votes.—Powers of County Court judge—Corrupt acts.*]—*Held*, that a judge of the County Court, in holding a scrutiny of votes under the provisions of the Canada Temperance Act, can only determine which side has a majority of the votes polled, by inspection of the ballots, and has no power to inquire into corrupt acts, such as bribery, etc., which might avoid the election (*Henry, J., dubitante*). (See 22 C. L. J. 46.) *Chapman v. Rand*, xi., 312.

2. *Referred case — Demand that vote be taken—Divided county—Deposit of notice in office of registrar of one riding only.*]—Section 6 of the Canada Temperance Act, 1878, provides that the notice to be sent to the Secretary of State asking that the votes of the electors be taken must be deposited in the office of the sheriff or registrar of deeds of or in the county for public examination, and evidence of such deposit sent to the Secretary or State, with notice prescribed in s. 5. In this case the notice was deposited with the registrar of the north riding of the county only. On petition praying that under these circumstances no proclamation under s. 7 should be issued, the Governor-General-in-Council referred the following case to the Supreme Court: "There are two registrars of deeds for the County of Perth, Ont.—One for the north riding, with an office at Stratford, and one for the south riding, with an office at St. Mary's. With a notice and petition for bringing the second part of the Canada Temperance Act, 1878, into force in the said county, there was laid before the Secretary of State evidence that such notice and petition was deposited, for the purpose and time required, in the office of the registrar of deeds for the north riding of the said county. — Is that a compliance, in that respect, with the requirements of the sixth section of the said Act?" *Ritchie, C.J.*, in giving judgment, said, that in such an important matter, involving the rights of a certain class of persons, it was important that every provision of the law should be strictly complied with. This, he held, had not been done. The petition might have been deposited either in the sheriff's office or in both the registry offices. He held that the filing in the one registry office was insufficient.—*Strong, J.*, said there could be only one construction of the Act, and no argument could be advanced to sustain the validity of the filing. He was only surprised that it had been found necessary to resort to this court to obtain a decision upon such a question.—The other judges concurred. *In re Canada Temperance Act, 1878 (County of Perth)*, 20 C. L. J. 375; *Cass. Dig.* (2 ed.) 105.

3. *Referred case — Petitioners withdrawing names.*]—The case was referred by the Governor-General-in-Council as follows: "A number of electors of the County of Kent, Ontario, having signed a notice and petition under the Canada Temperance Act, 1878, for bringing into force in the said county the second part of the Act, and the notice and petition having been laid before the Secretary of State with evidence of compliance by the petitioners with the formalities prescribed by the Act, but before being submitted to the Governor-General-in-Council or the issuing of a proclamation under the Act, some of the signatories laid before the Secretary of State, a petition asking to withdraw their names from

the petition. Have they a right to so withdraw their names?" *Opinion*—The signatories to the petition, signed under the provisions of the Act for bringing into force the second part of said Act, have not, under the circumstances set forth, the right to withdraw their acknowledged and deliberate signatures, or to have the same withdrawn from the petition. *In re Canada Temperance Act, 1878 (County of Kent)*, *Cass. Dig.* (2 ed.) 106.

4. *Prosecution of offences — C. T. Act, s. 107—Appropriation of penalties — Interpretation Act — Statutes relating to P. E. I.*]—An appeal against a decision under the Act was allowed, and it was *Held*, that 31 Vict. c. 1, s. 7, s.s. 22 (*Interpretation Act*), did not apply to penalties imposed under the Canada Temperance Act; that the second part of that sub-section refers only to appropriation of penalties imposed under the provisions of the first part, relating to the mode of recovering penalties where no such mode is given in the Act contravened, and as s. 107 of the Canada Temperance Act provides for the prosecution of offences in the manner directed by the Act relating to the duties of justices of the peace out of sessions, and for such purposes incorporates the necessary parts of the latter Act in itself, thus providing a mode for the recovery of penalties under the Canada Temperance Act, the sub-section 22 aforesaid has no application; that the penalties imposed by the Canada Temperance Act should therefore go to the Crown as in cases under the Act relating to the duties of justices of the peace out of sessions which makes no specific appropriation of penalties imposed under it. (*Ritchie, C.J., dubitante*). *Held*, also, that the *Interpretation Act* (31 Vict. c. 1), applies to statutes of the Dominion relating to Prince Edward Island whether such statutes were passed before or after the admission of the province into the Dominion. *Fitzgerald v. McKimlay*, *Cass. Dig.* (2 ed.) 107.

5. *Application of fines under — Incorporated town separated from county for municipal purposes.*]—By order in council made in September, 1886, it is provided that "all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county, or any incorporated town separated for municipal purposes from the county . . . shall be paid to the treasurer of the city, incorporated town or county," etc. *Held*, reversing the decision of the Supreme Court of New Brunswick, *King, J.*, dissenting, that to come within the terms of this order an incorporated town need not be separated, from the county for all purposes; it includes any town having municipal self-government even though it contributes to the expense of keeping up certain institutions in the county. *Town of St. Stephen v. County of Charlotte*, xxiv., 329.

6. *Search warrant — Magistrate's jurisdiction — Justification of ministerial officers — Goods in custodia legis — Replevin — Estoppel — Res judicata.*]—A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority, and is valid on its face, it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact, and may have been quashed or set aside. *Taschereau, J.*, dissenting.—The statutory form does not require the

premises to be searched to be described by metes and bounds or otherwise.—A judgment on *certiorari* quashing the warrant will not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside and such judgment was a judgment *inter partes* only. *Taschereau, J.*, dissenting. *Sleeth v. Hurlbert*, xxv., 620.

7. Assault on constable — Peace officer — Serving summons — Discharge of duty — Indictable offence — Evidence.

See CRIMINAL LAW, 8.

8. C. T. Act, 1878, s. 105—"Absence"—Justification of justice of the peace.

See JUSTICE OF THE PEACE, 1.

CANVASSER.

Contract — *Lex loci* — *Lex fori* — Fire insurance — Principal and agent — Payment of premium — Interim receipt — Repudiation of acts of sub-agent.

See INSURANCE, FIRE, 1.

AND see ELECTION LAW.

CAPIAS.

1. Affidavit — Art. 798 C. C. P.—Reasonable and probable cause—Malicious arrest — Damages.]—S., resident in Toronto, on the eve of departure for a trip to Europe, passed through Montreal, and while there refused to settle an overdue debt with McK., who had sued him for it in Ontario, where proceedings were still pending. McK. thereupon caused him to be arrested under *capias*, and S. paid the debt. S. claimed damages from McK. for malicious arrest and McK. relied on a plea of justification, acting upon reasonable and probable cause. In the affidavit for *capias* the reasons given for belief that S. was about to leave Canada were: "That the deponent's partner was informed last night in Toronto by a broker that S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and he was himself informed this day by J. R., of S.'s departure for Europe and other places." The evidence shewed that S. was in business at Toronto, and was leaving for the Paris exhibition, that he was in the habit of crossing every year, and that his banker, and all his business friends knew that he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud, but it appeared that before execution of the *capias* S., on being asked to settle, refused to pay McK. and told him "he might get his money as best he could." *Held*, reversing the Court of Queen's Bench, that the affidavit was defective, as it did not state any sufficient reasonable and probable cause for believing that the debtor was leaving with intent to defraud his creditors; that, in the present case, the evidence shewed no reasonable and probable cause to justify the arrest under *capias*, and consequently the plaintiff was entitled to recover substantial damages. *Shaw v. McKenzie*, vi., 181.

S. C. D.—8

2. Petition for discharge—R. S. C. c. 135, s. 28—Arts. 819-821 C. C. P. — Final judgment — Judicial proceeding.

See APPEAL, 165.

CARRIERS.

1. BILLS OF LADING AND SHIPPING RECEIPTS, 1-5.
2. CONNECTING LINES, 6-9.
3. CONDITIONS AGAINST LIABILITY, 10-14.
4. NEGLIGENCE, 15-22.
5. OTHER CASES, 23-24.

1. BILLS OF LADING AND SHIPPING RECEIPTS.

1. Contract—Correspondence — Carriage of goods — Transportation company — Carriage over connecting lines — Bill of lading.]—A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped.—Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent. *Taschereau, J.*, dissented on the facts. *N. W. Transportation Co. v. McKenzie*, xxv., 38.

2. Contract—Shipping receipt — Carriers—Limitation of liability—Negligence—Connecting lines — Wrongful conversion — Sale for non-payment of freight—Principal and agent — Varying terms of contract.]—Conditions in a shipping receipt relieving the carrier from liability for losses or damages arising out of "the safe keeping and carriage of the goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier.—A shipping receipt with terms as above was for carriage by the defendants' and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shewn by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. *Held*, that the plaintiff's agent

at the shipping point had not authority as such to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants, and that they were not exempted from liability in respect thereof at their full value under the terms of the shipping receipt.—As the evidence shewed definitely what damages had been sustained, there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from, ordered that the damages should be reduced to those proved in respect of the goods sold and converted. Armour, J., however, was of opinion that the judgment of Craig, J., at the trial should be restored. *Wilson v. Canadian Development Co.*, xxxiii., 432.
[The Privy Council refused leave to appeal, July, 1903.]

3. *Bill of lading—Contract against liability—Railway Act, 1868—34 Vict. c. 43, s. 5—42 Vict. c. 9—“Notice, condition or declaration”—Contract against liability.*

See RAILWAYS, 2.

4. *Bill of lading—Conditions—Statutory liability—Bailment—Notice—Delivery—Warehousing—Loss after transit—Joint tortfeasors—Release to one.*

See RAILWAYS, 3.

5. *Shipping—Bill of lading—Delivery—Custom of port.*

See TRADE CUSTOM, 1.

2. CONNECTING LINES.

6. *Forwarding over connecting lines—Contract by one for several—Bills of lading—Terms of contract—Custody of goods—Delivery—Negligence.*—The appellant, contracted with H. to carry butter from London, Ont., to England, and the bills of lading were signed by B., describing himself as agent severally, but not jointly, for the G. W. Ry. Co., the M. D. T. Co. and the G. W. S. S. Co. named as carriers therein. The G. W. Ry. Co. were to carry the goods from London to Suspension Bridge, the M. D. T. Co. from Suspension Bridge to New York, and it was then to be delivered to the S. S. Co. for carriage to England. It was provided by the bill of lading that if damage was caused to the goods during transit the sole liability was to be on the company having the custody thereof at the time of such damage occurring. The butter was carried to New York, where it was taken from the car and placed in lighters owned by the M. D. T. company to be conveyed to the steamer “Dorset” belonging to the S. S. Co. On arriving at the pier where the steamer lay, the lighter could not get near enough to unload, and the stevedore in charge of the steamer had it towed across the river with instructions for it to remain until sent for. The “Dorset” sailed without the butter, which was sent by another steamer of the S. S. Co. some five days later. The butter was damaged by heat while in the lighter.—*Held*, affirming the judgment appealed from (12 Ont. App. R. 201), that the M. D. T. Co., having made a through contract for the carriage of the goods, were liable to H. for the

damage, and even under the bill of lading were not relieved from liability, as the butter was never delivered to, and received by, the S. S. Co., but was in the custody of the M. D. T. Co. when the damage occurred. *Merchants’ Despatch Transportation Co. v. Hatley*, xiv., 572.

7. *Ships and shipping—Chartered ship—Perishable goods—Ship disabled by excepted perils—Transshipment—Obligation to transship—Repairs—Reasonable time—Carrier—Bailee.*—If a chartered ship be disabled by excepted perils from completing the voyage the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination, and earn the freight.—The option to transship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch, or otherwise the owner of the cargo becomes entitled to his goods.—*Quere*, Is the ship-owner obliged to transship?—If the goods are such as would perish before repairs could be made, the ship-owner should either transship, deliver them up or sell, if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable.—And if in such a case the goods are sold without the consent of the owner the latter is entitled to recover from the ship-owner the amount they would have been worth to him if he had received them at the port of shipment, or at their destination at the time of the breach of duty. *Owen v. Outerbridge*, xxvi., 272.

8. *Railway company—Carriage of goods—Connecting lines—Special contract—Loss by fire in warehouse—Negligence—Pleading.*

See RAILWAYS, 6.

9. *Shipping receipt—Limitation of carrier’s liability—Negligence—Connecting lines—Wrongful conversion—Sale for non-payment of freight—Principal and agent—Varying terms of contract.*

See No. 2, ante.

3. CONDITIONS AGAINST LIABILITY.

10. *Negligence—Bill of lading—Exception from liability—Stowage.*—A bill of lading acknowledged receipt on board steamer, in good order and condition, of goods shipped (fresh meat) and contracted to deliver the same in like good order and condition, . . . loss or damage resulting from sweating . . . decay, stowage, . . . or from any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners or other persons in the service of the ship, or for whose acts the ship-owner is liable (or otherwise howsoever) always excepted, namely (setting them out).—*Held*, affirming the Supreme Court, P.E.I., Ritchie, C.J., and Fournier, J. dissenting, that the clause “whether arising from the negligence, default or error in judgment of the master,” etc., covered as well the preceding exceptions as those which followed, and was not limited in its application by the words “from any of the following perils,” and the defendants were, therefore, not liable for damage to the goods shipped resulting from improper stowage, which was one of the excepted perils. *Trainor v. Black Diamond S. S. Co.*, xvi., 156.

11. *Special contract—Exemption from liability*—"At owner's risk"—"Against all casualties."—The Commercial Travellers Assn. of Ontario, by written agreement, obtained for its members for the season of 1885 special privileges in travelling by the company's boats, one of the terms being that members should receive tickets at a reduced rate "With allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties." This agreement was continued during 1886 by verbal agreement between the manager of the company and the secretary and traffic manager of the association. A commercial traveller obtained a ticket for passage on one of the company's boats under this agreement, paying the reduced fare, and took on board three trunks containing the usual outfit of a traveller for a jewellery house valued at about \$15,000. The trunks were checked in the usual way and no intimation was given to any of the officials on the boat as to their contents. On the passage the contents of the trunks were damaged by negligence of officers of the company and an action was brought.—*Held*, affirming the decision appealed from (15 Ont. App. R. 647), that the agreement between the association and the company was in force in 1886; that the term "baggage" in the agreement meant not merely personal baggage, such as every passenger is allowed to carry without extra charge, but commercial baggage, and would include the outfit in this case; and that in the expression "must be at owner's risk against all casualties," the words "against all casualties" do not limit, control or destroy, but rather strengthen, the protection which the former words "at owner's risk" afforded the defendants. *Dixon v. Richelieu Navigation Co.*, xviii., 704.

12. *Bailees—Common carriers—Express company—Receipt for money parcel—Conditions precedent—Formal notice of claim—Pleading—Money had and received—Special pleas.*—Where an express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package, unless within sixty days of loss or damage a claim should be made by written statement, with a copy of the contract annexed.—*Held*, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee. *Richardson v. The Canada West Farmers' Ins. Co.* (16 U. C. C. P. 430), distinguished.—In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" puts in issue all material facts necessary to establish the plaintiff's right of action. *Northern Express Co. v. Martin*, xxvi., 135.

13. *Shipping—Bill of lading—Limitation of time to sue—Damage from unseaworthiness—Construction of contract.*—On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date after which the same should be completely barred.—*Held*, reversing the judgment appealed from (8 B. C. Rep. 228), *Mills, J.*, dissenting, that this limitation applied to a claim for damage caused by unseaworthiness of the steamer. *Union Steamship Co. v. Drysdale*, xxiii., 379.

14. *Shipping receipt—Limitation of carrier's liability—Negligence—Connecting lines—Wrongful conversion—Sale for non-payment of freight—Principal and agent—Varying terms of contract.*

See No 2, ante.

4. NEGLIGENCE.

15. *Railway—Authority of agent—Bill of lading—Condition verbally stated—Perishable goods—Duty of providing fit and proper transportation—Negligence—Printed conditions—"At owner's risk"—Estoppel.*—Action against a railway company for negligence and breach of verbal contract between the shippers and company's agent to carry oil in covered cars with despatch. The oil was forwarded in open cars and delayed in different places, and in consequence a large quantity was lost. The bill of lading said nothing about covered cars, and stated that the goods were subject to conditions indorsed thereon, one being that the company would not be liable for leakage or delays, and that the oil was carried at the owner's risk.—*Held, per Ritchie, C.J., and Fournier and Henry, JJ.*, that the loss did not result from risks imposed on the owners, but from the wrongful act of the carriers in placing the oil on open cars, which was inconsistent with the contract, and in contravention as well of their duty to provide fit and proper transport of the goods shipped.—*Per Strong, Fournier, Henry and Gwynne, JJ.* Evidence of the verbal contract to carry in covered cars was properly admitted; that the agent had authority to make such a contract in the ordinary course of his duties and it did not militate against but was incorporated with the writing so as to make the whole contract one for carriage in covered cars, and that non-compliance with the condition as to carriage in covered cars prevented the company setting up the condition that "oil was carried at the owner's risk" to avoid liability. Judgment appealed from (28 U. C. C. P. 587), affirmed. *Grand Trunk Railway Co. v. Fitzgerald*, v., 204.

16. *Maritime law—Affreightment—Charter party—Privy of contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Arts. 1674, 1675, 1676 C. C.—Liability for fault of servants—Arts. 2353 (8), 2390, 2409, 2413, 2424, 2427 C. C.*—The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and masters from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners, and other servants of the owners, and the contract had been made with them only.—The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse ship-owners from liability for damages caused through improper or insufficient stowage.—A condition in a bill of lading, providing that the ship-owners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents, is not contrary to public policy nor prohibited by law in the Province of Quebec.—When a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur,

whether from negligence, rough handling or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect, or error in judgment of the pilot, master, mariners or other servants of the ship-owners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions applied only to loss or damage resulting from acts done during the carriage of the goods, and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage. *Glengoil S. S. Co. v. Pilkington*; *Glengoil S. S. Co. v. Ferguson*, xxviii., 146.

17. *Railways—Carriage of goods—Special instructions—Acceptance by consignee—Warehousemen—Negligence—Amendment.*—*F. Bros.*, dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a Rolling Mills Co. at Sunnyside in Toronto West. The G. T. R. had no station at Sunnyside the nearest being at Swansea, a mile further west, but the Rolling Mills Co. had a siding capable of holding three or four cars. In 1897 *F. Bros.* instructed the G. T. R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co., and in Oct., 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to Jan. 2nd, 1900, five cars, one addressed to the company and others to themselves at Sunnyside. On Jan. 10th the company notified *F. Bros.* that previous shipments had contained iron not suitable for their business and not of the kind contracted for and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On Feb. 4th the cars were placed on a siding to be out of the way and were there frozen in. On Feb. 9th *F. Bros.* were notified that the cars were there subject to their orders and two days later *F.*, one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were and *F.* arranged with the station agent to have them placed on the company's siding and that he would have what the company would accept taken to the mills by teams. The cars could not be moved until the end of April when the price of the iron had fallen and *F. Bros.* would not accept them, but after considerable correspondence and negotiation they took them away in the following October and brought an action against the G. T. R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company but sometimes they were sent without instructions, and on Feb. 3rd the station agent had written to *F. Bros.* that the cars were at Swansea and would be sent down to the rolling mills.—*Held*, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to re-

ceive them.—The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen and ordered a reference to ascertain the damages on that head.—*Held*, reversing such decision, *Mills, J.*, dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence and the question of negligence had never been raised nor tried the action must be dismissed *in toto*, with reservation of the right of *F. Bros.* to bring a further action should they see fit. *The Grand Trunk Ry. Co. of Canada v. Frankel*, xxxiii., 115.

18. *Liability of Crown—Public work—Negligence of employees of the Crown.*

See ACTION, 109.

19. *Government railways—Transportation ticket—Contract—Liability of Crown—Negligence.*

See RAILWAYS, 100.

20. *Municipal ferry—Liability of corporation—Passenger on through coupon ticket—Negligent mooring of boat.*

See NEGLIGENCE, 40.

21. *Conditions—Notice—Negligence—Special contract.*

See RAILWAYS, 8.

21a. *Express parcels—Loss in transit—Condition precedent—Formal notice of claim.*

See No. 12, ante.

22. *Shipping receipt—Limitation of carrier's liability—Connecting lines—Wrongful conversion—Sale for non-payment of freight—Principal and agent—Varying terms of contract.*

See No. 2, ante.

5. OTHER CASES.

23. *Lien for freight—Storage—Ships and shipping—Charter party—Delivery—Concurrent acts—Tender—Trove for cargo.*—A cargo of coal was consigned to *B.* and the master of the vessel refused to deliver it unless the freight was prepaid, which *B.* refused but offered to pay it ton by ton as delivered. By direction of the owner's agent the coal was taken out of the vessel and stored, whereupon *B.* tendered the amount of the freight and demanded it, but the agent still refused to deliver unless the cost of storage was paid. In trover against the master, *Held*, affirming the judgment appealed from (27 N. B. Rep. 231), *Gwynne, J.*, dissenting, that the refusal of the agent after tender of the full freight was a conversion of the cargo for which trover would lie.—*Held*, per *Patterson, J.*, that trover would lie, but not against the master, who was only the servant of the agent, and acting under his directions.—*Held*, also, that an action *ex delicto* for breach of duty in not delivering the coal according to the bill of lading would not lie. *Winchester v. Busby*, xvi., 336.

24. *Passengers—Railway company—Latent defect—Broken rail—Arts. 1053, 1673, 1678 C. C.*

See RAILWAYS, 10.

CASE RESERVED.

Refusal affirmed—Appeal—Fraudulent appropriation—Bailee or trustee—Unlawful receiving—Simultaneous Acts.

See CRIMINAL LAW, 13.

CERTIFICATE.

1. *Contract for public work—Extras—Final certificate—Pleading.*

See CONTRACT, 61.

2. *Contract—Public work—Final certificate of engineer—Previous decision—Necessity to follow.*

See RES JUDICATA, 9.

3. *Contract—Public work—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.*

See CONTRACT, 100.

AND see CONDITION; CONTRACT; PUBLIC WORK.

CERTIORARI.

1. *Jurisdiction of Supreme Court of Canada—Judge thereof—Issue of writ—Habeas corpus matter.*—Neither the Supreme Court, nor a judge thereof, has power to issue a writ of certiorari in a habeas corpus matter. *In re Poitvin*; Cass. Dig. (2 ed.) 675.

2. *Application to Supreme Court of Canada—Stay of execution on Supreme Court judgment—Jurisdiction of provincial judge—Appeal to Privy Council.*—Writ of certiorari moved for to bring up papers from the Supreme Court of British Columbia, the Chief Justice of that court having made an order staying execution on the judgment of the Supreme Court of Canada, certified to the court below in the usual way, on the ground that an appeal was being proceeded with to the Privy Council. Motion refused. *Sewell v. British Columbia Towing Co.*, Cass. Dig. (2 ed.) 675; Cass. S. C. Prac. (2 ed.) 55.

(Leave to appeal granted by the Privy Council but not prosecuted; see 9 Can. S. C. R. 527.)

3. *Appeal—Merchants' Shipping Act—Distressed seaman—Recovery of expenses—"Owner for time being"—Proof of ownership and payment—Final judgment.*—An appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute rule nisi for a certiorari to bring up proceedings before a police magistrate under the Merchants' Shipping Act with a view to having the judgment therein quashed. *Quare*, Where the Merchants' Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will certiorari lie to remove the proceedings into a Superior Court? *The Queen v. The Sailing Ship "Troop" Company*, xxix., 662.

4. *Nova Scotia Liquor License Act, 1895—Conviction by magistrate—Jurisdiction—Application for certiorari—Affidavit—Constitutional law—Powers of provincial legislature—Matter of procedure.*—On appeal, the Su-

preme Court of Canada affirmed the judgment of the Supreme Court of Nova Scotia (31 N. S. Rep. 436), vacating on order for certiorari, on the ground that the affidavit required by the Liquor License Act denying the commission of the offence charged, 1895, s. 117, had not been produced on the application for the writ. Gwynne, J., dissented holding that the constitutionality of the Liquor License Act should have been decided before entering upon the technical point respecting the affidavit. *Bigelow v. The Queen*, 12th June, 1901; xxxi., 128.

5. *Conviction—Arrest on warrant—Questions of fact—Jurisdiction—Sup. and Ex. Courts Act, 1-49—Sup. Court Amendment Act, 1876, s. 34—R. S. O. (1877) c. 70.*

See HABEAS CORPUS, 1.

CHAMPERTY.

1. *Champertous agreement—Administration proceedings—Proving claim—Promissory notes—Subsequent proof by original holder—Statute of limitations—Practice.*—H. & Co. holders of promissory notes in their favour by A. M. C. deceased, made the following agreement with O.: "Toronto, Feb. 28th, 1884. "I have this day bought from Messrs. W. P. Howland & Co. three promissory notes made in their favour by A. M. Cannon, one for \$1,000, due one year after date; one for \$3,218, due two years after date; and one for \$3,218, due three years after date, all three bearing date Sept. 5th, 1877, in consideration for which I agree to pay the said W. P. Howland & Co. one-half of the net amount I receive on account of the said notes, and I agree to use my best endeavours to collect the same, and if, at the expiration of two years, I have been unable to collect any portion of the said notes, I hereby agree to return them to the said W. P. Howland & Co., free from any costs or charges incurred by me. But, if, at any time previous to the expiration of the two years above mentioned, I have succeeded in collecting any portion of the said notes, then their portion above mentioned will be due and payable to the said W. P. Howland & Co. "WM. H. OATES." During the currency of that agreement O. obtained on 19th September, 1884, an order for the administration of the estate of A. M. C. of whose personal estate M. E. C. (appellant), was administratrix. The usual advertisement for creditors was published, and one T. proved a claim under the reference as a creditor of the deceased, and his claim had been duly allowed by the Master prior to October, 1886. M. E. C. applied to have the claim of O. upon the promissory notes disallowed, on the ground that the title by which he claimed was champertous and void. Proudfoot, J., (23rd October, 1886), adjudged that O.'s title to the notes, under the agreement was champertous and void, and that he could not prove in the administration by virtue of his title thereto, but he held that the administration order of 19th September, 1884, was for the benefit of all the creditors of the estate, one of whom had proved a claim and therefor, and refused to set it aside. (13 Ont. R. 70.) Neither party appealed from this order. Thereupon O. re-delivered the notes to H. & Co., who up to this time had been in no way party or privy to the proceedings for administration. The six years' allowance by the Statute of

Limitations had expired before the notes were re-delivered, but not before the date of the administration order. The reference had not been concluded, nor any report made by the Master. H. & Co. applied for liberty to come in and prove their claim on the notes, and the Master allowed them to do so. From this ruling the appellant appealed. — While the appeal was pending, the respondents came before the Master to prove their claim, pursuant to leave granted, and the Master allowed their claim upon the promissory notes. From this allowance the appellant appealed, and the last mentioned appeal came on for argument at the same time as the appeal from the Master's exercise of discretion in granting leave to the respondents to prove their claim. Both appeals were dismissed by Proudfoot, J., who held that the order for administration prevented the bar of the Statute of Limitations; and that H. & Co. might assert their title to the notes and prove on them, notwithstanding the former agreement with O., which he had already held to be champertous. — The Supreme Court of Canada dismissed an appeal from the judgment of the Court of Appeal for Ontario affirming this decision. Present: Strong, Fournier, Taschereau and Gwynne, JJ. — *Per Gwynne, J.* I am unable to perceive upon what right the maker of an unquestionably valid note or his personal representative can in any proceeding taken by the payee to recover upon the note, institute an enquiry as to what the payee may have done with the note in the interval elapsing between the making of the note and the proceeding taken to recover payment of it. H. & Co., payees of the note, cannot as it appears to me be affected by the adjudication in the proceeding instituted by O., to which they were not a party, and while the administrator's order remains in force they are entitled to prove the debt represented by the notes and to the benefit of that order in preventing the Statute of Limitations to run. If a champertous dealing in respect of the notes between H. & Co. and O., could affect their right to prove they must have a right to insist that the dealing was not affected with the vice of champerty, notwithstanding the adjudication on the tender of proof by O. And if it were necessary to decide that point, I should be of opinion that in the transaction with O., there was no champerty. A promissory note in the hands of the payee is as much a piece of property as an acre of land, or a horse, a quantity of merchandise, or any other chattel, and the agreement made between H. & Co. and O. in respect of the notes upon the occasion of their being transferred to him under the special agreement in evidence, was no more champertous than would a like agreement have been in case the property transferred had been an acre of land, a horse, a quantity of merchandise or any other chattel. Moreover the maker of the note, or his personal representative, who did not dispute their liability upon the notes, had no right, as it appears to me, to institute an enquiry as to what were the terms as between the payees and their transferee upon which the notes were transferred to the holder. *Cannon v. Howland*, 14th June, 1889; Cass. Dig. (2 ed.) 111.

2. *Litigious rights—Collusive judgment—Purchase by advocate—Arts. 1485, 1533 C. C.*
See TITLE TO LAND, 131.

3. *Will—Sheriff's deed—Proof of heirship—New trial.*
See EVIDENCE, 171.

Charter—Forfeiture—Compliance with statute—Timber slides—Action against incorporated company.

See COMPANY LAW, 5.

CHARTER PARTY.

Contract—Negligence—Stowage—Bill of lading—Notice—Arts. 1674, 1675, 1676, 2383, 2390, 2409, 2413, 2424, 2427 C. C.—Liability of owners.

See CARRIERS, 7, 16.

AND see CONTRACT—SHIPPING.

CHATTEL.

1. *Fixtures—Severance from realty—Conditional sales—Unpaid vendor—Hypothecary creditor—Arts. 379, 2017, 2083, 2085, 2089 C. C.*

See CONTRACT, 66.

2. *Mortgage—Mining machinery—Registration—Fixtures—Interpretation of terms—Bill of sale—Personal chattels—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of sale)—55 Vict. (N. S.), c. 1, s. 143 (The Mines Act)—41 & 42 Vict. (N. S.) c. 31, s. 4.*

See MORTGAGE, 43.

CHATTEL MORTGAGE.

1. CONSIDERATION, 1, 2.
2. FORM, 3-9.
3. POSSESSION OF GOODS, 10, 11.
4. PREFERENCES, 12-14.
5. PROPERTY AFFECTED, 15-19.
6. REGISTRATION, 20, 21.
7. OTHER CASES, 22-25.

1. CONSIDERATION.

1. *Bills of Sale Act—R. S. O. (1887) c. 125—Valuable consideration—Pre-existing debt.*—A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt is a purchaser for valuable consideration within s. 5 of the Bills of Sale Act. *Williams v. E. Leonard & Sons*, xxvi., 406.

2. *Promissory note—Indorsement—Statement of consideration.*

See No. 8, *infra*.

2. FORM.

3. *Debtor and creditor—Description of goods—C. S. M. c. 49, s. 5.*—In a chattel mortgage the goods were described as "all and singular the goods, chattels, furniture, and household stuff hereinafter particularly mentioned and described, in the schedule hereunto annexed marked A., all of which goods and chattels are now situate" (description of the premises) without stating that such goods were all the goods on such premises. *Held*, affirming the judgment appealed from,

Strong and Henry, JJ., dissenting, that the description of the goods was not a full and sufficient description within the meaning of C. S. M. c. 49, s. 5, and the mortgage was void against execution creditors. *McCall v. Wolf*, xiii., 130.

4. *Description of goods mortgaged*—*N. W. Ter. Ord. No. 5 of 1881*.]—Section 6 of the ordinance provides: "All the instruments mentioned in this ordinance, whether for the mortgage or sale of goods and chattels, shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished." The description in a chattel mortgage was: "All and singular, the goods, chattels, stock-in-trade, fixtures, and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mortgagors on the north half of section 6, township 19, range 28 west of the 4th principal meridian." *Held*, affirming the decision appealed from (1 N. W. T. Rep. No. 1, p. 88), that the description was sufficient. *McCall v. Wolf* (13 Can. S. C. R. 130) distinguished; *Hovey v. Whiting* (14 Can. S. C. R. 515) followed. *Thomson v. Quirk*, xviii., 695.

5. *Affidavit of bona fides*—*Compliance with statutory form*—*R. S. N. S. (5 ser.) c. 92, s. 4*.]—By R. S. N. S. (5 ser.), c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides*, "as nearly as may be" in the form given in a schedule to the Act. The form of the jurat to such affidavit in the schedule is: "Sworn to at in the county of , this day of A.D. Before me a commissioner, etc. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that where the jurat to an affidavit was "sworn to at Middleton this 6th day of July, A.D. 1891," etc., without naming the county, the mortgage was void, notwithstanding the affidavit was headed "in the County of Annapolis." *Archibald v. Hubley* (18 Can. S. C. R. 116) followed; *Smith v. McLean* (21 Can. S. C. R. 355) distinguished. *Morse v. Phinney*, xxii., 563.

6. *Affidavit of bona fides*—*Compliance with statutory forms*—*Change of possession*—*Levy under execution*—*Abandonment*.]—The Bills of Sale Act, Nova Scotia, R. S. N. S. (5 ser.), c. 92, by s. 4 requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the Act, and by s. 5, if the mortgage is to secure a debt not matured the affidavit must follow another form. By s. 11 either affidavit must be, "as nearly as may be," in the forms prescribed. A mortgage was given to secure both a present and future indebtedness, and was accompanied by a single affidavit combining the main features of both forms. *Held*, affirming the decision appealed from (27 N. S. Rep. 90), Gwynne, J., dissenting, that this affidavit was not "as nearly as may be," in the form prescribed; that there would have been no difficulty in complying strictly with the requirements of the Act; and though the legal effect might have been the same the mortgage was void for want of such compliance. *Reid v. Creighton*, xxiv., 69.

7. *Description*—*Bills of Sale Act*—*R. S. O. (1887) c. 125*.]—In a chattel mortgage the

goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Co. (describing the premises), on the north side of King street, in the City of London." and in a schedule referred to in the mortgage was this additional description: "And all machines . . . in course of construction, or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor . . . or which are now or shall be on any other premises in the said City of London." *Held*, affirming the decision of the Court of Appeal, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and, if it could, the description was not sufficient within the meaning of the Bills of Sale Act (R. S. O. [1887] c. 125), to cover machines so manufactured. *Williams v. E. Leonard & Sons*, xxvi., 406.

8. *Promissory note*—*Indorser*—*Bills of Exchange Act, 1890, s. 56*—*Chattel mortgage*—*Consideration*.]—Under s. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorser to the latter.—The provisions of the Ontario Chattel Mortgage Act requiring the consideration of a mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect. *Robinson v. Mann*, xxxi., 484.

9. *R. S. N. S. (5 ser.) c. 92*—*Registry*—*Defective jurat*—*Assignment*.

See BILL OF SALE, 116.

3. POSSESSION OF GOODS.

10. *Possession of goods*—*Right of mortgagor to sell*—*Ordinary course of trade*—*Seizure in execution*—*Justification*.]—In a chattel mortgage containing no redemise clause there may be an implied contract that the mortgagor shall remain in possession until default, of equal efficacy with an express clause to that effect; and such an implied contract necessarily arises from the nature of the instrument, unless it be very expressly excluded by its terms. *Porter v. Flintoff* (6 U. C. C. P. 335) distinguished.—In a chattel mortgage of the stock-in-trade and business effects of a trader there was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the said goods the mortgagee might take possession of the same as in case of default of payment. *Held*, that this proviso only prohibited the sale of the goods other than in the ordinary course of business. (*Ritchie, C.J., contra*).—The mortgagee of the chattels seized the mortgaged goods under an execution in a suit for the debt secured by the mortgage. The execution was set aside as being against good faith. In an action for the wrongful seizure and conversion of the goods. *Held*, that the mortgagee could not justify the seizure under the mortgage.—Judgment appealed from (4 Man. L. R. 139) reversed. *Dedrick v. Ashdown*, xv., 227.

11. *Change of possession—Assignment in trust to mortgagee.*—N. executed a chattel mortgage of his effects, and shortly afterwards made an assignment to one of the mortgagees, in trust for the benefit of his creditors. The assignee took possession under the assignment. *Held*, affirming the decision appealed from (27 N. S. Rep. 90), that there was no delivery to the mortgagees under the mortgage which transferred to them the possession of the goods. *Reid v. Creighton*, xxiv, 69.

4. PREFERENCES.

12. *Preference—Hindering and delaying creditors—Statute of Elizabeth.*—In an assignment for benefit of creditors one preferred creditor was to receive nearly \$300 more than was due him from the assignor, on an understanding that he would pay certain debts due from the assignor to other persons, amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment. *Held*, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor who had parted with all his property, they would be hindered and delayed in the recovery of their debts, and the deed was, therefore, void under the Statute of Elizabeth. (Cf. 29 N. S. Rep. 162; 28 Can. S. C. R. 337). *McDonald v. Cummings*, xxiv, 321.

13. *Assignment for benefit of creditors—Preferences—R. S. N. S. c. 92, ss. 4, 5, 10—Chattel mortgage—Statute of Elizabeth.*—Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors it is "an assignment for the general benefit of creditors" under s. 10 of the Nova Scotia Bills of Sale Act (R. S. N. S. c. 92), and does not require an affidavit of *bona fides*. *Durkee v. Flint* (19 N. S. Rep. 487), approved and followed; *Archibald v. Hubley* (18 Can. S. C. R. 116), distinguished.—A provision in an assignment for the security and indemnity of makers and indorsers of paper not due, for accommodation of the debtor, does not make it a chattel mortgage under s. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it. *Kirk v. Chisholm*, xxvi, 111.

14. *Bona fide advance to insolvent—Consideration partly bad—Statute of Elizabeth—R. S. O. (1887) c. 124, s. 2.*

See FRAUDULENT PREFERENCE, 7.

5. PROPERTY AFFECTED.

15. *After acquired property—Agreement not to register—Assignment for benefit of creditors—Legal title of trustee—Equitable title of mortgagee—Priority.*—In May, 1880, D., being indebted to M., gave a chattel mortgage on all his stock in trade, chattels and effects then being in his store on G. st., in Halifax; and agreed to convey to M. all stock which during the continuance of the indebtedness he might purchase for the purpose of substituting in place of stock then owned by

him in connection with his said business. These goods were never so conveyed. By the terms of the mortgage the debt was to be paid in 3 years, in 12 equal instalments at specified times, and if any instalment should be unpaid for 15 days after becoming due, the whole to become immediately payable, and M. could take possession of and sell the mortgaged goods. It was further agreed that to save the business credit of D. the mortgage was not to be filed and was to be kept secret; and it was not filed until 12th Dec., 1881. On the 13th Dec., 1881, D. assigned to F. in trust for the benefit of creditors, by trust deed executed by D., F., and one of D.'s creditors, and subsequently by a number of other creditors. At the time F. had no notice of the mortgage to M., and took possession of the goods in the store on G. st., and refused to deliver them to M. on demand, on 14th Dec., default having been made in payments under the mortgage, and suit was brought for recovery of the goods and an account. Previous to the suit F. delivered a small portion of the goods in the store to M., which, as he alleged, were all that remained of the stock on the premises in May, 1880.—*Held*, affirming the judgment appealed from (5 Russ. & Geld. 151), Strong, J., dissenting, that the legal title to the property vested in F. must prevail, the plaintiff's title being merely equitable and the equities between the parties being equal. *McAllister v. Forsyth*, xii, 1.

16. *After acquired property—Partus sequitur ventrem—Novus actus interveniens—Trove against sheriff.*—Plaintiffs were the grantees and H. the grantor in a bill of sale, by way of mortgage, which conveyed four horses, with proviso that until default H. might remain in possession, but power to plaintiffs, on default, to take possession and dispose of the property as they should see fit. After default in payment of principal and interest, a mare, described in the mortgage, dropped a foal, which was seized by defendant (sheriff) under an execution against H.—On appeal from the Supreme Court of New Brunswick (4 Pugs. & Bur. 246), *Held*, that it being established by the evidence that the foal was dropped after default made and therefore while plaintiffs were owners and entitled to possession of the mare, such foal was their property—*partus sequitur ventrem*. *Temple v. Nicholson*, Cass. Dig. (2 ed.) 114.

17. *Hire receipt—Including subsequently acquired goods—Fraud against creditors—Prior agreement—Additional chattels in mortgage.*—B. sold to P. machinery, tools and fixtures, in a factory owned by B. to be paid for by monthly payments, extending over 48 months. P. agreed to keep them insured in favour of B. and to give B. a hire receipt or chattel mortgage, as security for payment, was put in possession of the property, and received letters from B. recommending him to merchants in Montreal, where he purchased goods from L. on credit.—Two months later L. sued P. for the price of goods so purchased, and, after being served with the writ, P. gave B. a chattel mortgage on the goods originally purchased and other goods which it was alleged would have been included in the purchase from B. had it not been claimed that they were not in the factory at the time, but were afterwards found to be there. P. had not given a hire receipt or chattel mortgage at the time of the original purchase from B.

—L. signed judgment against P. issued execution, and caused the mortgaged goods to be seized. On an interpleader issue to try the title in said goods, B. recovered judgment for the goods originally sold to P. but not for those added in the mortgage. The Divisional Court set aside this judgment, holding that the mortgage was void for inclusion of goods not mentioned in the original agreement and his decision was affirmed by the Court of Appeal for Ontario. On appeal—*Held*, that the judgment of the Court of Appeal should be affirmed. *Brown v. Lamontague*, 26 C. L. J. 306; Cass. Dig. (2 ed.), 120.

18. *Collateral security on logs and timber—Mortgagor's administration—Agency—Slide and boom dues—Agreement between Crown and mortgagor of lumber—Lien—C. S. C. c. 28—31 Vict. c. 12.*—Petition of right by appellants, praying that a seizure of a quantity of logs, made for arrears of slide dues, owned by S. for the logs seized and other logs, be removed, and that \$5,267, which had been paid by the appellants to the Crown, under duress, be refunded.—S., being indebted to appellants, had given as collateral security for his debt, two chattel mortgages on logs and timber. These mortgages were executed, on 18th Dec., 1876, and 11th May, 1877. On 15th May, 1877, S. became insolvent, and in 1878, his equity of redemption was released to appellants by his assignee. In June, 1877, S., who had been allowed to remain in possession of the property and to attend to the manufacture and disposal of the lumber in virtue of special provisions in the mortgages, and who also owed slide dues for several years, in order to repay this general debt for dues, agreed to pay the government \$2 per 1,000 feet B. M., on all lumber to be shipped by him through the canals. The dues fixed by the government regulations were 4 cents per log, equal to about 26 cents per 1,000 feet B. M. Appellants claimed that this arrangement was unknown to, and had never been ratified by them.—In 1878, when appellants began to ship the lumber on barges, the collector of slide dues refused to allow the barges to pass through the canals until the appellants paid the \$2 agreed upon between S. and the government.—*Held*, reversing the judgment appealed from (1 Ex. C. R. 1) that S. had no authority, express or implied, from the bank, to pledge the property covered by the mortgages for the payment of arrears of Crown dues, or to impose on such property any lien, charge or burthen other than the law had attached to it for the slidge and boomage of that specific property.—That there was no evidence that the bank had any knowledge of any general lien or charge on that property, or of any arrears other than on the lumber mentioned in the mortgages, or of any claim by the Crown other than for the slidge and boomage on the logs in dispute.—That if the bank did know there were arrears for slide or boom dues on logs previously brought down and manufactured into lumber, such knowledge would not create a charge or attach a lien for such dues on other lumber than that for the slidge and boomage of which they became due.—That if S. did propose by any arrangement with the Crown to give the Crown a charge or lien for arrears due for other lumber, there was no evidence of any adoption, ratification or confirmation of any such arrangement by the bank.—That there was nothing in the law or regulations giving the Crown any general lien for arrears, or

for any general balance which the owner of logs may owe the government, or any lien except on the specific lumber for the amount due for its passage or boomage, viz., 4c. per log, equal to 26c. per 1,000 ft. B. M.—That the transaction was in no sense that of principal and agent, but of debtor and creditor, in which the debtor by mortgage by way of collateral security transferred property to his creditor and agreed to retain possession and so deal with it that its value should be realized in such a manner as to secure to the creditor the proceeds in payment of his debt, the surplus, if any, being for the benefit of the mortgagor. Having transferred the property by way of mortgage, S. was in no position to give by agreement or otherwise a charge to take precedence of such mortgage.—*Per Fournier, J.*, without giving any decided opinion as to the validity of the regulations by virtue of 31 Vict. c. 12, s. 17, such regulations might be looked at to ascertain the amount of dues which could be claimed under them, because the appellants could not at the same time admit and deny the validity of such regulations. Admitting they were invalid, the logs in question having passed through the government slides, there would still be due to the government the value of the services rendered, and by tendering \$1,500 the suppliants admitted that something was justly due to the government, if not legally due in virtue of the regulations. Appeal allowed with costs, Strong and Taschereau, JJ., dissenting. *Merchants Bank of Canada v. The Queen*, Cass. Dig. (2 ed.) 636.

19. *Security for advances—Bank Act, s. 74—Chattel mortgage—Conversion.*—H. held a chattel mortgage on a sawmill belonging to G., with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent incumbrancers. Two months later G. gave H. a second mortgage on said property to secure a note for \$794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G. being unable to purchase the logs asked the bank for an advance. The bank, knowing G. to be financially embarrassed, refused the advances to him but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of \$3,500 G. assigned the contractor's order to the bookkeeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the bank all monies to accrue in respect to the contract, which assignment was agreed to by the contractor, and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. * This purported to be done under s. 74 of the Bank Act. Two or three days later G. made an assignment for benefit of his creditors, previous to which, however, the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage.—*Held*, affirming the judgment appealed from (7 B. C. Rep. 465), that no property in the logs assigned to the bank had passed to G., and H. having no higher right than his mortgagor, could not claim them under his mortgage.—Shortly before G.'s assignment for benefit of his creditors his bookkeeper transferred to the bank

a chattel mortgage given him by G. to secure payment of \$800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due on said mortgage.—*Held*, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent. *Houston v. The Merchants Bank of Halifax*, xxxi., 361.

6. REGISTRATION.

20. *Chattel mortgage—Registration—Renewal—Computation of time—N. W. Terr. ord. No. 5 of 1881.*—The North-West Territories ordinance relating to chattel mortgages (1881, No. 5) provides by s. 9 "every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the persons making the same after the expiration of one year from the filing thereof, unless a statement, etc., is again filed within 30 days next preceding the expiration of the said term of one year." A chattel mortgage was filed 12th Aug., 1886, and registered at 4.10 p.m. of that day. A renewal was registered at 11.49 a.m. 12th Aug., 1887.—*Held*, affirming the decision appealed from, that the renewal was filed within one year from the date of the filing of the original mortgage as provided by the ordinance.—*Per Patterson, J.* In computing the time mentioned in this section, the day of the original filing should be excluded, and the mortgagee would have had the whole of 12th Aug., 1887, for filing renewal. *Thomson v. Quirk*, xviii., 695.

21. *Construction of statute—55 Vict. c. 26, ss. 2 and 4 (O.)—Chattel mortgage—Agreement not to register—Void mortgage—Possession by creditor.*—By the Act relating to chattel mortgages (R. S. O. [1887] c. 125), a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vict. c. 26, s. 2 (O.), that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting assignments and preferences (R. S. O. [1887] c. 124).—By s. 4 of 55 Vict. c. 26, a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors . . . before such taking of possession."—*Held*, reversing the decision of the Court of Appeal, that under this legislation a mortgage so void is void against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set aside, and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subse-

quent taking of possession.—*Held, per Strong, C.J.*, that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession such mortgage is, on grounds of public policy, void *ab initio*. *Clarkson v. McMaster & Co.*, xxv., 96.

7. OTHER CASES.

22. *Chattel mortgage—Mortgagee in possession—Negligence—Wilful default—Sale under powers—"Slaughter sale"—Practice—Assignment for the benefit of creditors—Revocation of.*—A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives, but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor.—An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it.—Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.—Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124, and the assignor was notified of such refusal, and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner. *Rennie v. Block*, xxvi., 356.

23. *Insurance on goods—Condition of policy—Assignment—Consent in writing.*

See INSURANCE, FIRE, 19.

24. *Mortgage of goods insured—Condition against assigning policy—Breach.*

See INSURANCE, FIRE, 24.

25. *Mortgage on goods insured—Condition against sale, transfer or change of title—Breach.*

See INSURANCE, FIRE, 25.

CHEMISTS.

See PHARMACY.

CHEQUES.

See BANKS AND BANKING.

CHOSE IN ACTION.

1. *Assignment—Action by assignee—Statutory notice—R. S. N. S. (4 ser.) c. 94, ss. 355, 357.*—R. S. N. S. (4 ser.) c. 94, s. 355, authorizes the assignee of a chose in action in certain cases to sue thereon in the Supreme Court as his assignor might have done, and s. 357 provides that before such action is brought a notice in writing, signed by the assignee, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall be served on the party

to be sued. Pursuant to this section the assignee of a debt served the following notice: "Pictou, November 21st, 1878, Alex. Grant, Esq.: Admin. Estate of Alexander McDonald, deceased. Dear Sir,—You are hereby notified in accordance with c. 94 of the revised statutes, s. 357, that the debt due by the above estate of Finlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of twelve hundred dollars, the amount of the said debt so assigned to him. S. H. Holmes, attorney for Alex. D. Cameron."—*Held*, affirming the judgment appealed from (23 N. S. Rep. 50), that the notice was a sufficient compliance with the statute. *Grant v. Cameron*, xviii., 716.

2. Will — Devise of all testator's property — Debt due by devisee.]—A devise of all "my real estate and property whatsoever and of what nature and kind soever" at a place named does not include a debt due by the devisee, who resided and carried on business at such place, to the testator,—(4 Ont. L. R. 682 affirmed.) *Thorne v. Thorne*, xxxiii., 309.

3. Assignment — Indorsement of order for money — Absolute transfer — Account.

See PRACTICE AND PROCEDURE, 4.

4. Chattel mortgage — Mortgagee in possession — Negligence — Wilful default — Sale under powers — "Slaughter sale" — Assignment for benefit of creditors — Revocation.

See SALE, 40.

5. Revocation of assignment—Suit by assignee—Re-transfer of chose in action.

See CHATTEL MORTGAGE, 22.

CHOSE JUGÉE.

See RES JUDICATA.

CHURCHES.

1. Rights of pew-holder — Disturbance in possession — Action for tort — Measure of damages.

See ACTION, 41.

2. Lien for church rates—Hypothecary action — Future rights — Charge on lands.

See APPEAL, 21.

3. Presbyterian Church in Canada—Trustees—"Union Act of 1875" — Recovery of church property.

See ACTION, 119.

4. Decision of domestic tribunal — Conference of Methodist Church — Church discipline.

See APPEAL, 138.

5. Will — Condition of legacy — Religious liberty — Restriction as to marriage — Education — Exclusion from succession — Public policy.

See PUBLIC POLICY, 1.

CHURCH FUND.

Diocesan society—Support of clergymen—Participation.

See BENEFIT SOCIETY, 1.

CHURCH LANDS.

Interest of vestry — Rector and wardens—Rectory endowments—Rectory lands—29, 30 Vict. c. 16—Construction.]—*Held*, affirming the judgment of the courts below, that the lands in question in this case were rectory lands within the meaning of the Act, 29 & 30 Vict. c. 16, entitled "An Act to provide for the sale of rectory lands in this province."—*Held*, also, that the lands were held by the rector of the Church of St. James, in the City of Toronto, as a corporation sole for his own use, and not in trust for the vestry and church wardens or parishioners of the rectory or parish of St. James, and such vestry and church wardens had therefore no *locus standi* in *curia* with respect to said lands. *Du Moulin v. Langtry*, xiii., 258. (Appeal to the Privy Council was refused—57 L. T. (N. S.) 17.)

CHURCH SOCIETY.

See CLERGY.

CIRCUIT COURT.

Appealable causes — Appellate jurisdiction of Supreme Court.

See APPEAL, 109.

CIVIL PROCEDURE.

See PRACTICE AND PROCEDURE—CODE OF CIVIL PROCEDURE — PRACTICE OF SUPREME COURT.

CIVIL RIGHTS.

B. N. A. Act, 1867—Powers of legislation—Provincial courts — Procedure — Dominion Controverted Elections Act, 1874—Dominion courts.

See CONSTITUTIONAL LAW, 12.

CIVIL SERVICE.

1. Construction of statute—R. S. C. c. 18—Abolition of office—Discretionary power—Jurisdiction.]—Employees in the civil service of Canada who may be retired or removed from office under the provisions of the eleventh section of "The Civil Service Superannuation Act" (R. S. C. c. 18), have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority. *Balderson v. The Queen*, xxviii., 261.

2. Extra salary — Additional remuneration —Permanent employees — 51 Vict. c. 12, s. 51.

See STATUTE, 63.

AND see PENSION DE RETRAITE.

CLERGY.

Stipend — Commutation fund — Member of synod — Trust — Vested rights — By-law—Church society.—The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the synod to be from time to time passed for that purpose." In 1860, a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each \$200, with a provision for increase in certain events. In 1873, the plaintiff became entitled under this by-law, and in 1876 the synod (the successors of the Church Society) repealed all previous by-laws respecting the fund, and made a different appropriation of it.—*Held*, affirming the Court of Appeal for Ontario (9 App. R. 411), (Fournier and Henry, JJ., dissenting), that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and making a different appropriation of it for the support and maintenance of the clergy of the diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition. *Wright v. Synod of the Diocese of Huron*, xi., 95.

CODICIL.

1. *Will—Revocation—Revival—Intention to revive—Reference to date—Removal of executor—Statute of Mortmain—Will executed under mistake—Ontario Wills Act, R. S. O. (1887) c. 199—9 Geo. II. c. 36 (Imp.)*—A will which has been revoked cannot, since the passing of the Ontario Wills Act (R. S. O. [1887] c. 109), be revived by a codicil unless the intention to revive it appears on the face of the codicil either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the court, with reasonable certainty, the existence of the intention in question.—A reference in the codicil to a date of the revoked will, and the removal of the executor named therein, and substitution of another in his place will not revive it.—*Held*, per King, J., dissenting, that a codicil referring to the revoked will by date and removing an executor named therein is sufficient indication of an intention to revive such will, more especially when the several instruments are executed under circumstances shewing such intention. *Macdonald v. Purcell; Cleary v. Purcell*, xxiii., 101.

2. *Will—Devise to two sons—Devise over of one share—Condition—Context—Codicil.*—A testator devised property "equally" to his two sons J. S. and T. G., with a provision that "in the event of the death of my said son T. G., unmarried, or without leaving issue," his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property, on a condition, which was not complied with, and the de-

vise to him became of no effect.—*Held*, reversing the decision of the Supreme Court of Nova Scotia, that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties the estate of J. S. being absolute, and that of T. G. subject to an executory devise over in case of death at any time, and not merely during the lifetime of the testator. *Cowan v. Allen* (26 Can. S. C. R. 292) followed.—*Held*, also, that the word "equal" indicated the respective shares which the two devisees were to take in the area of the property devised, and not the character of the estates given in those shares. *Fraser v. Fraser*, xxvi., 316.

COGNOVIT ACTIONEM.

Judgment in default of appearance—R. S. O. (1877) c. 118.

See FRAUDULENT PREFERENCE, 1.

COLLISION.

See ADMIRALTY LAW — NEGLIGENCE—SHIPS AND SHIPPING.

COLLOCATION.

Contestations of report—Appeal—Amount in controversy—Pecuniary interest of appellant—Arts. 746, 747 C. C. P.

See APPEAL, 68.

COMITY.

1. *International law—Public policy—Foreign corporation—Contract in Canada—Operating telegraph line—Exclusive privilege—Restraint of trade.*—A foreign telegraph company has a right to enter into a contract with a railway company in Canada for the exclusive privilege of constructing and operating a line of telegraph over the road of such railway company provided the contract is consistent with the purposes for which the foreign company is incorporated and not prohibited by its charter nor by the laws of the Province of Canada in which the contract is made. The right of a foreign corporation to enter into such a contract, and carry on the business provided for thereby, is a right recognized by the comity of nations. *Canadian Pacific Ry. Co. v. Western Union Telegraph Co.*, xvii., 151.

2. *Foreign corporation—Carrying on business in Canada.*

See COMPANY LAW, 2.

COMMISSION.

1. *Appeal—Evidence taken by commission—Reversal on questions of fact.*—Where the witnesses have not been heard in the presence of the judge, but their depositions were taken before a commissioner, a Court of Appeal may deal with the evidence more fully than if the

trial judge had heard it, or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it. *Malzard v. Hart*, xxvii., 510.

2. *Examination of witnesses—Execution—Directory provisions—Defective return—Failure to administer interrogatories.*

See EVIDENCE, 7.

3. *Security for financial assistance—Remuneration for indorsement of note not disallowed.*

See CONTRACT, 254.

4. *Receiving affidavits—Presumption of authority—Manitoba Newspaper Act.*

See AFFIDAVIT, 1.

COMMITMENT.

Form of—Jurisdiction—Judicial notice—R. S. C. c. 135, s. 32.

See HABEAS CORPUS, 7.

COMMON EMPLOYMENT.

1. *Injury to employee—Art. 1056 C. C.—Liability.*—The doctrine of common employment does not prevail in the Province of Quebec. *The Queen v. Filion* (24 Can. S. C. R. 482) followed. *The Queen v. Grenier*, xxx., 42.

2. *Employers' liability—Arts. 1053, 1056, C. C.—Cause of accident.*—As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *The Queen v. Filion* (24 Can. S. C. R. 482); and *The Queen v. Grenier* (30 Can. S. C. R. 42) followed. *Asbestos and Asbestic Co. v. Durand*, xxx., 285.

AND see MASTER AND SERVANT — NEGLIGENCE.

COMMON FAULT.

See NEGLIGENCE.

COMMON WALL.

See PARTY WALL.

COMMON SCHOOL FUND.

Accounts of the Province of Canada—Common school fund and lands—Administration by Ontario—Remitting price of land sold—Default in collections—Withholding lands from sale—Uncollected balances—Jurisdiction of Dominion arbitrators.—By the submission of 10th April, 1890, amongst other matters submitted to the Dominion arbitrators were the following: "(h) The ascertainment and determination of the principal of the common

school fund, the rate of interest which would be allowed on such fund, and the method of computing such interest. (i) In the ascertainment of the amount of the principal of the said common school fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold." The Province of Quebec claimed that Ontario was liable (1) for the purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold; and (4) for all uncollected balance of purchase money. *Held*, Gwynne, J., dissenting, that the Dominion arbitrators have jurisdiction, under the submission, to hear and adjudicate upon the claims so made by the Province of Quebec. *The Province of Quebec v. The Province of Ontario and the Dominion of Canada; In re Common School Fund and Lands*, xxxi., 516.

COMMUNITY.

1. *Renunciation—Estoppel—Marchande publique—Prescription—Arts. 1379, 2191 C. C.—Art. 632 C. C. P.*

See TITLE TO LAND, 75.

2. *Assets—Second community—Edit de secondes nocces—Arts. 279, 282, 283 C. de P.—Arts. 774, 1265, 1760 C. C.—Transfer to descendants.*

See HUSBAND AND WIFE, 1.

3. *Husband and wife—Liquidation of insolvent estate—Action by heirs of deceased wife—Deposits in bank—Parties.*

See PRINCIPAL AND AGENT, 20.

4. *Continuation—Tripartite inventory—Procès-verbal de carence.*

See HUSBAND AND WIFE, 6.

5. *Husband and wife—Judicial separation as to property—Debts incurred by husband before dissolution of community—Obligation by wife—Art. 1301 C. C.—Nullity—Public policy.*

See HUSBAND AND WIFE, 8.

6. *Construction of deed—Propre de communauté—Sale of land to married woman without authorization.*

See TITLE TO LAND, 87.

7. *Marriage contract—Universal community—Don mutuel—Registry laws—Construction of contract—Divisibility—Arts. 807, 819, 1411 C. C.*

See MARRIAGE LAWS, 2.

AND see HUSBAND AND WIFE.

COMPANY LAW.

1. BUSINESS, OBJECTS, ETC., 1-9.
2. CRIMINAL INDICTMENT, 10.
3. DECEIT AND FRAUD, 11-12.
4. DIRECTORS, ETC., 13-17.
5. FOREIGN CORPORATIONS, 18-20.
6. FORFEITURE OF CHARTER, 21-22.
7. INCORPORATION AND PROMOTION, 23-27.
8. SEAL, 28-31.
9. SHARES AND SHAREHOLDERS, 32-52.
10. WINDING-UP, 53-60.

1. BUSINESS, OBJECTS, ETC.

1. *Limited liability—Towage contract—Sawmill company—Collision—Merchant shipping.*—Where there is nothing in the charter of a company incorporated for the purposes of a sawmill manufacturing business which would prevent it purchasing and owning a steam tug for use incidental to such business, the company can validly enter into contracts for towage to be done by the tug and hire it for such purposes. *Sewell v. B. C. Towing Co. and Moodyville Sawmill Co.*, ix., 527.

2. *Foreign corporation—Telegraph company—Business in Canada—Contract for—Exclusive right—Restraint of trade—Railway telegraph—Public policy—Comity of nations.*—In 1869, E. & N. A. Ry. Co. owning a railway from St. John, N.B., to U. S. boundary, agreed with the W. U. Tel. Co. giving it the exclusive right for 99 years to construct and operate a line of telegraph over its road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree in equity to the St. J. and M. Ry. Co., which, in 1883, leased it to the N. B. Ry. Co. for 999 years. The telegraph line was constructed by the W. U. Tel. Co. under the agreement, and has been continued ever since without any new agreement being made with the St. J. and M. Ry. Co. or the N. B. Ry. Co. The W. U. Tel. Co. is incorporated by the State of New York for constructing and operating telegraph lines in the state. Its charter neither allows nor prohibits it engaging in business outside the state. In 1888 the C. P. Ry. Co. completed a road from Montreal to St. John, a portion of it having running powers over the N. B. Ry., on which the W. U. Tel. Co. had constructed its telegraph line. The N. B. Ry. Co. having given permission to the C. P. Ry. Co. to construct another telegraph line over the same road, the W. U. Tel. Co. obtained an injunction. On appeal the Supreme Court of Canada—*Held*, 1. That the agreement of 1869 was binding on the present owners of the road. 2. That the contract made with the W. U. Tel. Co. was consistent with the purposes of its incorporation, not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations. 3. The exclusive right granted to the W. U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade.—*Per Gwynne, J.*, dissenting. The comity of nations does not require the courts of the country to enforce, in favour of a foreign corporation, a contract

depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land. *Can. Pac. Ry. Co. v. Western Union Tel. Co.*, xvii., 151.

3. *Joint stock company—Ultra vires contract—Consent judgment—Action to set aside.*—A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter, or such as are reasonably incidental thereto, nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.—If a company enters into a transaction which is *ultra vires* and litigation ensues, in the course of which a judgment is entered by consent, such judgment is as binding upon the parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company. *Charlebois v. Delap*, xxvi., 221.

4. *Banking—Bills of exchange and promissory notes—Discount by president—Credit to company's account—Payments out to company's creditors—Liability of company upon note given without authority—Bona fides.*—Where the president of an incorporated company made a promissory note in the company's name, without authority, and discounted it with the company's bankers, the proceeds being credited to the company's account, and paid out by cheques in the company's name to its creditors, whose claims should have been paid by the president out of funds which he had previously misappropriated, the bankers, who had taken the notes in good faith, are entitled to charge the amount thereof at maturity against the company's account.—Judgment of the Court of Appeal for Ontario (23 Ont. App. R. 66) affirmed. *Brigdwatwater Cheese Factory Co. v. Murphy*, xxvi., 443.

5. *Incorporated company—Action against—Forfeiture of charter—Estoppel—Compliance with statute—Res judicata.*—In an action against a river improvement company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, etc., for which tolls were claimed, were not placed on the properties mentioned in the letters patent of the company; that the company did not comply with the statutory requirement that the works should be completed within two years from the date of incorporation whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters contrary to the provisions of the Timber Slide Companies Act, and could not exact toll in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands, whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the commissioner in fixing the schedule of tolls. *Held*, affirming the judgment of the Court of Appeal for Ontario, that the

above grounds of impeachment were covered by the consent judgment and were *res judicata*. *Held*, further, that the plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.—By R. S. O. [1887] c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers “unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works.” *Semble*, the non-completion of the work within two years would not, *ipso facto*, forfeit the charter, but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared.—Another ground of objection to the imposition of tolls was that the commissioner, in acting on the report of the valuator appointed under the consent judgment, erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a scale of tolls fixed. *Held*, that under the statute the schedule could only be allowed or varied by the commissioner and the court could not interfere, especially as no application for relief had been made to the commissioner. *Hardy Lumber Co. v. Pickerel River Improvement Co.*, xxix., 211.

6. Powers—Erection of booms—Impeding navigation—45 Vict. c. 100 (N.B.)

See CONSTITUTIONAL LAW, 66.

7. Building society—Objects and purposes—By-law—Loan transaction—Powers—Ultra vires.

See BUILDING SOCIETY, 1.

8. Manitoba Newspaper Act—Affidavit for corporate owner—Affirmation.

See LIBEL, 4.

9. Constitutional law—Municipal corporation—Powers of legislature—License—Monopoly—Highways and ferries—Tolls—Navigable streams—By-laws and resolutions—Intermunicipal ferry—Disturbance of licensee—Club associations, companies and partnerships—North-West Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act (1867), c. 92, ss. 8, 10, and 16—Rev. Ord. N. W. T. (1888) c. 28—N. W. T. Ord. No. 7 of 1891-2, s. 4.

See CONSTITUTIONAL LAW, 27.

2. CRIMINAL INDICTMENT.

10. Criminal law—Manslaughter—Indictment against body corporate—Criminal Code, s. 213—Fine.]—Under s. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control.—The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the

indictment.—As s. 213 provides no punishment for the offence the common law punishment of a fine may be imposed on a corporation indicted under it. — Judgment appealed from (7 B. C. Rep. 247) affirmed. *Union Colliery Co. v. The Queen*, xxxi., 81.

3. DECEIT AND FRAUD.

11. Promoters of company—*Bona fide statement—Misrepresentation—Concealment—Action ex delicto for deceit—Waiver—Prospectus—Misstatements—Rescission of contract.*]—A suit brought against a joint stock company and four shareholders who had been the promoters, alleged that the defendants, other than the company, had been carrying on a lumber business as partners and had become embarrassed; that they then concocted the scheme of forming a joint stock company; that the sole object of the proposed joint stock company was to relieve the members of the firm from personal liability for debts incurred in the business and induce the public to advance money to carry it on; that application was made for a charter, and, at the same time, a prospectus issued which was set out in full in the bill; that such prospectus contained the following paragraphs among others, which the plaintiffs alleged to be false: 1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber. 2. The interest of the proprietors of the old company in its assets, estimated at about \$140,000 over liabilities, has been transferred to the new company at \$105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company. 3. Preference stock not to exceed \$75,000 will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst all the shareholders *pro rata*. 4. Should the holders of preference stock so desire the company binds itself to take that stock back during the year 1880 at par, with 8 per cent. per annum, on receiving six months' notice in writing. 5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary, as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.—The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus; that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor that a mortgage on the assets of the old company had been given, after the prospectus issued, but before the stock certificates were granted; that the assets of the old company were not worth \$140,000, or any sum, over liabilities, but were worthless; and prayed for a rescission for the contract for taking stock, for repayment of the amount of such stock, and for damages against the directors and promoters for misrepresentation.—There was evidence that the promoters had reason to believe the prospects for the new company to be good,

and that they had honestly valued their assets.

—Three grounds of relief were put forward:—
1. Rescission of the contract to subscribe for preference stock. 2. Specific performance of the contract to take back the preference stock during the year 1880 at par. 3. Damages against the directors and promoters for misrepresentation.—The company having become insolvent, the plaintiffs put their case principally on the third ground.—*Held*, affirming the judgment, appealed from (11 Ont. App. R. 336), that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation.—That, as to the defendants, other than the company, the evidence failed to establish such a case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit.—That as to the alleged concealment of the mortgage it was given after the prospectus issued and could not have been mentioned in the prospectus, and moreover that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence shewed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind. *Petrie v. Guelph Lumber Co.*, xi., 450.

12. *Stock subscription — Deceit by agent — Filling up blank — Oral proof — Receipt of dividend — Estoppel.*

See No. 35, *infra*.

4. DIRECTORS, ETC.

13. *By-law — Sale by director to company — Ratification by shareholders — Vote of owner.*—A director personally owned a vessel which he wished to sell to the company; he possessed a majority of the shares of the company, some of which he assigned to persons to qualify as directors, positions they accordingly filled. Upon a proposed sale the board of directors, including the owner of the vessel, passed a by-law approving the purchase of the vessel by the company, and subsequently at a general meeting of shareholders, a resolution confirming the by-law was passed by a small majority obtained by the votes controlled by the interested director.—*Held*, reversing the judgment appealed from (11 Ont. App. R. 205), that the by-law was illegal and the resolution invalid. *Beatty v. Northwestern Transportation Co.*, xii., 598.

[Reversed by the Privy Council, 12 App. Cas. 589.]

14. *Powers of directors — Assignment for benefit of creditors — Assent of shareholders.*—The directors of a joint stock company have power to assign all the company's property for the benefit of creditors without special statutory authority or formal assent by the shareholders. Judgment appealed from (13 Ont. App. R. 7) affirmed. *Hovey v. Whiting*, xiv., 515.

15. *Winding-up Act — Sale by liquidator — Purchase by director of insolvent company—*

Fiduciary relationship — R. S. C. c. 129, s. 34.—Upon the appointment of a liquidator for a company being wound up under R. S. C. c. 129 (The Winding-up Act), if the powers of the directors are not continued, as provided by s. 34 of the Act, their fiduciary relations to the company or its shareholders are at an end, and a sale of them by the liquidator of the company is valid. *Chatham National Bank v. McKeen*, xxiv., 348.

16. *Directors — By-law — Ultra vires — Discount shares — Calls for unpaid balances — Contributories — Trustees — Powers — Contract — Fraud — Breach of trust — Statute, construction of — C. S. M. c. 9, Div. 7—R. S. M. c. 25, ss. 30, 33.*—The directors of a joint stock company incorporated in Manitoba have no powers under the provisions of "The Manitoba Joint Stock Companies Incorporation Act" to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of the shareholders of the company is invalid.—A by-law or resolution of a joint stock company which operates unequally towards the interests of any class of the shareholders is invalid and *ultra vires* of the company's powers.—Where shares in the capital stock of a joint stock company have been illegally issued below par, the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value. Judgment of the Court of Queen's Bench for Manitoba (11 Man. L. R. 629) reversed, *Taschereau, J.*, dissenting. *North-west Electric Co. v. Walsh*, xxix., 33.

17. *Debtor and creditor — Preference — Collusion — Pressure — R. S. B. C. cc. 86, 87—The Bank Act, s. 80 — Company law — Mortgage by directors — Ratification — B. C. Companies Acts 1890, 1892, 1894.*—The action was to set aside a mortgage by an incorporated company to the bank, an assignment of book debts and judgment by the bank against the company on grounds: (1) That the mortgage was voluntary, fraudulent and void under the Statute of Elizabeth; (2) void as a fraudulent reference; (3) not executed in accordance with the Companies Act; (4) that the assignment was void for same reasons and contrary to the Bank Act; and (5) the judgment voluntary, fraudulent and void under the Statute of Elizabeth. It was contended that moneys received by the bank were exigible under plaintiffs' executions and an order asked accordingly. The judgment appealed from (8 B. C. Rep. 314) affirmed the trial judgment and held that there was good consideration for the mortgage, that it was given under pressure and should not be set aside although comprising the whole of the debtor's property and given under insolvent circumstances to the knowledge of the mortgagee and deprived the other creditors of their remedy; also, that the mortgage given by the company's directors without proper authority had been legally ratified by subsequent resolution of the shareholders. The Supreme Court affirmed the judgment appealed from, *Gwynne, J.*, taking no part in the decision, and, subsequently, the Privy Council refused leave for an appeal (8 B. C. Rep. 337). *Adams & Burns v. The Bank of Montreal*, xxxii., 719.

5. FOREIGN CORPORATIONS.

18. *Foreign corporation — Winding-up order — Conflict of laws — 28 & 29 Vict. c. 63 (Imp.)—45 Vict. c. 23 (D.)—Insolvent trading corporations — Obiter dictum.*—Under a proper construction of the Act, 45 Vict. c. 23 (D.) it was not the intention of the Parliament of Canada to make it applicable to foreign corporations doing business in the Dominion.—(This decision was by Sir William Ritchie, C.J., specially expressed as not involving consideration of the question of jurisdiction in respect to insolvent trading corporations, and Strong, J., stated that it did not impugn the authority of the Parliament of Canada to make provisions in respect to insolvent foreign corporations, not in conflict with imperial legislation.) *Merchants Bank of Halifax v. Gillespie*, x., 312.

19. *Constitutional law — Winding-up Act — R. S. C. c. 129, s. 3—Foreign corporations.*—Section 3 of the Winding-up Act (R. S. C. c. 129) which provides that the Act applies to incorporated trading companies doing business in Canada wheresoever incorporated is *intra vires* of the Parliament of Canada. Judgment appealed from (16 Q. L. R. 79) affirmed. *Allen v. Hanson; In re Scottish Canadian Asbestos Co.*, xviii., 667.

20. *Foreign telegraph company — Exclusive privileges — Public policy — Restraint of trade — National comity.*

See No. 2, ante.

6. FORFEITURE OF CHARTER.

21. *Condition precedent — Subscription of shares — Act of incorporation—Forfeiture—44 Vict. c. 61 (D.)—Information—R. S. C. c. 21, s. 4—Scire facias—Form of proceedings — Arts. 997 et seq. C. C. P.*—The company by its Act of incorporation was authorized to carry on business provided \$100,000 of its capital stock was subscribed, and 30% paid thereon, within six months after the passing of the Act. On information that only \$60,500 had been *bond fide* subscribed prior to commencing operations, the balance having been subscribed for by G. in trust, who subsequently surrendered a portion of it to the company, and that the 30% had not been truly and in fact paid thereon, the Attorney-General sought by proceedings in the Superior Court to have the company's charter set aside and declared forfeited.—*Held*, affirming the judgment appealed from, Gwynne, J., dissenting, 1. That this being a Dominion statutory charter proceedings to set it aside were properly taken by the Attorney-General of Canada. 2. That such proceedings taken by the Attorney-General of Canada under arts. 997 et seq. C. C. P., in the form authorized by those articles, are sufficient and valid though erroneously designated in the pleadings as a *scire facias*. 3. That the *bond fide* subscription of \$100,000 within six months from the passing of the Act of incorporation, and the payment of 30% thereon were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been *bond fide* and in fact complied with within such six months the Attorney-General was entitled to have the charter declared forfeited. *Dominion s. c. D.—9*

Salvage and Wrecking Co. v. Attorney-General of Canada, xxi., 72.

22. *Forfeiture of charter — Estoppel — Compliance with statute — Action — Res judicata.*—In an action against a river improvement company for re-payment of tolls alleged to have been unlawfully collected, it was stated that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that the works should be completed within two years from the date of incorporation whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters contrary to the provisions of the Timber Slide Company's Act, and could not exact tolls in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Company's Act, and to be acted upon by the commissioner in fixing the schedule of tolls.—*Held*, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment and were *res judicata*.—*Held*, further, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.—By R. S. O. (1887) c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers, unless further time were granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works.—*Semble*, the non-completion of the works within two years would not *ipso facto* forfeit the charter, but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared.—Another ground of objection to the imposition of tolls was that the commissioner, in acting on the report of the valuator appointed under the consent judgment erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a new scale of tolls fixed.—*Held*, that under the statute the schedule could only be altered or varied by the commissioner and the court could not interfere, especially as no application for relief had been made to the commissioner. *Hardy Lumber Co. v. Pickering River Improvement Co.*, xxix., 211.

7. INCORPORATION AND PROMOTION.

23. *Loan to promoter — Personal liability — Guarantee.*—A promoter of a joint stock company borrowed money for the purposes of the company giving his own note as security. The lender was informed at the time of the

manner in which the loan was to be, and was, applied.—*Held*, that as the company did not exist at the time of the loan it could not be the principal debtor nor the borrower a mere guarantor. The latter was, therefore, primarily liable for re-payment of the loan. Judgment appealed from, *sub nom. Bugbee v. Clergue* (27 Ont. App. R. 96) affirmed. *Clergue v. Humphrey*, xxxi., 66.

24. *Principal and agent — Promoters of company — Agent to solicit subscriptions — False representations — Ratification — Benefit.*—Promoters of a company employed an agent to solicit subscriptions for stock and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters: *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 261) that the latter, having benefited by the sum paid by W. were liable to repay it though they did not authorize it and had no knowledge of the false representations of their agent. *Held*, per Strong, C.J., that neither express authority to make the representations nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule *respondent superior* applies as in other cases of agency. *Milburn v. Wilson*, xxxi., 481.

25. *Island of Anticosti Co.—Constitutionality of incorporating Act—Res judicata.*

See ESTOPPEL, 62.

26. *Unincorporated association — Note by manager—Liability of members.*

See BILLS AND NOTES, 5.

27. *Paid up shares—Transfer of property to company — Fiduciary relationship—Consideration.*

See No. 41, *infra*.

8. SEAL.

28. *Special charter—37 Vict. c. 85 (Ont.) —Binding contract—Policy of life insurance —Absence of corporate seal—Fraud—Pleadings—Equitable relief.*—The statute incorporating the company enacted that "no contract shall be valid unless made under the seal of the company, and signed by the president or vice-president, or one of the directors, and countersigned by the manager, except the interim receipt." In an action for a death claim, to the plea that the policy sued on was not sealed, and, therefore, not binding on the company, the plaintiff replied, on equitable grounds, that the defendant accepted the application for insurance, and that the policy issued was acted upon by all as a valid policy, but the seal was inadvertently omitted, and claimed that defendant should be estopped from setting up the absence of the seal, or ordered to affix it.—*Held*, affirming the judgment appealed from (5 Ont. App. R. 218), Ritchie, C.J., and Taschereau, J., dissenting, that setting up "the want of a seal" as a defence was, under the circumstances of the case, a fraud which a court of equity should interfere to prevent in virtue of its functions and duty of repressing all fraud whenever and in whatever shape it appears;

and therefore the plaintiff was entitled to relief as prayed in her equitable replication. *London Life Insurance Co. v. Wright*, v., 466.

29. *Corporate seal—Executed contract.*—A corporation is liable on an executed contract for the performance of work, within the purposes for which it was created, which it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. Ritchie, C.J., and Strong, J., dissenting. *Bernardin v. North Dufferin*, xix., 581.

30. *Agent of foreign corporation—Use of corporate seal — Sale of goods—Evidence—Mesne process—Conversion.*

See SHERIFF, 1.

31. *Agreement by agent — Executed contract—Corporate seal—Ratification.*

See CONTRACT, 117.

9. SHARES AND SHAREHOLDERS.

32. *Allotment of shares below par—Subsequent transfer—Transferee holding in good faith and without notice—27 & 28 Vict. c. 23 (Can.)—Shareholders' liability towards creditors.*—Certain shares in a company incorporated by letters patent under 27 & 28 Vict. c. 23, were allotted, by resolution at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. below their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was allotted nine shares, which were subsequently assigned to the appellant for value as fully paid up. Appellant inquired of the secretary of the company, who also informed him that they were fully paid up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share-book the amount mentioned was "shares, two, at \$300—\$600."—*Held*, (Richards, C.J., and Ritchie, J., dissenting), reversing the judgment of the Court of Appeal for Ontario (37 U. C. Q. B. 422; 1 Ont. App. R. 1), that a person purchasing shares in good faith, without notice, from an original shareholder under 27 & 28 Vict. c. 23, as shares fully paid up, is not liable to an execution creditor of the company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares. *McCracken v. McIntyre*, i., 479.

33. *Joint and several liability — Paid up shares — Registration of payment — Shareholder — Action by creditor of company—C. S. C. c. 63, ss. 25, 33, 34, 35.*—In an action against stockholders of a joint stock company incorporated under C. S. C. c. 63, to recover an unpaid judgment against the company.—*Held*, affirming the judgment appealed from (27 U. C. C. P. 65), that under C. S. C. c. 63, as soon as a shareholder has paid up his full shares and has registered a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always

debts to employees, as specially mentioned in s. 36, although the registration was not effected until after the 30 days mentioned in s. 35. (Ritchie, C.J., and Fournier, J., dissenting.) *McKenzie v. Kittridge*, iv., 368.

34. *Special charter — Railway Act—Subscription of stock—Allotment—Notice—Liability as shareholder—Conditional agreement.* — A judgment creditor of the T. G. & B. Ry. Co., sued M. as a shareholder therein, for unpaid stock. M. had signed the stock-book, which was headed by an agreement by subscribers to become shareholders for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," to pay ten per cent. of the shares and all future calls. The company passed a resolution instructing the secretary to issue allotment certificates to each shareholder for the amount of his shares. The secretary prepared them, including one for the respondent, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice, signed by the secretary, in a daily paper, notifying subscribers that the first call of ten per cent. was required to be paid immediately by them. M. never called for or received his certificate of allotment, never paid the ten per cent., and denied notice of the allotment. The judge found that M. had subscribed for and had been allotted fifty shares, but was unable to say whether or not he received actual notice of allotment. *Held*, affirming the Court of Appeal (5 Ont. App. R. 126), (Ritchie, C.J., and Gwynne, J., dissenting), that the document signed was only an application for shares and did not create any liability as a shareholder; that it was necessary for the plaintiff to have shewn notice within a reasonable time of the allotment of shares, and, no such notice having been proved, the defendant could not be held liable upon his subscription. *Nasmith v. Manning*, v., 417.

35. *Stock subscription—Error—Deceit by agent—Filling up blanks—Oral testimony—Action for calls — Contract—Repudiation—Receipt of dividend—Estoppel.* — In an action to recover calls upon fifty shares alleged to have been subscribed for by C., it was shewn that upon solicitation of an authorized agent of the company C., intending to subscribe for five paid up shares, paid \$500 and signed his name to the subscription book; the columns for amount and number of shares, at the time left blank, were afterwards, in his presence, filled in for fifty shares by the agent, without C.'s consent. Having discovered his position, C. endeavoured, on numerous occasions, ineffectually, to induce the company to relieve him from the larger liability. At the end of the year, the company declared a dividend of 10 per cent. on the paid up capital and C. received a cheque for \$50, for which he gave a receipt. It did not appear that any allotment of shares to C. was ever made. A judgment recovered for the calls was affirmed by the Court of Queen's Bench. — *Held*, Ritchie, C.J., *dubitante*, reversing the judgment appealed from, that the evidence shewed that C. never contracted to take fifty shares; that the receipt given for the dividend of 10 per cent. on the amount he actually paid was not a ratification or admission of liability for the larger amount, and he was not estopped from shewing that he was never, in fact, a subscriber for more than five shares in the capital

stock of the company. *Coté v. Stadacona Ins. Co.*, vi., 193.

36. *Increase of capital—Powers of directors — Unauthorized issue of stock — Scire facias—Shareholder—27 & 28 Vict. c. 23—Estoppel—Mortgage of shares.* — A company incorporated under 27 & 28 Vict. c. 23, with power to increase the capital stock "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from \$130,000 to \$250,000 before the original capital stock had been paid in. Execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by *sci. fa.* against A. as holder of shares not fully paid up. It appeared that the shares held by A. were shares of increased capital and not of that originally authorized. *Held*, affirming the judgment appealed from (7 Ont. App. R. 1), Gwynne, J., dissenting, that as the original nominal capital was never paid in, the directors had no power to increase the stock of the company, and that an action could not be maintained against A. as the shares held by him consisted wholly of new unauthorized stock. — Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. — *Per* Gwynne, J., dissenting. The objection not having been taken by the defendant, or tried, the court, under R. S. O. c. 38, s. 22, should put the questions of fact upon which the validity any sufficiency of the objections suggested by the court rested, into course for trial in due form of law. — *Per* Strong and Henry, JJ. (Gwynne, J., *contra*). That although A., as mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. *Page v. Austin*, x., 132.

37. *Misrepresentation by promoters—Action by individual shareholders—Delay—Parties—Estoppel.* — Individual shareholders cannot take action against promoters for damages caused by alleged misrepresentations by the latter as to the prospects of the company when formed, the injury, if any, being an injury to the company, not to the respective shareholders. (Strong, J., dissenting). If the shareholders could bring such action a delay of four years, during which they suffered the business of the company to go on with full knowledge of the alleged misrepresentations, would disentitle them to relief. (Strong, J., dissenting.) *Beatty v. Neelon*, xiii., 1.

38. *Stock list subscriptions before incorporation—31 Vict. c. 25 (Que.)—Action for calls—Non-allotment.* — P. signed an agreement to take shares in a company to be incorporated under 31 Vict. c. 25 (Que.), but his name did not appear in the notice applying for letters patent, nor as one of the original incorporators. The directors never allotted shares to P. and he never subsequently acknowledged any liability to the company. In an action by the company for \$10,000 alleged to be due by him on 100 shares in the capital stock of

the company,—*Held*, affirming the judgment appealed from (12 Q. L. R. 200), that P. was not liable for calls on stock. *Magog Textile & Print Co. v. Price*; *Magog Textile & Print Co. v. Dobell*, xiv., 664.

39. *By-law to increase capital — Sanction by shareholders*—31 Vict. c. 25 (Que.), ss. 11, 17, 19, 20—[Calls on new stock.]—Section 11 of 31 Vict. c. 25 (Que.), provides “no by-law for increasing or decreasing the capital of the company shall have any force or effect whatever until it shall have been sanctioned by a vote of not less than two-thirds in amount of the shareholders at a general meeting of the company, duly called for considering the same, and afterwards confirmed by supplementary letters patent.” On 9th March, 1875, directors of the St. John Stone Chinaware Co. passed a by-law increasing the capital stock by the issue of 250 additional shares of \$200 each, payable by monthly instalments of ten per cent. each.—At the general meeting, on 8th June, 1875, for the election of directors and other business, this by-law was confirmed. There was no evidence as to whether it was sanctioned by two-thirds in amount of the shareholders. There was no day appointed for payment of calls, and the books contained no other entry relating to calls for the increased stock than the minutes of the meeting of the directors on 9th March. and of the general meeting on 8th June, 1875. In an action by the assignee of the company against an original stockholder and director, for calls of 20 shares of new stock,—*Held*, affirming the Court of Queen’s Bench for Lower Canada, that there was no evidence of calls for the payment of the shares in question having been duly made, and therefore defendant was not liable. — *Per Fournier and Henry, JJ.* There was no evidence that the by-law had been sanctioned by a vote of not less than two-thirds in amount of the shareholders at a general meeting of the company duly called for considering the same, and on that ground also the appeal should be dismissed. *Knight v. Whitfield*, 22 C. L. J. 15; Cass. Dig. (2 ed.) 186.

40. *Stock subscription—Payment — Appropriation of payment by company — Portion treated as paid up — Estoppel.*]—N., a director and shareholder of a railway company, agreed to lend the company \$100,000, taking among other securities for the loan 168 shares held by B., which were to be paid up. B. owned 188 shares, on which he had paid an amount equal to 40 per cent. of their value, but being unable to pay the balance the directors of the company agreed to treat the sum paid as payment in full for 75 of the 188 shares, and B. consented to transfer that number to N. as fully paid up. N. agreed to this and B. signed a transfer which was entered on the books of the company. There was no formal resolution by the board of directors authorizing the appropriation of the money paid by B. A judgment creditor of the railway company whose writ of execution had been returned *nulla bona* brought an action against N. for payment of his debt, claiming that only 40 per cent. had been paid on the 75 shares, and that the remaining 60 per cent, was still due the company thereon. A judgment in favour of N. was affirmed by the Divisional Court, but reversed by the Court of Appeal, on the ground that the appropriation by the directors of the money paid by B. was invalid for want of a

formal resolution authorizing it.—*Held*, reversing the judgment of the Court of Appeal, Gwynne, J., dissenting, that the company having got the benefit of the loan by N. were estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares, upon the security of which the loan was made, and creditors not having been prejudiced, are bound in the same way; and the transaction being binding between B. and the company, and not objectionable as regards creditors, N. could accept the 75 shares in lieu of the 168 he was entitled to. *Neelon v. Town of Thorold*, xxii., 390.

41. *Winding-up Act—Contributory—Shares paid for by transfer of property—Adequacy of consideration—Promoter selling property to company — Trust — Fiduciary relation.*]—Shares in a joint stock company may be paid for in money or money’s worth, and if paid for by a transfer of property they must be treated as fully paid up.—In proceedings under the Winding-up Act the Master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories.—There is a distinction between a trust for a company of property acquired by promoters and afterward sold to the company, and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed. A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter, and if he sells to them must not violate any of the duties devolving upon him in respect to such relationship. If he sells, for instance, through the medium of a board of directors, who are not independent of him, the contract may be rescinded provided the property remains in such a position that the parties may be restored to their original status. There may be cases in which the property may be regarded as being bound by a trust either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid up shares of the company issued as part of the purchase price of the property such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory. *In re Hess Mfg. Co.; Edgar v. Sloan*, xxiii., 644.

42. *Directors—By-law — Ultra vires—Discount shares—Calls for unpaid balances—Contributories — Trustees’ powers — Contract — Fraud — Breach of trust — Construction of statute—C. S. M. c. 9—R. S. M. c. 25, ss. 30, 33.*]—The directors of a joint stock company incorporated in Manitoba have no powers under the provisions of “The Manitoba Joint Stock Companies Incorporation Act” to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of the shareholders of the company is invalid.—A by-law

or resolution of the directors of a joint stock company, which operates unequally towards the interests of any class of the shareholders is invalid and *ultra vires* of the company's powers.—Where shares in the capital stock of a joint stock company have been illegally issued below par, the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value.—Judgment of the Court of Queen's Bench for Manitoba (11 Man. L. R. 629) reversed, *Taschereau, J.*, dissenting. *North-west Electric Co. v. Walsh*, xxix., 33.

The Privy Council refused leave to appeal from this decision.

43. *Joint stock company—Irregular organization—Subscription for shares—Withdrawal—Surrender—Forfeiture—Duty of directors—Powers—Cancellation of stock—Ultra vires—“The Companies Act”*—“*The Winding-up Act*”—Contributories—Pleading—Construction of statute.]—After the issue of an order for the winding-up of a joint stock company incorporated under “The Companies Act” (R. S. C. c. 110), a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company as, under the provisions of the Act, such grounds may be taken only upon direct proceedings at the instance of the Attorney-General.—The powers given directors of a joint stock company, under “The Companies Act” (R. S. C. c. 110), as to forfeiture of shares for non-payment of calls, are intended to be exercised only when the circumstances of the shareholder render it expedient in the interests of the company, and they cannot be employed for the benefit of the shareholder. *Common v. McArthur*, xxix., 239.—*Judgment appealed from (A.K. 843, 125) reversed.*

44. *Judgment creditor—Action against shareholder—Transfer of shares—Evidence.*—Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought action against H. as a shareholder in which they failed from inability to prove that he was owner of any shares. They then brought action against G. in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but were not registered in the company's books. On this evidence the court below gave judgment in favour of G. *Held*, affirming such judgment, that the shares were duly transferred to H. though not registered, as it appeared that H. had acted for some time as president of, and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G. *Held*, also, that although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit.—The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed intitled “An Act to consolidate and amend” the former Act but authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the latter Act came into force. The judgment against the company was recovered in 1895. *Held*, that G. was never a shareholder of the com-

pany against whom such judgment was obtained. *Hamilton v. Grant*, xxx., 566.

45. *Joint stock company—Payment for shares—Equivalent for cash—Written contract.*—M. and C. each agreed to take shares in a joint stock company paying a portion of the price in cash and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396) that, as there was no agreement in writing for the payment of the difference by money's worth instead of cash under s. 27 of the Companies Act, M. & C. were liable to pay the balance of the price of the shares to the liquidator of the company. *Morris v. Union Bank of Canada; Union Bank of Canada v. Morris*; *Code v. Union Bank of Canada*, xxxi., 594. *Judgment appealed from (33 N. B. Rep. 77) affirmed.*

46. “The Companies Act, 1890” (B. C.) and amendment—Construction of statute—Memorandum of association—Conditions imposed by statute—Public policy—Preference stock—Election of directors.]—In the memorandum of association of a joint stock company formed under the provisions of the British Columbia “Companies Act, 1890,” and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors or trustees for the management of the business of the company, notwithstanding anything contained in the Act.—*Held*, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was *ultra vires* of the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of trustees and directors imposed by the Act as matters of public policy.—Judgment appealed from (9 B. C. Rep. 275) reversed. *Colonist Printing and Publishing Co. et al. v. Dunsmuir et al.*, xxxii., 679.

47. *Incorporated bank—The Banking Act, 34 Vict. c. 5, ss. 19, 58 (D.)—Transfer of shares—Resolution—Binding effect on absent stockholder—Equitable plea.*

See BANKS AND BANKING, 35.

48. *Building society—Forfeiture of shares—Purchaser with notice—Judgment on similar dispute—Arts. 1582, 1583, 1584 C. C.*

See LITIGIOUS RIGHTS, 1.

49. *Shares held “in trust”—Sale by trustee—Purchase for value—Notice—Account.*

See TRUSTS, 7.

50. *Subscription for shares—Action for calls—Appeal—Jurisdiction—Future rights.*

See APPEAL, 39.

51. *Lien on shares of building society for debt by shareholder—Pledge—Redemption.*

See PLEDGE, 4.

52. *Lease to joint stock company—Shareholders—Personal liability—Assignment for benefit of creditors—Forfeiture.*

See LANDLORD AND TENANT, 3.

10. WINDING-UP.

53. *Winding-up proceedings—Contributories—Subscription for stock—Payment by services.*—The Act of incorporation of a joint stock company provided "that no subscription for stock should be legal or valid until ten per cent. should have been actually and *bonâ fide* paid thereon." C. gave to the manager of the company a power of attorney to subscribe for him ten shares in the company, containing the words: "and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not, in fact, enclosed, but the amount was placed to the credit of C. in the books of the company, and a certificate of stock issued to him which he held for several years. The company having failed, proceedings were taken to have C. placed on the list of contributors. The sum to his credit was for professional services to the company as solicitor, and there had been an arrangement that his stock was to be paid for by such services. *Held*, affirming the judgment appealed from (12 Ont. App. R. 486), Henry, J., dissenting, that C. was rightly placed on the list of contributors. *Caston's Case*, xii., 644.

54. *Contributory—Promoter's shares—Transfer of property to company—Adequacy of consideration.*—In proceedings under the "Winding-up Act" the Master has no authority to inquire into the adequacy of the consideration paid for shares with a view to placing the holder on the list of contributors. *In re Hess Mfg. Co.*; *Edgar v. Sloan*, xxiii., 644.

55. *Joint stock company—Irregular organization—Subscription for shares—Withdrawal—Surrender—Forfeiture—Duty of directors—Powers—Cancellation of stock—"The Companies Act"—"The Winding-up Act"—Contributories—Construction of statute.*—After the issue of the order for the winding-up of a joint stock company incorporated under "The Companies Act," a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company; such grounds can be taken only upon direct proceedings at the instance of the Attorney-General.—The powers given the directors of a joint stock company under the provisions of "The Companies Act" as to forfeiture of shares for non-payment of calls is intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company and cannot be employed for the benefit of the shareholders. *Common v. McArthur*, xxix., 239.

56. *Objection to winding-up order—Notice to creditors*—45 Vict. c. 23, s. 24.

See WINDING-UP ACT, 2.

57. *Provincial incorporation—Compulsory liquidation—Procedure.*

See WINDING-UP ACT, 5.

58. *Foreign corporations—Constitutional law—Winding-up Act.*

See No. 19, ante.

59. *Imperial Companies Act, 1862—Proceedings of foreign tribunal—Contributories—Calls on past members—Right of action—Demurrer.*

See WINDING-UP ACT, 11.

60. *Sale of liquidator to director of insolvent company—Fiduciary relationship.*

See No. 15, ante.

COMPENSATION.

1. *Partnership—Judicial abandonment—Confusion of rights—Composition and discharge.*

See ASSIGNMENT, 25.

2. *Overcharges on fees—Counterclaim in suit by sheriff—Signed bill of costs.*

See SOLICITOR, 10.

AND see SET-OFF.

COMPOSITION AND DISCHARGE.

1. *Debtor and creditor—Acquiescence in—New arrangement of terms of settlement—Waiver of time clause—Principal and agent—Deed of discharge—Notice of withdrawal from agreement—Fraudulent preferences.*—Upon default to carry out the terms of a deed of composition and discharge a new arrangement was made respecting the realization of a debtor's assets, and their distribution, to which all the executing creditors appeared to have assented. *Held*, that a creditor who had benefited by the realization of the assets and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it. The debtor's assent to such repudiation and the grant of better terms to the one creditor would be a fraud upon the other creditors, and as such inoperative and of no effect. *Howland, Sons & Co. v. Grant*, xxvi., 372.

2. *Discharge of debtor—Execution of deed—Ratification—Estoppel.*

See DEBTOR AND CREDITOR, 5.

3. *Discharge of debt of insolvent firm—Release of debtor.*

See PARTNERSHIP, 42.

COMPROMISE.

Action for account—Rectification of error—Prejudice.

See MISTAKE, 5.

CONCILIATION.

See ARBITRATIONS—AMIABLES COMPOSITEURS.

CONDUCTIO INDEBITI.

See ACTION—REPETITION.

CONDITIONS.

1. CONDITIONS AND WARRANTIES, 1-6.
2. CONDITION PRECEDENT, 7-27.

1. CONDITIONS AND WARRANTIES.

1. *Life insurance—Conditions and warranties—Indorsements on policy—Inaccurate statements—Misrepresentations—Latent disease—Material facts—Cancellation of policy—Return of premium—Construction of statute—55 Vict. c. 39, s. 33 (Ont.)*—The provisions of the second sub-section of section thirty-three of "The Insurance Corporations Act, 1892," (Ont.), limiting conditions and warranties, indorsed on policies, providing for the avoidance of the contract by reason of untrue statements in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements, but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by the third sub-section.—*Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. Venner v. The Sun Life Insurance Company* (17 Can. S. C. R. 394) followed. *Jordan et al. v. Provincial Provident Institution*, xxviii., 554.

2. *Fire insurance—Condition in policy—Notice of additional insurance—Duty of insured.*—A policy of insurance against fire contained a condition requiring notice of insurances existing at the time the policy issued or afterwards made on the same property, and that a memorandum thereof should be indorsed on the policy, otherwise that the policy should be void, a proviso being added that the company should have the option to cancel the policy, or, if it remained in force with their consent, then the company to be liable only for rateable proportion of loss or damage. Insured applied for additional insurance while this policy was in force, on 10th July, 1895, in another company, and on 17th July his application was accepted, but notice of acceptance did not reach him until the 20th. The insured property was destroyed by fire on the 18th July, and the company refused payment on the ground that the policy was void for want of notice of the additional insurance, and indorsement thereof, as required by the condition.—*Held*, affirming the judgment of the Supreme Court of New Brunswick, that the policy was not avoided; that the condition did not require the insured to give notice of insurance of which he had no knowledge, but only covered the case of insurance effected before a loss of which notice could be given, also before loss. *Commercial Union Insurance Co. v. Temple*, xxix., 206.

3. *Policy of insurance—Magistrate's certificate—Waiver.*

See INSURANCE, FIRE, 21.

4. *Government railway—Liability of Crown—Negligence of Crown—Notice.*

See CONSTITUTIONAL LAW, 29.

5. *Deed of lands—Riparian rights—Building dams—Penning back water—Warranty—Improvement of watercourses—Arts. 555 R. S. Q.—Arbitration—Condition precedent—Assessment of damages.*

See RIVERS AND STREAMS, 6.

6. *Location of Crown lands—Timber license—Suspensive condition—Sales by local agents.*

See CROWN, 95.

2. CONDITION PRECEDENT.

7. *Arbitration clause in policy—Award—Condition precedent to action.*—Where a policy of insurance provided that no action for any claim thereunder should be maintainable until the amount of the claim should have been fixed by an award obtained in the manner provided, it was held that the making of such award was a condition precedent to any right of action for a loss under the policy. *Guerin v. Manchester Fire Assur. Co.*, xxix., 139.

8. *Action—Condition precedent—Allegation of performance—Burden of proof—Waiver—Insurance policy.*—Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff. *Home Life Assn. v. Randall*, xxx., 97.

9. *Engineer's certificate—Claim for extras.*

See CONTRACT, 90.

10. *Public work—Extras—Certificate of chief engineer—Waiver—37 Vict. c. 15 (D.)—Abolition of office of chief engineer.*

See PUBLIC WORKS, 1.

11. *Arbitration and award—Policy of insurance—Matters in difference.*

See INSURANCE, MARINE, 52.

12. *Issue of railway bonds—39 Vict. c. 57 (Q.)—Certificate of engineer.*

See RAILWAYS, 144.

13. *Intercolonial railway contract—Claim for extras—Engineer's certificate.*

See CONTRACT, 94.

14. *Railway aid debentures—Bonus by-law—Prior agreement—Specific conditions—Performance—Damages.*

See MUNICIPAL CORPORATION, 29.

15. *Statement in claim—Performance of contract—Implied promise—Direction to jury—Benefits accrued.*

See CONTRACT, 59.

16. *Certificate of engineer—Progress estimate—Final estimate.*

See CONTRACT, 60.

17. *Accident insurance—Condition in policy—Notice—Action.*

See INSURANCE, ACCIDENT, 4.

18. *Fire insurance—Condition in policy—Time limit for submitting particulars of loss—Waiver—Authority of agent.*

See ACTION, 26.

19. *Expiration of time limited for appeal—Ouster of jurisdiction—Waiver—Objection raised by court.*

See PRACTICE OF SUPREME COURT, 37.

20. *Policy of insurance—Memo. on margin—Countersignature—Delivery—Payment of premium—Contract.*

See INSURANCE, LIFE, 5.

21. *"Final closing certificate"—Report of engineer—Claim for extras.*

See CONTRACT, 96.

22. *Accident policy—Immediate notice—Waiver—Excepted risks.*

See INSURANCE, ACCIDENT, 2.

23. *Public corporation—Forfeiture of charter—Subscription of shares.*

See COMPANY LAW, 21.

24. *Remedial process—Arbitration and award—Petition of right—Deferred liability of Province of Canada—8 Vict. c. 90 (Can.).*

See CONSTITUTIONAL LAW, 8.

25. *Performance—Burden of proof—Waiver—Insurance policy.*

See ACTION, 27.

26. *Contract—Certificate of engineer.*

See CONTRACT, 69.

27. *Rescission of contract—Notice—Mise en demeure—Long user—Waiver.*

See CONTRACT, 29.

CONFLICT OF LAWS.

1. *Foreign corporations—Winding-up Act—Construction of statute—Obiter dictum.*—The Act, 45 Vict. c. 23 (D.), must be construed, in conformity with the rules of international law, as not intended to apply to foreign corporations carrying on business in Canada.—*Per Ritchie, C.J., and Strong, J.* This decision does not impugn the power of the Parliament of Canada to legislate in respect to insolvent foreign corporations consistently with imperial statutes. *Merchants Bank of Halifax v. Gillespie, x., 312.*

2. *Insolvent Act of 1875—Merchant Shipping Act, 1854—Mortgage in contemplation of insolvency.*

See INSOLVENCY, 21.

CONFUSION OF RIGHTS.

Compensation—Judicial abandonment—Composition and discharge.

See ASSIGNMENTS, 25.

CONSPIRACY.

1. *Contract—Unlawful consideration—Répétition de l'indu—Account—Public policy—Monopoly—Trade combination—Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Arts. 989, 1000, 1067, 1077,*

2188 C. C.—*Matters judicially noticed.*—In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract. *Held, per Sedgewick, King and Girouard, J.J.,* that the evidence disclosed a conspiracy and that, although under the provisions of the Civil Code the moneys so advanced could be recovered back, yet no interest before action could be allowed thereon, as the law merely requires that the parties should be replaced in the position they respectively occupied before the illegal transactions took place. *Rolland v. Caisse d'Economie de Québec (24 S. C. R. 405)* discussed, and *L'Association St. Jean-Baptiste de Montréal v. Brault (30 S. C. R. 598)* referred to. *Held, also,* that laws of public order must be judicially noticed by the court *ex proprio motu*, and that, in the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu*.—*Per Taschereau, J. (dissenting).* 1. A new point should never be entertained on appeal, if evidence could have been brought to affect it, had objection been taken at the trial. 2. In the present case, the concurrent findings of both courts below, amply supported by evidence ought not to be disturbed, and as the company itself prevented the performance of the condition of the agreement in question requiring the assent of the Government to the transfer of the binder twine manufacturing contract, its non-performance cannot be admitted as a defence to the action upon the executed contract.—*Gwynne, J.,* also dissented on the ground that the judgment appealed from proceeded upon wholly inadmissible evidence and that, therefore, the action should have been dismissed and further, that the evidence which was received and acted on, though inadmissible for the purposes for which it was intended, shewed that the action was based upon a contract between the plaintiffs and defendant for the commission of an indictable offence; that neither party could recover either by action or by counterclaim upon such a contract and, therefore, that the incidental demand, as well as the action, should be dismissed. *Consumers Cordage Co. v. Connolly, xxxi., 244.*

On appeal to the Privy Council this decision was reversed, the order set aside and a new trial ordered upon terms or, alternatively, that the judgment of the Court of Review should be restored, August, 1903.

2. *Controverted election—Identification of ballots—Corrupt practices.*

See ELECTION LAW, 53.

3. *Conspiracy to rob—Withdrawal of conspirator—King's evidence.*

See CRIMINAL LAW, 22.

CONSTABLE.

1. *The Criminal Code, s. 575—Persons designata—Officers de facto and de jure—Chief constable—Common gaming house—Confiscation of gaming instruments, moneys,*

etc.—Evidence—The Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.—Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of “the chief constable or deputy chief constable” of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. Girouard, J., dissenting.—The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*. *O’Neil v. Attorney-General of Canada*, xxvi, 122.

2. *Canada Temperance Act—Assault on constable—Serving summons—Indictable offence—Evidence.*

See CRIMINAL LAW, 8.

3. *Canada Temperance Act—Search warrant—Magistrate’s jurisdiction—Justification of ministerial officer—Goods in custodia legis—Replevin—Estoppel—Res judicata—Judgment inter partes.*

See CANADA TEMPERANCE ACT, 6.
AND see POLICE OFFICER.

CONSENT.

See SPECIAL CASE.

CONSIGNMENT.

See SALE.

CONSTITUTIONAL LAW.

1. IMPERIAL ACTS, 1-11.
2. DOMINION ACTS, 12-41.
3. ONTARIO ACTS, 42-50.
4. QUEBEC ACTS, 51-63.
5. NOVA SCOTIA ACTS, 64, 65.
6. NEW BRUNSWICK ACTS, 66, 67.
7. MANITOBA ACTS, 68-71.
8. BRITISH COLUMBIA ACTS, 72-74.
9. PRINCE EDWARD ISLAND ACTS, 75.
10. NORTH-WEST TERRITORIAL ORDINANCES, 76, 77.
11. YUKON TERRITORIAL ORDINANCES, 78, 79.
12. OTHER ACTS AND MATTERS, 80-88.

1. IMPERIAL ACTS.

1. *Powers of Provincial Legislatures—Procedure—Residence of judges—B. N. A. Act, 1867, s. 92, s.s. 14—Delegation of powers to Lieutenant-Governor-in-Council—“Judicial District Act, 1879” (B.C.)—“Better Administration of Justice Act, 1878,” 42 Vict. c. 12 (1879) (B.C.)*—Case respecting the status of the Supreme Court of British Columbia, and the power of the Legislature of the province to legislate in regard to procedure

in that court, and the residences of the judges thereof referred to the Supreme Court of Canada for hearing and consideration by His Excellency the Governor-General-in-Council under the provisions of s. 52 of the Supreme and Exchequer Court Act by order-in-council bearing date the 15th day of May, 1883.—1st Question: Is the Supreme Court of British Columbia a provincial court within the meaning of the 14th sub-section of section 92 of the British North America Act?—Opinion: The Supreme Court of British Columbia is a provincial court within the meaning of the 14th sub-section of s. 92 of the British North America Act.—2nd Question: Has the Legislature of the province exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the province? If not, to what extent has it such authority?—Opinion: The Legislature of the province has exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the province which come within the legislative jurisdiction of the Provincial Legislature.—3rd Question: If that Legislature can make rules to govern the procedure of that court, can it delegate this power to the Lieutenant-Governor-in-Council?—Opinion: The Legislature can make rules to govern the procedure of that court in all such matters as limited by the preceding answer, and can delegate this power to the Lieutenant-Governor-in-Council.—4th Question: Is the “Judicial District Act, 1879,” British Columbia, within the powers of the Legislature of that province? If so, does it apply to judges appointed before that Act came into force?—Opinion: “The Judicial District Act, 1879,” is within the powers of the Legislature of that province and does apply to judges appointed before that Act came into force.—5th Question: Are the following Acts passed by the Legislature of British Columbia, namely, the “Better Administration of Justice Act, 1878,” 42 Vict. c. 20, 1878; 42 Vict. c. 12, 1879, “An Act to amend the Practice and Procedure of the Supreme Court of British Columbia, and for other purposes relating to the Administration of Justice,” 44 Vict. c. 1, “An Act to carry out the objects of the ‘Better Administration of Justice Act, 1878,’ and ‘The Judicial District Act, 1879,’” so far as they relate to procedure in the Supreme Court of British Columbia, they are within the legislative authority of the Legislature of British Columbia. *Sevell v. British Columbia Towing Co.*, “The Thrasher Case,” Cass. Dig. (2 ed.) 480.

2. *Manitoba Constitutional Act—33 Vict. c. 3, s. 22, s.s. 2—Powers of Provincial Legislature in matters of education—Rights and privileges—Legislative power to repeal previous statutes—Right of appeal to Governor-General-in-Council—B. N. A. Act (1867) s. 93, s.s. 3.*—Section 22 of the Manitoba Act, 33 Vict. c. 3 (D.), enacts: “In and for the province the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union. (2) An appeal shall lie to the Governor-General-in-Council from any act or decision of the Legislature of the province, or of any pro-

vincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Sub-section 3 of s. 93 of the British North America Act (1867) enacts:

(3) "Where in any province a system of separate or dissentient schools exists by law of the union, or it is thereafter established by the Legislature of the province, an appeal shall lie to the Governor-General-in-Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."—By certain statutes of the Province of Manitoba relating to education, passed in 1871, and subsequent years, the Catholic minority of Manitoba enjoyed up to 1890 immunity from taxation for other schools than their own, etc., etc., but by the Public Schools Act, 53 Vict. c. 38 (1890) these Acts were repealed and the Roman Catholics were made liable by assessment for the public schools which are non-denominational, but were left free to send their children to the public schools. On a petition and memorials sent to the Governor-General-in-Council by the Catholic minority, alleging that rights and privileges in the matter of education secured to them since the union had been affected, and praying for relief under s.-ss. 2 and 3 of s. 22 of the Manitoba Act, 1871, a special case was submitted to the Supreme Court of Canada, and it was: *Held*, 1. That the said rights and privileges in the matter of education, being rights and privileges which the Legislature of Manitoba had itself created, and there being no clear express and unequivocal words in s. 22 of the Manitoba Act, 1871, restricting the constitutional right of the Legislature of the province to repeal the laws it might itself enact in relation to education, no right of appeal lies to the Governor-General-in-Council as claimed either under s.-s. 2 of s. 22 of the Manitoba Act, or s.-s. 3 of s. 93 of the British North America Act, 1867. Fournier and King, JJ., *contra*. 2. That the right to appeal given by s.-s. 2 of s. 22 of the Manitoba Act is only from an Act or decision of the Legislature, which might affect any rights or privileges existing at the time of the union as mentioned in s.-s. 1, or of any provincial, executive or administrative authorities affecting any right or privilege existing at the time of the union. Fournier and King, JJ., dissenting.—*Per* Taschereau and Gwynne, JJ., that the decision in *Barrett v. Winnipeg* ([1892] A. C. 443) disposes of and concludes the present application.—*Quare*, *Per* Taschereau, J., Is s. 4 of 54 & 55 Vict. c. 25, which purports to authorize such a reference for hearing "or" consideration, *intra vires* of the Parliament of Canada? *In re Education Statutes of Manitoba*, xxii., 577. MEMO.—See (1895) A. C. 202.

3. *Construction of statute—British North America Act*, ss. 112, 114, 115, 116, 118—36 Vict. c. 30 (D.)—47 Vict. c. 4 (D.)—*Provincial subsidies—Half-yearly payments—Reduction of interest*.—By s. 111 of the British North America Act, Canada is made liable for the debt of each province existing at the union. By s. 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the union over \$62,500,000, and chargeable with 5 per cent. interest thereon; ss. 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding

eight and seven million dollars respectively; and by s. 116, if the debts of those provinces should be less than said amounts they are entitled to receive, by half-yearly payments, in advance, interest at the rate 5 per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada, and shall be paid half-yearly, in advance, to each province, but the Government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in s. 112.—On appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec.—*Held*, affirming said award, that the subsidy of the provinces under s. 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under s. 118.—By 36 Vict. c. 30 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the union was then ascertained to be \$73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vict. c. 4, in 1884, it was provided that the accounts between the Dominion and the provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to January 1st, 1873, with interest at 5 per cent. from the day on which it would have been so paid to July 1st, 1884, should be deemed capital owing to the respective provinces, bearing interest at 5 per cent., and payable after July 1st, 1884, as part of the yearly subsidies.—*Held*, affirming the said award, Gwynne, J., dissenting, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the provinces half-yearly, but leaves such deduction as it was under the British North America Act. *Dominion of Canada v. Provinces of Ontario and Quebec*, xxiv., 498.

4. *Province of Canada—Treaties with Indians—Surrender of Indian lands—Annuity to Indians—Revenue from lands—Increase of annuity—Charge upon lands*—B. N. A. Act, s. 109.—In 1850 the late Province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts, by which the Indian lands were surrendered to the Government of the province in consideration of a certain sum paid down and an annuity to the tribes, with a provision that "should all the territory hereby ceded by the Indians at any future period produce such an amount as will enable the Government of this province, without incurring loss, to increase, the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time." By the B.

N. A. Act the Dominion of Canada assumed the debts and liabilities of the Province of Canada, and s. 109 of that Act provided that all lands, etc., belonged to the several provinces in which the same were situate "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same." The lands so surrendered are situate in the Province of Ontario, and have for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government has paid the annuities since 1867 (from 1874, at the increased amount), and claims to be reimbursed therefor.—*Held*, reversing the said award, Gwynne and King, JJ., dissenting, that the provision in the treaties as to increased annuities had not the effect of burdening the lands with a "trust in respect thereof" or "an interest other than that of the province in the same," within the meaning of said s. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the increased annuities, but only liable jointly with Quebec as representing the Province of Canada. *Ontario v. Canada and Quebec; In re Indian Claims*, xxv., 434. (Affirmed by Privy Council).

5. *Canadian waters — Property in beds — Public harbours — Erections in navigable waters — Interference with navigation — Rights of fishing — Power to grant — Riparian proprietors — Great lakes and navigable rivers — Operation of Magna Charta — Provincial legislation — R. S. O. (1887) c. 24, s. 47—55 Vict. (O.), c. 10 ss. 5 to 13, 19 and 21—R. S. Q. arts. 1375-1378.* — The beds of public harbours not granted before confederation are the property of the Dominion of Canada. *Holman v. Green* (16 Can. S. C. R. 707) followed. — The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters. — *Per Gwynne, J.* The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament, so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada under the British North America Act, s. 92, item 10, and for the administration of the fisheries. — *R. S. C. c. 92*, "An Act respecting certain works constructed in or over navigable rivers," is *intra vires* of the Dominion Parliament. — The Dominion Parliament has power to declare what shall be deemed an interference with navigation, and to require its sanction to any work in navigable waters. — A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with *R. S. C. c. 92*. — Riparian proprietors before confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown. *Robertson v. The Queen* (6 Can. S. C. R. 52) followed. — The rule that riparian proprietors own *ad medium flum aquæ* does not apply to the great lakes or navigable rivers. — Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide. — Where the provisions of Magna Charta are not in force, as in the Province of Quebec, the Crown

in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Gwynne, J., dissenting. — *Per Strong, C.J.*, and King and Girouard, JJ. The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec) unless repealed by legislation, but such legislation has probably been passed by the various provincial legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation. — The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters, the beds and banks of which are assigned to the provinces under the British North America Act. — The legislative authority of Parliament under s. 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license, and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal conferring qualification, and give no exclusive right to fish in a particular locality. — Section 4 and other portions of Revised Statutes of Canada, c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne, J., *contra*. — *Per Gwynne, J.* Provincial Legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, s. 91, item 12, including the grant of leases or licenses for exclusive fishing. — *Per Strong, C.J.*, Taschereau, King and Girouard, JJ. *R. S. O. c. 24, s. 47*, and ss. 5 to 13 and 19 to 21 of the Ontario Act of 1892, are *intra vires*, but may be superseded by Dominion legislation. — *R. S. Q. arts. 1375 to 1378* are also *intra vires*. — *Per Gwynne, J.* *R. S. O. c. 24, s. 47*, is *ultra vires* so far as it assumes to authorize the land covered with water within public harbours. — The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. — The Act of 1892 and *R. S. Q. arts. 1375 to 1378* are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*. *In re Jurisdiction over Provincial Fisheries*, xxvi., 444.

Varied on appeal by the Privy Council, [1898] A. C. 700.

6. *Convention of 1818 — Construction of treaty — Construction of statute — Fisheries — Three mile limit — Foreign fishing vessels — "Fishing" — 59 Geo. III., c. 38 (Imp.) — R. S. C. cc. 94 & 95.* — Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia and the seine pursued up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine; *Held*, Strong, C.J., and Gwynne, J., dissenting, affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818, between

Great Britain and the United States of America and of the Imperial Act 59 Geo. III. c. 38, and the Revised Statutes of Canada, c. 94, and consequently liable with her cargo, tackle, rigging, apparel, furniture, and stores to be condemned and forfeited. *The Ship "Frederick Gerring, Jr." v. The Queen*, xxvii., 271.

7. *B. N. A. Act, s. 142—Award of 1870, Validity of—Upper Canada improvement fund—School fund—B. N. A. Act, s. 109—Trust created by—Effect of confederation on trust.*—The arbitrators appointed in 1870, under s. 142 of the B. N. A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the Provinces of Ontario and Quebec, respecting the former Province of Canada. In dealing with the common school fund established under 12 Vict. c. 200 (Can.), they directed the principal of the fund to be retained by the Dominion and the income therefrom to be paid to the provinces.—*Held*, that even if there was no ultimate "division and adjustment," such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore *intra vires* of the arbitrators.—*Held*, further, that there was a division of the beneficial interest in the fund, and a fair adjustment of the rights of the provinces in it which was a proper exercise of the authority of the arbitrators under the statute.—By 12 Vict. c. 200, s. 3 (Can.), one million acres of the public lands of the Province of Canada were to be set apart to be sold, and the proceeds applied to the creation of the "common school fund," provided for in s. 1. The lands so set apart were all in the present Province of Ontario.—*Held*, that the trust in these lands created by the Act for the common schools of Canada did not cease to exist at confederation, so that the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the common schools of the new Provinces of Ontario and Quebec.—In the agreement of reference to the arbitrators appointed under Acts passed in 1891 to adjust the said accounts questions respecting the Upper Canada improvement fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two provinces up to January, 1889. — *Held*, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the schools lands, the amount of which was one of the items in the accounts so rendered. *Provinces of Ontario and Quebec v. Dominion of Canada; In re Common School Fund and Lands*, xxviii., 609.

8. *B. N. A. Act, 1867, s. 111 — Debts of Province of Canada — Deferred liabilities—Toll bridge—8 Vict. c. 90 (Can.)—Reversion to Crown — Indemnity — Arbitration and award — Condition precedent — Petition of right—Remedial process.*—A toll bridge with its necessary buildings and approaches was built and maintained by Y. at Chambly, in the Province of Quebec, in 1845, under a franchise granted to him by an Act (8 Vict. c. 90) of the late Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use and that Y., or his representatives should then be compensated therefor by the Crown, provision being also made for ascer-

taining the value of the works by arbitration and award. *Held*, affirming the judgment of the Exchequer Court of Canada (6 Ex. C. R. 103), that the claim of the suppliants for the value of the works at the time they vested in the Crown on the expiration of the fifty years' franchise was a liability of the late Province of Canada coming within the operation of s. 111 of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial. *The Attorney-General of Canada v. The Attorney-General of Ontario* ([1897] A. C. 199; 25 Can. S. C. R. 434) followed. *Held*, also, that the arbitration provided for by s. 3 of the Act, 8 Vict. c. 90, did not impose the necessity of obtaining an award as a condition precedent but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants' claim for compensation under the provisions of that Act (8 Vict. c. 90), was a proper subject for petition of right within the jurisdiction of the Exchequer Court of Canada. *The Queen v. Yule*, xxx., 24.

(The Privy Council refused leave to appeal.)

9. *Treaties with Indians—Contingent annuities—B. N. A. Act (1867) s. 112—Debts of the Province of Canada—Res judicata.*—The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently should be taken into account and included in the debt of the late Province of Canada mentioned in s. 112 of the British North America Act, 1867. *Held*, affirming the decision of the arbitrators, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of *The Attorney-General of Canada v. The Attorney-General of Ontario* ([1897] A. C. 199), and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec v. Dominion of Canada Arbitration; In re Indian Claims*, xxx., 151.

10. *Constitutional law—Construction of B. N. A. Acts—Representation of provinces in House of Commons—Aggregate population of Canada.*—In determining the number of representatives to which Ontario, Nova Scotia, and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in s. 4 of s. 51 of the B. N. A. Act, 1867, mean the whole population of Canada including that of provinces which have been admitted subsequently to the passing of that Act. The special terms on which the Province of Prince Edward Island was admitted into the Dominion do not except that province from the general operation of the clauses of the B. N. A. Act, 1867, as to representation in the House of Commons as above stated. *In re Representation in the House of Commons of Canada*, xxxiii., 475; 594.

11. *Indian treaty No. 3—North-west angle—Title to lands—B. N. A. Act, ss. 91, 92, 109, 117.*

See INDIAN LANDS, 1.

2. DOMINION ACTS.

12. *Powers of legislation—Dominion Controverted Elections Act, 1874—Jurisdiction—Provincial courts—Civil rights—Procedure—B. N. A. Act, 1867, ss. 18, 41, 91, s.-ss. 13 & 14 of s. 92, and ss. 101 & 129—Dominion courts.]—The Parliament of Canada by "The Dominion Controverted Elections Act, 1874," imposed on provincial courts and the judges thereof the duty of trying controverted elections of members of the House of Commons. After the general elections of 1878, L. filed an election petition in the Superior Court, Province of Quebec, against the return of V. as a member of the House of Commons. V. objected to the jurisdiction of the court held by Meredith, C.J., on the ground that the Act was *ultra vires*.—*Held*, affirming the judgment of Meredith, C.J. (5 Q. L. R. 1), that the Act was not *ultra vires* of Parliament, and whether or not it established a Dominion court, Parliament had jurisdiction to give to the Superior Courts of the respective provinces, and the judges thereof, the power, and to impose upon them the duty, of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers and established courts to discharge the duties assigned to them by the Act, in any particular, invade the rights of the Provincial Legislatures.—Upon abandonment by the House of Commons of the jurisdiction exercised over controverted elections without express legislation thereon, the power of dealing therewith would fall, *ipso facto*, within the jurisdiction of the Superior Courts of the provinces by virtue of the inherent original jurisdiction of such powers over civil rights.—The Dominion Parliament has the right to interfere with civil rights, when necessary for the purpose of legislating generally and effectually in relation to matters within its jurisdiction.—The exclusive power of legislation given to Provincial Legislatures by s.-s. 14 of s. 92, B. N. A. Act, over procedure in civil matters, means procedure in civil matters within the powers of the Provincial Legislatures.—*Per* Ritchie, C.J., and Taschereau and Gwynne, JJ. The "Dominion Controverted Elections Act, 1874," established, as the Act of 1873 did, as respects elections, a Dominion court.—*Montmorency Election Case; Valin v. Langlois*, iii., 1.*

[The Privy Council refused leave to appeal from this judgment. 5 App. Cas. 117.]

13. *Supreme Court Acts—Appeals denied by Provincial Legislatures.]—Quære, per Fournier and Henry, JJ., Can the Parliament of Canada give a right to an appeal in cases where the local Legislature has expressly denied it? Danjou v. Marquis, iii., 251.*

14. *Canada Temperance Act, 1878—Powers of Parliament—Sections 91 & 92, B. N. A. Act, 1867—Sale of intoxicating liquors—Prohibition.]—Held, 1. That "The Canada Temperance Act, 1878," is within the legislative authority of the Parliament of Canada. 2. That by the B. N. A. Act, 1867, plenary powers of legislation are given to the Parlia-*

ment of Canada over all matters within the scope of its jurisdiction, and that they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and may be brought into force in one part of the Dominion and not in the other. 3. That under powers in s.-s. 2 of s. 91, B. N. A. Act, 1867, as to the "regulation of trade and commerce," the Parliament of Canada alone has authority to prohibit traffic in intoxicating liquors in the Dominion or in any part of it, and the court has no right whatever to inquire what motive induced Parliament to exercise its powers. (Henry, J., dissenting.) *The Mayor, etc., of Fredericton v. The Queen*, iii., 505.

See 7 App. Cas. 829.

15. *Legislative jurisdiction—Navigation and shipping—Maritime Court of Ontario.]—Held, that 40 Vict. c. 21 (D.) establishing a court of maritime jurisdiction for the Province of Ontario, is intra vires of the Dominion Parliament. "The Picton," iv., 648.*

16. *Warehouse receipts—Banking Act—34 Vict. c. 5, ss. 46, 47, 48 (D.)—Jurisdiction of Parliament of Canada.]—Per Fournier, Henry and Taschereau, JJ. The provisions of ss. 46, 47, and 48 of 34 Vict. c. 5 (D.) are within the legislative jurisdiction of the Parliament of Canada. Merchants Bank of Canada v. Smith, viii., 512.*

17. *Obiter dictum—Foreign corporation—Winding-up Act—Insolvency—Powers of Parliament—Conflict of laws—45 Vict. c. 23 (D.)]—Per Ritchie, C.J., and Strong, J., That although the provisions of the Winding-up Act do not apply to foreign corporations, yet, in this decision, there is nothing which might impugn the powers of the Parliament of Canada in respect to insolvent foreign corporations by express provisions not in conflict with any imperial legislation. Merchants Bank of Halifax v. Gillespie, x., 312.*

18. *Legislative jurisdiction—Vice-Admiralty Courts—Penalties—Illegal distilling—31 Vict. c. 8, s. 156—Inland Revenue Act, 1867.]—So much of s. 156 of the Inland Revenue Act, 1867, as gives the Court of Vice-Admiralty jurisdiction in prosecutions for penalties and forfeitures incurred thereunder, is intra vires, notwithstanding such court is established in Canada by Imperial authority. Valin v. Langlois (3 Can. S. C. R. 1, 5 App. Cas. 115) discussed and followed. Attorney-General of Canada v. Flint, xvi., 707.*

19. *Appeal to Supreme Court of Canada—Constitutional law—42 Vict. c. 39 s. 6 (D.)]—Per Taschereau, J. The provision for an appeal to the Supreme Court of Canada by s. 6 of c. 39 of the statutes of Canada, 42 Vict., is intra vires of the Parliament of Canada. Grand Trunk Ry. Co. v. Credit Valley Ry. Co. et al. Doutre, Constitution of Canada, p. 337.*

20. *Winding-up Act—R. S. C. c. 129, s. 3—Foreign corporations.]—Section 3 of "The Winding-up Act," R. S. C. c. 129, which provides that the Act applies to incorporated trading companies doing business in Canada wheresoever incorporated is intra vires of the Parliament of Canada. Judgment appealed*

from (16 Q. L. R. 79) affirmed. *Allen v. Hanson; In re Scottish Canadian Asbestos Co.*, xviii., 667.

21. *Legislative jurisdiction — Winding up insolvent bank—Banking and incorporation of banks—Bankruptcy and insolvency—31 Vict. c. 17 (D.)—33 Vict. c. 40 (D.)—B. N. A. Act, s. 91—Crown lands — Exemption from taxation—R. S. O. 1887, c. 193, s. 7, s.-s. 1.*—In 1866 the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 Vict. c. 17, the Dominion Parliament incorporated said trustees giving them authority to carry on the business of the bank so far as was necessary for winding up the same. By 33 Vict. c. 40 all the property of the bank vested in the trustees was transferred to the Dominion Government which became seized of all the powers of the trustees.—*Held*, affirming the judgment appealed from (*sub nom. The Queen v. County of Wellington*, 17 Ont. App. R. 421) that these Acts were *intra vires* of the Dominion Parliament.—*Per Ritchie, C.J.*, that the legislative authority of Parliament over "banking and the incorporation of banks" and over "bankruptcy and insolvency" empowered it to pass said Acts.—*Per Strong, Taschereau, and Patterson, JJ.*, the authority to pass said Acts cannot be referred to the legislative jurisdiction of Parliament over "banking and incorporation of banks" but to that over "bankruptcy and insolvency" only.—After the property of the bank became vested in the Dominion Government a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale.—*Held*, affirming the judgment appealed from, that the Crown having a beneficial interest in the land it was exempt from taxation as Crown lands. *Quirt v. The Queen*, xix., 510.

22. *Legislative jurisdiction — Administration of justice — Provincial courts — Appointment of judges — Criminal procedure—B. N. A. Act, 1867, s. 92, s.-s. 14—References under 54 & 55 Vict. c. 25 (D.)*—The power given to the Provincial Governments by the B. N. A. Act, 1867, s. 92, s.-s. 14, to legislate regarding the constitution, maintenance and organization of provincial courts includes the power to define the jurisdiction of such courts territorially as well as in other respects and also to define the jurisdiction of the judges who constitute such courts.—*C. S. B. C. c. 25, s. 14*, enacts that "any County Court judge appointed under this Act may act as County Court judge in any other district upon the death, illness, or unavoidable absence of, or at the request of the judge of that district, and while so acting the said first mentioned judge shall possess all the powers and authorities of a County Court judge in the said district; provided, however, the said judge so acting out of his district shall immediately thereafter report in writing to the Provincial Secretary the fact of his so doing and the cause thereof," and by 53 Vict. c. 8, s. 9 (B. C.), it is enacted that "until a County Court judge of Kootenay is appointed, the judge of the County Court of Yale shall act as and perform the duties of the County Court judge of Kootenay, and shall, while so acting, whether sitting in the County Court

District of Kootenay or not, have, in respect of all actions, suits, matters, or proceedings being carried on in the County Court of Kootenay, all the powers and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters, and proceedings; and for the purpose of this Act, but not further, or otherwise, the several districts as defined by ss. 5 & 7 of the County Courts Act, over which the County Court of Yale and the County Court of Kootenay, respectively, have jurisdiction shall be united."—*Held*, that these statutes were *intra vires* of the Legislature of British Columbia under said section of the B. N. A. Act, 1867.—By the Dominion statute, 51 Vict. c. 47, "The Speedy Trials Act," jurisdiction is given to "any judge of the County Court," to try certain criminal offences.—*Held*, that the expression, "any judge of the County Court," in such Act means any judge having by force of the provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature to do so.—"The Speedy Trials Act" is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure.—*Per Taschereau, J.* It is doubtful if Parliament had power to pass those sections of 54 & 55 Vict. c. 25, which empower the Governor-General-in-Council to refer certain matters to the Supreme Court of Canada for an opinion. *Re County Court Judges (B. C.)* xxi., 446.

23. *Territorial rights — Exercise of—Territorial or prerogative rights — Beneficial interest — Great seal — Suits by Dominion Government — Exchequer Court — Jurisdiction.*—The Crown, in right of the Dominion, has a right to take proceedings to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights.—The rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or province (as the case may be), in which is vested the beneficial interest therein.—The Parliament of Canada has the right to enact that all actions and suits of a civil nature at common law or equity, in which the Crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court. *Taschereau, J., dubitante. Farwell v. The Queen*, xxii., 553.

24. *Foreshore of harbour — Property in—44 Vict. c. 1, s. 18 (D.)—Authority to railway company to use foreshore—Jus publicum—Access to public harbour.*—The Dominion statute, 44 Vict. c. 1, s. 18, gave the C. P. Ry. Co. the right to take and use the land below high water mark in any stream, lake, etc., so far as required for the purposes of the railway.—*Held*, that the right of the public to have access to a harbour, the foreshore of which had been taken by the company under this Act, was subordinate to the rights given to the company thereby, and the latter could prevent by injunction an interference with the use of the foreshore so taken. *City of Vancouver v. Canadian Pacific Ry. Co.*, xxiii., 1.

25. *Dominion Government — Liability to action for tort — Injury to property on public work—Non-feasance—39 Vict. c. 27 (D.).—R. S. C. c. 40, s. 6—50 & 51 Vict. c. 16 (D.).—50 & 51 Vict. c. 16, ss. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort (Taschereau, J., expressing no opinion on this point).—By 50 & 51 Vict. c. 16, s. 16 (D.), the Exchequer Court is given jurisdiction to hear and determine *inter alia*: “(c) Every claim against the Crown arising out of any death or injury to the person, or to the property, on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment: (d) Every claim against the Crown arising under any law of Canada.” . . . In 1877 the Dominion Government became possessed of the property in the City of Quebec, on which the Citadell was situated. Many years before that a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the city engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth, until, in 1889, a large portion of the rock fell from the cliff into a street of the city below, causing great damage, for which compensation was claimed from the Government.—*Held, per Taschereau, Gwynne and King, JJ.*, affirming the decision of the Exchequer Court, that as the injury to the property of the city did not occur upon a public work, s.-s. (c) of the above Act did not make the Crown liable, and, moreover, there was no evidence that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.—*Held, per Strong, C.J., and Fournier, J.*, that while s.-s. (c) of the Act did not apply to the case, the city was entitled to relief under s.-s. (d); that the words “any claim against the Crown” in that sub-section, without the additional words, would include a claim for a tort; that the added words “arising under any law of Canada,” do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any province of Canada, and even if the meaning be restricted to the statute law of the Dominion, the effect of s. 58 of 50 & 51 Vict. c. 16 is to reinstate the provision contained in s. 6 of the repealed Act R. S. C. c. 40, which gives a remedy for injury to property in a case like the present; that this case should be decided according to the law of Quebec, regulating the rights and duties of proprietors of land situated on different levels; and that under such law the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair, and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain.—*Held, also, per Strong, C.J., and Fournier, J.*, that, independently of the enlarged jurisdiction conferred by 50 & 51 Vict. c. 16, the Crown would be liable to damages for the injury complained of not as for tort but for a breach of its duty as owner of the superior heritage, by altering its natural state to the injury of the inferior proprietor. *City of Quebec v. The Queen*, xxiv. 420.*

26. *Powers of executive councillors—“Letter of credit”—Ratification by Legislature—Obligations binding on the province—Discretion of the Government as to the expenditures—Petition of right—Negotiable instrument—“Bills of Exchange Act, 1890”—“The Bank Act.” R. S. C. c. 120.]—The Provincial Secretary of Quebec wrote the following letter to D., with the assent of his colleagues, but not being authorized by order-in-council:—“J’ai l’honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un intem de six mille piastres qui vous seront payées immédiatement après la session, et cela à titre d’acompte sur l’impression de la ‘Liste des terres de la Couronne, concédées depuis 1763 jusqu’au 31 décembre, 1890.’ dont je vous ai confié l’impression dans une lettre en date du 14 janvier, 1891. Cette somme de six mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement.” D. indorsed the letter to a bank as security for advances to enable him to do the work.—*Held*, affirming the judgment of the Court of Queen’s Bench, that the letter constituted no contract between D. and the Government; that the Provincial Secretary had no power to bind the Crown by his signature to such a document; and that a subsequent vote of the Legislature of a sum of money for printing “liste des terres de la Couronne,” etc., was not a ratification of the agreement with D., the Government not being obliged to expend the money though authorized to do so, and the vote containing no reference to the contract with D., nor to the said letter of credit.—*Held, also*, that a bank cannot deal in such securities as the said letter of credit which is dependent on the vote of the Legislature, and therefore not a negotiable instrument within the Bills of Exchange Act of 1890, or the Bank Act, R. S. C. c. 120, ss. 45 and 60. *Jacques-Cartier Bank v. The Queen*, xxv., 84.*

27. *Municipal corporation—Powers of legislature—License—Monopoly—Highways and ferries—Navigable streams—By-laws and resolutions—Intermunicipal ferry—Tolls—Disturbance of licensee—North-West Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act s. 92 s.-ss. 8, 10 and 16—Rev. Ord. N. W. T. (1888) c. 28—N. W. T. Ter. Ord. No. 7 of 1891-92, s. 4.]—The authority given to the Legislative Assembly of the North-West Territories, by R. S. C. c. 50, and orders-in-council thereunder, to legislate as to “municipal institutions” and “matters of a local and private nature” (and perhaps as to license for revenue), within the Territories includes the right to legislate as to ferries.—The Town of Edmonton, by its charter, and by “The Ferries Ordinance” (Rev. Ord. N. W. T. (1888) c. 28), can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor-in-Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary.—A “club” or partnership styled “The Edmonton Ferry Company” was formed for the purpose of building, establishing, and operating a ferry within the limits assigned in the license by the municipality granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership, and*

taking at least one share of \$5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by further subscriptions for shares *ad infinitum*. The club supplied their ferryman with a list of membership, and established and operated their ferry, without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights.—*Held*, that the establishment of the club ferry and the use thereof by members and others under their club regulations was an infringement of the rights under the license, and that the licensee could recover damages by reason of such infringement. *Dinner v. Humberstone*, xxvi., 252.

28. *Criminal Code*, ss. 275, 276—*Bigamy—Canadian subject marrying abroad—Jurisdiction of Parliament.*—Sections 275 and 276 of the *Criminal Code*, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. *Strong, C.J., contra. Criminal Code*, 1892; *Bigamy*, xxvii., 461.

29. *Government railway—R. S. C. c. 38, s. 50—Liability for negligence by employee of the Crown.*—In s. 50 of the *Government Railways Act* (R. S. C. c. 38) providing that "Her Majesty shall not be relieved from liability by any notice, condition, or declaration in the event of any damage arising from any negligence, omission, or default of any officer, employee, or servant of the Minister," the words "notice, condition, or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. *Grand Trunk Railway Co. v. Vogel* (11 Can. S. C. R. 612) disapproved. *The Queen v. Grenier*, xxx., 42.

30. *Constitutional law — Powers of Canadian Parliament—Prohibited contract—Consolidated Railway Act, 1879.*—For the reasons given by the court below the Supreme Court of Canada affirmed the judgment appealed from (Q. R. 8 Q. B. 555), which held, that the "Consolidated Railway Act, 1879," s. 19, s.-s. 16, was within the legislative jurisdiction of the Parliament of Canada, which, having power to legislate on railway matters, could also legislate on all incidents required to carry out the objects it had in view connected with and primarily intended to assist in carrying out such principal object; that the capacity of directors was such an object essentially connected with the internal economy of a railway company; that a contract prohibited by statute is void although not specially stated to be so in the statute, which merely provides a penalty against an offender, and that, where the president of a railway company, subject to that Act, entered secretly into partnership with contractors for the construction of the railway, no action could be maintained upon the partnership contract by him against his partners. *Macdonald v. Riordon*, xxx., 619.

31. *Appeal — Jurisdiction — Legislative powers—Appeals from the Court of Review—54 & 55 Vict. c. 25, s. 3 (D.)—B. N. A. Act, 1867, s. 101—Illegal consideration of contract—Lottery—Co-relative agreements.*—The power of the Parliament of Canada under s. 101 of the *British North America Act*, 1867, respecting a general court of appeal for Can-

ada is not restricted to the establishment of a court for the administration of laws of Canada and, consequently, there was constitutional authority to enact the provisions of s. 3 of the *Dominion statute* 54 & 55 Vict. c. 25, authorizing appeals from the Superior Court, sitting in review, in the Province of Quebec.—On the merits, this appeal was allowed with costs, *Girouard, J.*, dissenting, the decision in *L'Association St. Jean-Baptiste de Montréal v. Brault* (30 Can. S. C. R. 598), respecting lotteries and contracts for illegal consideration being followed. *L'Association St. Jean-Baptiste de Montréal v. Brault*, xxxi., 172.

32. *Crown lands—Mining licenses—Royalities—Dominion Lands Act.*—The Dominion Government, by regulations made under The *Dominion Lands Act*, may validly reserve a royalty on gold produced by placer mining in the Yukon though the miner, by his license, has the exclusive right to all the gold mined. *Taschereau and Sedgewick, J.J.*, dissenting. *The King v. Chappelle, etc.*, xxxii., 586.

[Leave to appeal and for a cross-appeal to the Privy Council granted, 4th March, 1903; (40 Can. Gaz. 569.)]

33. *Protection and regulation of fisheries—Fishery licenses—51 Vict. c. 60 (D.)—B. N. A. Act, 1867, ss. 91, 92, 109.*

See FISHERIES, 2.

34. *Jurisdiction of Parliament — Insolvent Act of 1875, s. 136—Fraudulent purchases on credit by person in insolvent circumstances.*

See INSOLVENCY, 38.

35. *Supreme and Exchequer Courts Act, s. 51—Legislative jurisdiction.*

See HABEAS CORPUS, 1.

36. *Validity of by-law — Matter in controversy—Jurisdiction of Supreme Court.*

See APPEAL, 33.

37. *Action against Crown—Payment with departmental sanction — Appointment under unconstitutional statute.*

See LIQUOR LAWS, 6.

38. *Liquor License Act, 1883—Legislative jurisdiction.*

See LIQUOR LAWS, 7.

39. *Canadian waters—Property in beds—Public harbours — Erections in navigable waters—Interference with navigation—Rights of fishing—Power to grant—Riparian rights—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5-13, 19, 21—R. S. Q. arts. 1375-1378.*

See No. 5, ante.

40. *Convention of 1818 — Construction of treaty—Construction of statute—Fisheries—Three mile limit — Foreign fishing vessels—"Fishing"—59 Geo. III. c. 38 (Imp.)—R. S. C. cc. 94, 95.*

See No. 6, ante.

41. *Indian lands—Treaties with Indians—Surrender of Indian rights — Mines and minerals—Crown grant—43 Vict. c. 28 (D.)*

See TITLE TO LAND, 141.

3. ONTARIO ACTS.

42. *B. N. A. Act, 1867, ss. 91, 92—Sale of liquor—Brewers' licenses—“Other licenses”—Regulation of trade and commerce—Local and municipal matters—Police regulations—Powers of Parliament of Canada—Provincial legislative jurisdiction—31 Vict. c. 8 (D.)—37 Vict. c. 32 (Ont.)*—The Act 37 Vict. c. 32 (Ont.), is *ultra vires* of the Legislature of Ontario. — Taxation and regulation of the brewer's trade is in restraint of trade and commerce and within the exclusive jurisdiction of the Parliament of Canada under s. 91 *B. N. A. Act*. It is not in the exercise of police regulations, nor a matter of a local or municipal character within the authority conferred upon Provincial Legislatures by s.s. 9, s. 92, *B. N. A. Act*, and the expression “other licenses” therein does not extend to brewers' licenses or other licenses which are not of a local or municipal character. *Reg. v. Taylor* (36 U. C. Q. B. 218) overruled. *Ritchie and Strong, JJ.*, dissenting. *Severn v. The Queen*, ii., 70.

43. *Legislative jurisdiction—Ont. Jud. Act, 1881, s. 43—Appeal to Supreme Court—Limitation of—Conditions.*—Section 43 of the Ont. Jud. Act, 1881, providing that where the amount in controversy is under \$1,000 no appeal shall lie from the decision of the Court of Appeal for Ontario to the Supreme Court of Canada, except by leave of a judge of the former court, is *ultra vires* of the Legislature of Ontario and not binding on this court. (Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal.) *Clarkson v. Ryan*, xvii., 251.

44. *British North America Act, ss. 65, 92—Pardoning power of Lieutenant-Governors—51 Vict. c. 5 (O.)—Act respecting the executive administration of the laws of the province—Provincial penal legislation.*—The local Legislatures have the right and power to impose punishments by fine and imprisonment as sanction for laws which they have power to enact.—The Lieutenant-Governor of a province is as much the representative of Her Majesty the Queen for all purposes of provincial government as the Governor-General himself is for all purposes of the Dominion Government.—Inasmuch as the Act 51 Vict. c. 5 (O.) declares that in matters within the jurisdiction of the Legislature of the province all powers, etc., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several provinces before Confederation shall be vested in and exercisable by the Lieutenant-Governor of that province, if there is no proceeding in dispute which has been attempted to be justified under 51 Vict. c. 5 (O.), it is impossible to say that the powers to be exercised by the said Act by the Lieutenant-Governor are unconstitutional.—*Quere*. Is the power of conferring by legislation upon the representative of the Crown, such as a Colonial Governor, the prerogative of pardoning in the Imperial Parliament only or, if not, in what legislature does it reside?—Gwynne, J., dissenting, was of opinion that 51 Vict. c. 5 (O.), is *ultra vires* of the Provincial Legislature. *Attorney-General of Canada v. Attorney-General of Ontario*, xxiii., 458.

45. *Local Option Act—53 Vict. c. 56, s. 18 (O.)—54 Vict. c. 46 (O.)—Constitutionality—Prohibition—Sales by retail—Legislative powers.*—The statute 53 Vict. c. 56, s. 18 s. c. d.—10

(O.) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario Legislature, as is also s. 1 of 54 Vict. c. 46, which explains it, but the prohibition can only extend to sale by retail. *In re Local Option Act* (18 Ont. App. R. 572) approved. Gwynne and Sedgewick, JJ., dissenting. *Huson v. Council of South Norwich*, xxiv., 145.

See [1896] A. C. 348, and No. 46 *infra*.

46. *Reference by Governor-in-Council—Constitutional law—Prohibitory laws—Intoxicating liquors—British North America Act, ss. 91 and 92—Provincial jurisdiction—53 Vict. c. 56, s. 18 (O.)—54 Vict. c. 46 (O.)—Local option—Canada Temperance Act, 1878.*—A provincial legislature has not jurisdiction to prohibit the sale, either by wholesale or retail, within the province, of spirituous, fermented or other intoxicating liquors. — *Per Strong, C.J.*, and Fournier, J., dissenting. A provincial legislature has jurisdiction to prohibit the sale within the province of such liquors by retail, but not by wholesale; and if any statutory definition of the terms wholesale and retail be required, legislation for such purpose is vested in the Dominion as appertaining to the regulation of trade and commerce.—A provincial legislature has not jurisdiction to prohibit the manufacture of such liquors within, or their importation into, the province.—The Ontario Legislature had not jurisdiction to enact the 18th section of the Act 53 Vict. c. 56, as explained by 54 Vict. c. 46. The Chief Justice and Fournier, J., dissenting. *In re Prohibitory Liquor Laws*, xxiv., 170. Memo.—See (1896) A. C. 348.

47. *Legislative jurisdiction—B. N. A. Act, 1867, ss. 91, 92—R. S. O. (1877) c. 162—Statutory conditions—Fire insurance—Validity of provincial statute—Regulation of trade and commerce.*

See INSURANCE, FIRE, 68.

48. *Legislative jurisdiction—Escheats for want of heirs—B. N. A. Act (1867) ss. 91, 92, 102, 109—R. S. O. (1877) c. 94.*

See CROWN, 56.

49. *Ont. Jud. Act, s. 43—Leave to appeal.*

See JUDICATURE ACTS, 1.

50. *Canadian waters—Property in beds—Public harbours—Erections in navigable waters—Interference with navigation—Rights of fishing—Power to grant—Riparian rights—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5-13, 19, 21—R. S. O. arts. 1375-1378.*

See No. 5, *ante*.

4. QUEBEC ACTS.

51. *Civil rights—Stamp duties—Consolidated Revenue Fund—Filings in court—Indirect tax—Jurisdiction of Provincial Legislature—43 & 44 Vict. c. 9, s. 9 (Que.)—B. N. A. Act (1867), ss. 65, 90, 91, 126, 129.]—43 & 44 Vict. c. 9, s. 9 (Que.)*, enacted that “A duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever, produced and filed before the Superior Court, the

Circuit Court, or the Magistrates' Court, such duties payable in stamps." The Act is declared to be an amendment and extension of 27 & 28 Vict. c. 5, by s. 3, s.s. 2, of which, the duties are to be "deemed to be payable to the Crown." The appellant obtained a rule *nisi* against the prothonotaries of the Superior Court at Montreal for contempt in refusing to receive and file an exhibit unaccompanied by a stamp, as required by the Act. Upon the return of the rule the Attorney-General for the province intervened. — *Held*, reversing the Court of Queen's Bench, Strong and Taschereau, JJ., dissenting, that the Act imposing the tax in question was *ultra vires*, the tax being an indirect tax and the proceeds to form part of the Consolidated Revenue Fund of the province for general purposes. — *Per* Strong and Taschereau, JJ., dissenting. Although the duty is an indirect tax, yet, under ss. 65, 126, 129, B. N. A. Act, 1867, the Provincial Legislature had power to impose it. *Reed v. Atty.-Gen. of Quebec*, viii., 408. [This judgment was affirmed by the Privy Council, 10 App. Cas. 141.]

52. *Legislative jurisdiction — Navigable rivers—Municipal limits*—43 & 44 Vict. c. 62 (Que.) — The Legislature of Quebec has power to include public navigable waters within the territorial limits of a municipality. *Central Vermont Ry. Co. v. Town of St. Johns*, xiv., 288.

53. *Legislative jurisdiction — Navigation — Municipal corporation—By-law—Double tax—Taxation of ferry boats—Jurisdiction of harbour commissioners*—39 Vict. c. 52 (Que.) — Under 39 Vict. c. 52, s. 1, s.s. 3, authorizing the City of Montreal to impose an annual tax on "ferry-men or steamboat ferries;" the city council passed a by-law imposing an annual tax of \$200 on proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distant, and obtained from the Recorder's Court a warrant of distress to levy upon the appellant such tax of \$200 for each steamboat employed by the company during the year as ferry-boats between Longueuil and Montreal. The action by the company, claimed that the statute was *ultra vires* of the Legislature; and that the by-law was *ultra vires* of the corporation, and asked for an injunction. — *Held*, affirming the judgment appealed from (M. L. R. 3 Q. B. 172), that the legislation was *intra vires*. — 2. Reversing that judgment, that the by-law was *ultra vires*, as the statute only authorized a single tax on the owner of each ferry, irrespective of the number of boats or vessels by means of which the ferry should be worked. — 3. Affirming the judgment, that the jurisdiction of the Harbour Commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferries within such limits. *Longueuil Navigation Co. v. City of Montreal*, xv., 566.

54. *Legislative jurisdiction—Municipal by-law—Licenses—Prohibitory fee—Restraint of trade—Sale of meat in private stalls*—37 Vict. c. 51, s. 123, s.s. 27, 31 (Que.) — B. N. A. Act, s.s. 9 of s. 92—"Other licenses." — By 37 Vict. c. 51, s. 123, ss. 27, 31 (Que.) the council of the City of Montreal is authorized to regulate and license the sale, in any private stall or shop in the city outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold in markets. — *Held*, affirm-

ing the judgment appealed from (33 L. C. Jur. 221), that the provisions in question are *intra vires* of the Provincial Legislature, and a by-law may validly be passed under their authority imposing a fee of \$200 for a license to sell in a private stall in addition to the business tax, levied upon all traders under another by-law. — *Per* Strong, J. The words "other licenses" in s. 92, s.s. 9, B. N. A. Act, 1867, include such a license as the Provincial Legislature have empowered the City of Montreal to impose by the terms of the above statute. *Lamb v. Bank of Toronto* (12 App. Cas. 575), and *Severn v. The Queen* (2 Can. S. C. R. 70) distinguished. *In re Pigeon*, xvii., 495.

55. 51 & 52 Vict. c. 91, ss. 9, 14 (Q.) — *Interpretation Act*, s. 19 R. S. Q. — *Railway subsidy — Discretionary power of Lieutenant-Governor-in-Council — Petition of right — Misappropriation of subsidy moneys by order-in-council*. — Where money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. — The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vict. c. 91 (Que.), the Lieutenant-Governor-in-Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order-in-council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section, of said c. 91 of 51 & 52 Vict., enacting that "it shall be lawful" etc., to convert the land subsidy into a money subsidy; that the company completed the construction of their line of railway, relying upon the said subsidy and order-in-council, and built the railway in accordance with the Act 51 & 52 Vict. c. 91, and the provisions of the Railway Act of Canada, 51 Vict. c. 29, and they claimed to be entitled to the sum of \$49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by order-in-council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties, and signed a receipt for the balance of \$6,500 due on account of the first subsidy. The petition of right was dismissed. *Held*, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right (Taschereau and Sedgewick, JJ., dissenting), but assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford Ry. Co. v. The Queen*, xxiv., 1.

56. *Powers of Provincial Legislatures — Direct taxation—Manufacturing and trading licenses—Distribution of taxes—Uniformity of taxation*—55 & 56 Vict. c. 10 and 56 Vict. c. 15 (Q.) — *British North America Act, 1867*. — The provisions of the Quebec statute, 55 & 56 Vict. c. 10, as amended by 56 Vict. c. 15, do not involve a regulation of trade and commerce, and the license fee thereby imposed

is a direct tax, and *intra vires* of the Legislature. The license required to be taken out by the statute is merely an incident to the collection of the tax, and does not alter its character.—Where a tax has been imposed by competent legislative authority, the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the courts in declaring it unconstitutional. *Bank of Toronto v. Lambe* (12 App. Cas. 575) followed. *Attorney-General v. The Queen Insurance Co.* (3 App. Cas. 1090) distinguished. *Fortier v. Lambe*, xxv., 422.

57. *Railways—Farm crossings—Legislative powers.*—The provincial legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of "The Railway Act of Canada." *The Canadian Pacific Railway Co. v. The Corporation of Notre-Dame de Bonsecours*, ([1899] A. C. 467) followed. *Grand Trunk Ry. Co. v. Therrien*, xxx., 485.

58. *Legislative powers—B. N. A. Act, 1867—Criminal code, 1892—R. S. C. c. 159—R. S. Q. art. 2920—53 Vict. c. 36 (Que.)—Lottery—Indictable offences—Contract—Illegal consideration—Co-relative agreements—Nullity—Invalidity judicially noticed—Arts. 13, 14, 989, 990 O.C.*—The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.—A contract in connection with a scheme for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful and cannot be enforced in a court of justice.—The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted and it is the duty of the courts, *ex mero motu*, to notice the nullity of such contracts at any stage of the case and without pleading.—*Per Grouard, J.* (dissenting). In Canada before the Criminal Code, 1892, lotteries were mere offences or contraventions and not crimes, and consequently the Act of the Quebec Legislature was constitutional. *L'Association St. Jean-Baptiste v. Brault*, xxx., 598.

59. *Sale of liquors—Prohibited hours—Police regulations—42 & 43 Vict. c. 4 (Que.).*
See LIQUOR LAWS, 2.

60. *Legislative jurisdiction—Liquor licenses—B. N. A. Act (1867) s. 91—20 Vict. c. 129 (Can.)—38 Vict. c. 76 (Que.)—43 Vict. c. 3 (Que.).*

See LIQUOR LAWS, 3.

61. *Licensed brewers—Quebec License Act—41 Vict. c. 3 (Que.)—43 Vict. c. 19 (D.)—Jurisdiction of Court of Sessions—Prohibition.*

See LIQUOR LAWS, 4.

62. *Incorporation of Island of Anticosti Co.—Validity of incorporating Act—Licitation—Res judicata.*

See ESTOPPEL, 62.

63. *Canadian waters—Property in beds—Public harbours—Erections in navigable waters—Interference with navigation—Rights of fishing—Power to grant—Riparian rights—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c.*

10, ss. 5-13, 19, 21—R. S. O. arts. 1375-1387.

See No. 5, ante.

5. NOVA SCOTIA ACTS.

64. *Queen's Counsel—Power of appointment—37 Vict. cc. 20 & 21 (N.S.)—Legislative authority—Precedence—Retrospective Act—Great seal of Nova Scotia—40 Vict. c. 3 (D.)—40 Vict. c. 2 (N.S.)—Appeal—Jurisdiction—Prerogative.*—By 37 Vict. c. 20 (N.S.), the Lieutenant-Governor was authorized to appoint Queen's Counsel for the province, and by 37 Vict. c. 21 (N.S.), to grant to any member of the bar a patent of precedence in the courts of the province. R. was appointed on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the province, several members of the bar were appointed Queen's Counsel for Nova Scotia, and precedence was granted to them, as well as to other Queen's Counsel appointed by the Governor-General after the 1st July, 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant-Governor, was published in the *Royal Gazette*, and the name of R. was included, but it gave precedence and pre-audience before him to several persons, including appellants, who did not enjoy it before. R. obtained a rule *nisi* to grant him rank and precedence over all Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R.'s precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia, which held.—1. That the letters patent of precedence, issued by the Lieutenant-Governor of Nova Scotia, were not issued under the great seal of the Province of Nova Scotia; 2. That 37 Vict. c. 20, 21 (N.S.), were not *ultra vires*; 3. That s. 2, c. 21, 37 Vict., was not retrospective, and that the letters patent of the 26th May, 1876, issued under that Act could not affect the precedence.—A preliminary objection was raised to the jurisdiction of the court to hear the appeal.—On the argument in appeal before the Supreme Court of Canada the question of the validity of the great seal of Nova Scotia was declared to have been settled by 40 Vict. c. 3 (D.) and 40 Vict. c. 2 (N.S.) and it was held, 1. That the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada; (Fournier, J., dissenting). 2. *Per Strong, Fournier and Taschereau, JJ.* That 37 Vict. c. 21 (N.S.), has no retrospective effect, and letters patent issued under it could not affect the precedence of the Queen's Counsel appointed by the Crown. 3. *Per Henry, Taschereau and Gwynne, JJ.* That the B. N. A. Act, 1867, has not invested the Legislatures of the provinces with any control over the appointment of Queen's Counsel; that Her Majesty forms no part of the Provincial Legislatures, as she does of the Dominion Parliament, and therefore no provincial Act can affect her prerogative right to appoint Queen's counsel in Canada directly, or through her representative the Governor-General, or vest such prerogative right in the Lieutenant-Governors of the provinces: and that 37 Vict. cc. 20 & 21

(N.S.), are *ultra vires* and void. [NOTE.—Reversed in *Atty.-Gen. of Can. v. Atty.-Gen. of Ont.* (23 Can. S. C. R. 458).]—4. *Per Strong and Fournier, JJ.* That this court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, and that there was no necessity in this case to express an opinion upon the validity of the Acts in question. *Lenoir v. Ritchie*, iii., 575.
See No. 80, *infra*.

65. *Nova Scotia Liquor License Act, 1895*—Conviction—Jurisdiction—Affidavit on certiorari—Powers of Provincial Legislature—Matter of procedure.

See CERTIORARI, 4.

6. NEW BRUNSWICK ACTS.

66. *Boom company—Jurisdiction of Provincial Legislatures—Obstructions to navigation—Tidal and navigable rivers—45 Vict. c. 100 (N.B.)—B. N. A. Act, 1867, s. 91.*—Although a Provincial Legislature may incorporate a boom company, it can not give it power to obstruct a tidal navigable river, and therefore the Act 45 Vict. c. 100 (N.B.), so far as it authorized erecting booms and other works in the Queddy River, obstructing its navigation, was *ultra vires* of the New Brunswick Legislature. *Queddy River Driving Boom Co. v. Davidson*, x., 222.

67. *N. B. Liquor License Act, 1887—Prohibition of sale of liquor—Granting licenses—Disqualifying liquor sellers—Restraint of trade.*—Applications for licenses under the New Brunswick Liquor License Act, 1888, must be endorsed by the certificate of one-third of the ratepayers of the district for which the license is asked. No holder of a license can be a member of the municipal council, a justice of the peace, or a teacher in the public schools. *Held*, that the legislature could properly impose these conditions to the obtaining of a license, and the provision is not *ultra vires* as being a prohibitory measure by reason of the ratepayers being able to prevent any licenses being issued; nor is it a measure in restraint of trade by affixing a stigma to the business of selling liquor. *Danaher v. Peters; O'Regan v. Peters*, xvii., 44.

7. MANITOBA ACTS.

68. *B. N. A. Act (1867) ss. 91, 92—Manitoba Municipal Act, 1886—50 Vict. c. 10, s. 43 (Man.)—Percentage addition to delinquent taxes—"Interest"—Legislative powers.*—The Mun. Act of Manitoba provides that persons paying taxes shall be allowed 10 per cent. discount; and after a certain time 10 per cent. on the original amount shall be added to delinquent taxes. *Held*, reversing the court below, Gwynne, J., dissenting, that the 10 per cent. added is only an additional rate or tax imposed as a penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of s. 91 of the B. N. A. Act. *Ross v. Torrance* (2 Legal News 186) overruled. *Lynch v. Canada N. W. Land Co.; South Dufferin v. Mornden; Gibbins v. Barber*, xix., 204.

69. *Manitoba Act—Education—Legislative jurisdiction—Denominational schools—Rights acquired "by practice"—53 Vict. c. 38 (Man.)—33 Vict. c. 3 (D.)*—The exclusive right to make laws with respect to education in Manitoba is assigned to the Provincial Legislature by 33 Vict. c. 3 (D.), provided that nothing in any such law "shall prejudicially affect the rights or privileges with respect to denominational schools which any class of persons had by law or practice in the province at the union." The words "or practice" are an addition to the terms of the B. N. A. Act, 1867, s. 91, s.s. 1, under which the N. B. Public School Act was upheld.—Prior to the union the Roman Catholics of Manitoba had no schools established by law, but there were schools under the control of the church for the education of Roman Catholic children.—In 1890 the Legislature of Manitoba passed 53 Vict. c. 38, by which control of all matters relating to education and schools was vested in a department of education consisting of a committee of the Executive Council and advisory boards established as provided by the Act; the schools of the province were to be free and non-sectarian and no religious exercises were to be had except as prescribed by the advisory boards; and the ratepayers of each municipality were to be indiscriminately taxed for their support. A Roman Catholic ratepayer moved to quash a by-law of the City of Winnipeg for collecting these school rates shewing by affidavit the position of Roman Catholic schools before the union, the practice of the church to control and regulate the education of Roman Catholics and to have the doctrines of their church taught in the schools, and that Roman Catholic children would not be allowed to attend the public schools. *Held*, reversing the judgment appealed from (7 Man. L. R. 273), that the Act (53 Vict. c. 38), by depriving Roman Catholics of the right to have their children taught according to the rules of their church, and by compelling them to contribute to the support of schools to which they could not conscientiously send their children, prejudicially affected rights and privileges with respect to their schools which they had by practice in the province at the union, and was *ultra vires* of the Legislature of the province. *Ex parte Renaud* [1 Pugs. (N.B.) 273] distinguished. *Barrett v. City of Winnipeg*, xix., 374.

The Privy Council reversed this judgment [(1892) A. C. 445; 61 L. J. P. C. cases 58; 67 L. T. 429.]

70. *Legislative jurisdiction—Portage extension R. R. V. Railway.*

See RAILWAY, 147.

71. *Manitoba Constitutional Act—33 Vict. c. 3, s. 22, s.s. 2—Powers of Provincial Legislature in matters of education—Rights and privileges—Legislative power to repeal previous statutes—Right of appeal to Governor-General-in-Council—B. N. A. Act, 1867, s. 93, s.s. 3.*

See No. 2, *ante*.

8. BRITISH COLUMBIA ACTS.

72. *Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption—Record prior to statutory conveyance to Dominion Government—Federal and*

provincial rights—British Columbia Lands Acts of 1873 and 1879—47 Vict. c. 6 (D.)—On 10th September, 1883, D. *et al.* obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20 mile belt south of the Canadian Pacific Railway, reserved 29th Nov., 1863, under agreement between the Governments of the Dominion and of the Province of British Columbia, and which was ratified by 47 Vict. c. 14 (B.C.). On 29th August, 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters patent under the great seal of British Columbia were issued to respondents. By the agreement ratified by 47 Vict. c. 6 (D.), it was also agreed that three and a half million additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by Crown grant. On an information by the Attorney-General for Canada to recover possession of the 640 acres: *Held*, affirming the Exchequer Court, (3 Ex. C. R. 293) that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D. *et al.* being subsequently abandoned or cancelled, the land became the property of the Crown in right of the province, and not in right of the Dominion. *The Queen v. Demers*, xxii., 482.

73. *Powers of Provincial Legislatures—Procedure—Residence of judges—B. N. A. Act, 1867, s. 92, s.s. 14—Delegation of powers to Lieutenant-Governor-in-Council—“Judicial District Act, 1879” (B.C.)—“Better Administration of Justice Act, 1878”—42 Vict. c. 12 (B.C.).*

See No. 1, *ante*.

74. *Legislative jurisdiction—Administration of justice—Provincial courts—Appointment of judges—Criminal procedure—B. N. A. Act, 1867, s. 92, s.s. 14—Reference under 54 & 55 Vict. c. 25 (D.).*

See No. 22, *ante*.

9. PRINCE EDWARD ISLAND ACTS.

75. *Land Purchase Act, 1875 (P. E. I.)—Court of last resort—Setting aside award—Remedy.*—By the Prince Edward Island “Land Purchase Act, 1875,” an award of the commissioners cannot be quashed and set aside and declared invalid and void on application to the Supreme Court of that province, but can be remitted back to the commissioners in the manner prescribed by the 45th section of that Act. *Kelly v. Sullivan*, i., 1.

10. NORTH-WEST TERRITORIAL ORDINANCES.

76. *Marital rights—Married woman—Separate estate—Jurisdiction of North-West Territorial Legislature—Statute—Interpretation of—40 Vict. c. 7, s. 3, and amendments—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.*—The provisions of ordinance No. 16 of 1889.

respecting the personal property of married women, are *intra vires* of the Legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor-in-Council was authorized to legislate by the order of the Governor-General-in-Council passed under the provisions of “The North-West Territories Act.”—The provisions of said ordinance No. 16 are not inconsistent with ss. 36 to 40 inclusively of “The North-West Territories Act,” which exempt from liability for her husband’s debts the personal earnings and business profits of a married woman.—The words “her personal property” used in the said ordinance No. 16, are unconfined by any context, and must be interpreted not as having reference only to the “personal earnings” mentioned in s. 36, but to all the personal property belonging to a woman, married subsequently to the ordinance, as well as to all the personal property acquired since then by women married before it was enacted. *Brittlebank v. Gray-Jones* (5 Man. L. R. 33) distinguished. *Conger v. Kennedy*, xxvi., 397.

77. *Municipal corporation—Powers of legislature—License—Monopolies—Highways and ferries—Navigable streams—By-laws and resolutions—Intermunicipal ferry—Tolls—Disturbance of licensee—North-West Territories Act, R. S. C. c. 50, ss. 8, 10 and 16—Rev. Ord. N. W. T. (1888) c. 28—N. W. T. Ord. No. 7 of 1891-92 s. 4.*

See No. 27, *ante*.

11. YUKON TERRITORIAL ORDINANCES.

78. *Administration of Yukon—Franchise over Dominion lands—Tolls.*—The Executive Government of the Yukon Territory may lawfully authorize the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority. *O’Brien v. Allen*, xxx., 340.

79. *Appeal—Jurisdiction—Yukon Territorial Court—Decisions of Gold Commissioner—Special appellate tribunal—Finality of judgment—Legislative jurisdiction of Governor-in-Council—62 & 63 Vict. c. 11, s. 13—1 Edw. VII. O-in-C. p. lxxii.—2 Edw. VII. c. 35—Mining lands.*—The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the Court of Appeal constituted by the ordinance of the Governor-in-Council of the 18th of March, 1901, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor-in-Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 Vict. c. 11 of the statutes of Canada. *Hartley v. Matson*, xxxii., 575.

12. OTHER ACTS AND MATTERS.

80. *Prerogative—Exercise by local government—Provincial rights—Insolvent bank—Note-holder’s lien.*—The Government of each province of Canada represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the province. *The*

Queen v. Bank of Nova Scotia (11 Can. S. C. R. 1) followed. Gwynne, J., dissenting.—Under s. 79 of the Bank Act (R. S. C. c. 120), note-holders have the first lien on the assets of an insolvent bank in priority to the Crown. Strong and Taschereau, J.J., dissenting. Judgment appealed from (27 N. B. Rep. 379) varied. *Liquidators, Maritime Bank v. Receiver-General of New Brunswick*, xx., 695. (Affirmed by Privy Council in respect to holding on prerogative, 8 Times L. R. 677).

81. *Navigable waters — Title to bed of stream—Crown—Dedication of public lands—Presumption of dedication—User—Obstruction of navigation—Public nuisance—Balance of convenience.*—The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion. *Dixon v. Snetsinger* (23 U. C. C. P. 235) discussed.—The property of the Crown may be dedicated to the public, and a presumption of dedication will arise from facts sufficient to warrant such an inference in the case of a subject.—By 23 Vict. c. 2, s. 35 (Can.), power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.—The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication. If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree. *The Queen v. Moss*, xxvi., 322.

82. *Cases attacking legislative jurisdiction—Hearing counsel—Right to begin—Reply.*
See PRACTICE OF SUPREME COURT, 145.

83. *British North America Act*, ss. 65, 92—*Pardoning Power of Lieutenant-Governor—51 Vict. c. 5 (Ont.)—Act respecting the executive administration of the laws of the province—Provincial penal legislation.*

See No. 44, ante.

84. *Reference by Governor-General — Prohibitory Liquor Laws—B. N. A. Act*, ss. 91, 92—*Provincial jurisdiction—53 Vict. c. 56, s. 18 (O.)—54 Vict. c. 46 (O.)—Local option—Canada Temperance Act, 1878.*

See No. 46, ante.

85. *Powers of executive councillors—"Letters of credit"—Ratification by legislature—Obligations binding on province—Discretion of Government as to expenditure—Petition of right—Negotiable instrument—"Bills of Exchange Act, 1890"—"The Bank Act"—R. S. C. c. 120.*

See No. 26, ante.

86. *Canadian waters — Property in beds — Public harbours — Erections in navigable waters—Interference with navigation—Rights of fishing—Power to grant—Riparian rights—Great lakes and navigable rivers—Operation*

of Magna Charta—Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5-13, 19, 21—R. S. Q. arts. 1375-1378.

See No. 5, ante.

87. *Indian lands—Legislative jurisdiction—Appeal per saltum.*

See PRACTICE OF SUPREME COURT, 195.

CONTEMPT OF COURT.

1. *Contempt of court—Constructive contempt—Obstructing litigation—Prejudice to suitor—Locus standi.*—On an application to commit a solicitor for a constructive contempt of court by obstructing litigation the alleged contempt consisted in publishing in a newspaper comments on a judgment rendered by a master in chambers in a cause in which the writer was solicitor for defendant. The motion to commit was made by the relator in such cause. Notice of appeal from said judgment had been given, but before the motion was made the notice was countermanded and the appeal abandoned. *Held*, that the proceedings in the cause before the Master being at an end the relator in the cause could not be prejudiced, as a suitor, by the publication complained of; and as such prejudice was the only ground on which he could institute the proceedings for contempt he had no *locus standi* and his application should not have been entertained. (14 Ont. App. R. 184). *In re Henry O'Brien*, xvi., 197.

2. *Appeal—Jurisdiction—Criminal proceeding—Final judgment—R. S. C. c. 135, s. 68.*—Contempt of court is a criminal proceeding, and unless it comes within s. 68 of the Supreme Court Act, an appeal does not lie to that court from a judgment in proceedings therefor. *O'Shea v. O'Shea* (15 P. D. 59) followed; *In re O'Brien* (16 Can. S. C. R. 179) referred to. In proceedings for contempt of court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought. *Ellis v. The Queen*, xxii., 7.

3. *Practice in court below—Rule made absolute—Final judgment.*

See APPEAL, 166.

4. *Discretion — Sentence — Fine — Final judgment.*

See APPEAL, 167.

5. *Criminal proceeding—R. S. C. c. 135, s. 68—Deferred sentence—Final judgment.*

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CONTRACT.

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41. VARYING TERMS, 261-266.

1. BREACH OF CONTRACT.

1. *Construction — License to cut timber—Ownership and control — Draft for stumpage.*—Respondents granted C. & S. a license to cut timber on 25 square miles in consideration of stumpage dues; "Said stumpage to be paid in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good indorsed notes, or other sufficient security to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the aforementioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take

all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and, after deducting reasonable expenses, commissions, and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages." For securing the stumpage payable to respondents under this license, C. & S. gave to the respondents an accepted draft upon J. & Co., which was approved of by the respondents, but which was not paid at maturity. After giving the draft C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land under the said agreement. J. & Co. failed, and appellant, their assignee, took possession of the lumber and sold it.—*Held, per Strong, Taschereau, and Gwynne, JJ.*, (affirming the judgment of the court below), Ritchie, C.J., and Fournier and Henry, JJ., dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to C. & S. immediately upon the receipt by the company of the accepted draft of C. & S. on J. & Co., and that appellant was liable for the actual payment of the stumpage. *McLeod v. New Brunswick Ry. Co.*, v., 281.

2. *Sale of goods—Payment—Appropriation—Nonsuit.*—The respondent sued for the price of coal sold and delivered to appellants during 1866, 1867, and 1868. S. and M. and McG. were partners carrying on business under the name of the Albertine Oil Co., S. furnishing the capital. S. who was a large stockholder in the plaintiff company purchased the coal for the Albertine Oil Co., the members of which he named; the president of the plaintiff company told S. they would look to him for payment, as the other partners were poor; the terms of sale were cash on delivery on board vessels; and S. agreed that the dividends on his stock should be applied in payment for the coal. The plaintiff credited the Albertine Oil Co. with S.'s dividends from time to time down to August, 1866, leaving a balance of \$912 due to S. The coal delivered was charged in the plaintiff's books to the Albertine Oil Co., and the bills of lading of the coal were made out in the name of that company. Some time afterwards a notice by S. and M. was given to the plaintiff, complaining of the inferior quality of the coal, and claiming damages. In 1868, S. repudiated the agreement to appropriate his dividends to the payment of coal, and refused to sign receipts therefor. He had signed the receipt for the dividend of 1866. The action (in 1873) was against S. and M., surviving partners. S. shortly afterwards sued for the dividends; the claim was referred to arbitration, and an award was made in his favour for \$15,280, which the plaintiff paid in July, 1874. The receipt stated that it was in full satisfaction of the judgment in the suit of S. against the Albert Mining Co., and it appeared (though the evidence was objected to) that it included the dividends for 1867 and 1868.—The trial judge nonsuited the plaintiff, but the full court of N. S. set aside the nonsuit.—*Held*, reversing the judgment appealed from (22 N. B. Rep. 346), Strong, J., dissenting, that there being clear evidence of the

appropriation of S.'s dividends in pursuance of agreement made with him, and therefore of the plaintiff having been paid for the coal in the manner and on the terms agreed, the plaintiff had been properly nonsuited. *Spurr v. Albert Mining Co.*, ix., 35.

3. *Breach — Charter-party — Conditions — Stranding — Unavoidable delay — Refusal of cargo — Evidence.*] — By charter-party, 11th December, 1878, it was agreed that plaintiff's ship, then on her way to Shelburne, N. S., should proceed with all possible despatch, after arrival at Shelburne, to St. John, N. B. and there load from the charterers a cargo of deals for Liverpool; and if the ship did not arrive at Shelburne on or before 1st January, 1879, the charterers were to be at liberty to cancel the charter-party. The ship arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the harbour of St. John she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs, and was not ready to receive her cargo until 21st April. On 26th March the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of charter-party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing damage was unreasonable and entirely frustrated the object of the voyage. The judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship-owners and charterers, they should find for defendants. The verdict was for defendants, and the full court ordered a new trial. — *Held*, affirming the court below (21 N. B. Rep. 558), that as there was no condition in the charter-party that the ship should be at St. John at any fixed date, and as the time taken in repairing damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract. *Carvill v. Schofield*, ix., 370.

4. *Resolutory condition — Promise of sale — Rescission — Nise en demeure — Arts. 1022, 1067, 1478, 1536, 1537, 1538, 1550 C. C.* — G. agreed to sell a farm to M., then a minor, for \$1,200—of which \$500 was paid at the time, balance payable in seven yearly instalments of \$100 each, with interest at 7 per cent. M. to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed, if instalments were paid as they became due, but if M. failed to make such payments he was to forfeit all right to a deed and all moneys paid, which then would be considered as rent, the agreement null and void, and the parties as lessor and lessee. M. became of age and left the country without ratifying the sale; he paid none of the instalments, and G. retained possession of the farm. Some time afterwards, M. returned, tendered the balance of the price, and claimed the farm. *Held*, reversing the judgment appealed from (3 Dor. Q. B. 212), Strong and Taschereau, JJ., dis-

smissing, that the condition of the promise of sale not having been complied with within the time specified in the contract, the terms of the contract placed the plaintiff *en demeure*, without the necessity of any formal demand or rescission immediately upon failure in performance of the condition when, *ipso facto*, the relation of the parties became changed from that of vendor and vendee to lessor and lessee. *Grange v. McLennan*, ix., 385.

5. *Breach — Construction of tramway — Use of traction engine — Steam engine — Construction of agreement.*] — A clause in an agreement under an Ontario Act between the Municipality of York and the Toronto Gravel Road Co., for a right to construct a tramway from their gravel pits to the City of Toronto, was as follows:—"So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highway of the said county, and shall discontinue the use and employment of the said traction engine, or of any other traction engine, upon or along such public highways." The company claimed the right to put steam engines upon the road, over such public highway, notwithstanding the above clause in their agreement. — *Held*, affirming the judgment appealed from (11 Ont. App. R. 765), that the use of steam engines was an infraction of the said clause. *Toronto Gravel Road Co. v. County of York*, xii., 517.

6. *Railway aid — Agreement to take stock — Breach — Special damages — Arts. 1065, 1070, 1073, 1077, 1840, & 1841, C. C.* — The Corporation of the County of Ottawa under the authority of a by-law undertook to deliver to the M., O. and W. Ry. Co. for stock subscribed by them 2,000 debentures of the corporation of \$100 each, payable twenty-five years from date and bearing 6 per cent. interest, and subsequently, without any valid cause or reason, refused to issue said debentures. In an action solely for damages for their neglect to issue said debentures, *Held*, affirming the judgment appealed from (M. L. R. 1 Q. B. 46), Ritchie, C.J., and Gwynne, J., dissenting, that apart from its liability for the amount of the debentures and interest thereon, the corporation was liable under arts. 1065, 1073, 1840, 1841, C. C., for damages for breach of the covenant. *County of Ottawa v. Montreal, Ottawa and Western Ry. Co.*, xiv., 193.

7. *Non-fulfilment — Temporary exception — Incidental demand — Damages — Cross-appeal.*] — In March, 1883, B. contracted with C. for the delivery of an engine in accordance with the Herreshoff system to be placed in the yacht "Ninie" then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On 31st August, C. took out a *saisie conservatoire* of the yacht, and claimed \$2,199.37 for the work and materials furnished. B. petitioned to annul the attachment and pleaded that the amount was not yet due, as C. had not performed the contract, and by incidental demand claimed a large amount. After various proceedings the *saisie conservatoire* was abandoned, and the Court of Queen's Bench, on appeal on the principal action and incidental demand, ordered that experts should ascertain whether the engine was built according to the contract and report on the defects. A report was made by which it

was declared that C.'s contract was not carried out, and that work and materials of the value of \$225 were still necessary to complete the contract.—On motion to homologate the expert's report, the Superior Court adjudicated upon the merits of the demand in chief and of the incidental demand, and held that as C. had not built an engine as covenanted B.'s plea should be maintained, but as to the incidental demand held the evidence insufficient to warrant a judgment in favour of B. On appeal, the Queen's Bench, taking into consideration the fact that the yacht had, since the institution of the action, been sold in another suit at the instance of one of B.'s creditors and purchased by C., the proceeds being deposited in court to be distributed amongst B.'s creditors, credited B. with \$225 necessary to complete the engine, allowed \$750 damages on B.'s incidental demand, and gave judgment in favour of C. for the balance, viz., \$1,225 with costs.—The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings.—On appeal and cross-appeal as to amount allowed on incidental demand:—*Held*, reversing the judgment appealed from, Ritchie, C.J., and Taschereau, J., dissenting, that as it was shewn that at the time of the institution of C.'s action it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C. covenanted to build it, the action was premature.—*Held*, also, that the evidence in the case fully warranted the \$750 allowed by the Court of Queen's Bench on B.'s incidental demand, and therefore he was entitled to a judgment for that amount on said incidental demand with costs.—Taschereau, J., was of opinion, on cross-appeal, that B.'s incidental demand should have been dismissed with costs. *Bender v. Carrier*, xv., 19.

8. *Parol agreement — Part performance—Carriage of mails—Authority to bind the Crown—R. S. C. c. 35.*—An action will not lie against the Crown for breach of a contract for carrying mails for 9 months at the rate of \$10,000 a year, made by parol with the Postmaster-General and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than \$1,000 it could not be made without the authority of an order-in-council, and if temporary it was revocable at the will of the Postmaster-General. Judgment appealed from (2 Ex. C. R. 386) affirmed. *Humphrey v. The Queen*, xx., 591.

9. *Breach—"Transmit"—Construction of agreement—Telephone service—Use of wires.*—The E. T. Co. carried on business of executing orders by telephone for messenger boys, cabs, etc., which it sold to the E. D. Co., agreeing among other things not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, etc., to any person or persons, company or corporation, except to the E. D. Co. The G. N. W. Co. afterwards established a messenger service for the purposes of which the wires of the Telephone Co. were used. In an action for breach of the agreement with the E. D. Co. and injunction to restrain the Telephone Co. from allowing their wires to be used for giving orders for messengers, etc.: *Held*, affirming the judgment appealed from (17 Ont. App. R. 292), Ritchie, C.J., doubting,

that the Telephone Co., being ignorant of the nature of communications sent over their wires by subscribers, did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted; and that the Telephone Co. was under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications with a view to preventing such orders being given. *Electric Despatch Co. v. Bell Telephone Co.*, xx., 83.

10. *Agreement to insure to amount of advances—37 Vict. c. 15 (Que.)—Continuance of cause—Suspension of prescription.*—The claim arose out of alleged breach of contract by S. & Co., in not insuring to the full extent of advances on the ship "Empress Eugenie," belonging to G.—For several years previous to 1857, S. & Co. had large dealings with G., principally advances, made on the security of ships, which appellant, a ship-builder, constructed and disposed of through them. On 18th August, 1854, G. assigned to S. & Co. the ship "Empress Eugenie," with freights and earnings, for £18,500, in trust, to sell her at such time and place as they might judge best; to receive the price and earnings thereof; and out of the moneys arising from such sale, freight, earnings or hire, or otherwise coming into their hands on account of G., to retain £18,500, and all other sums then due to them by the G., or which they might thereafter pay, lay out or advance for him, and all other moneys due for charges, expenses, interest and commission, as specified in the deed. It was stipulated that the vessel and her freights should at all times be kept insured by S. & Co. to at least the full amount advances made by them in respect thereof, and to such further reasonable amount as G. might see fit, the premiums to be deducted from the moneys received.—The "Empress Eugenie" left Quebec for Liverpool with a full cargo, but owing to the depressed state of the market she could not be sold, and it was agreed that she should be classed and coppered, in order that she might be run with freight until a more favourable opportunity occurred to dispose of her. While the vessel was at Liverpool expenses were incurred by S. & Co., with the assent of G. \$41,003.67 for classing and coppering, as well as for discharging and loading her. In the meantime S. & Co. received \$22,001.29 for freight on her voyage to Liverpool, and \$43,382.36, from other sources, which, according to the deed they were entitled to credit on advances. The vessel, after being classed and coppered, was insured for \$68,000, and left Liverpool for Quebec with cargo, freight of which valued at \$7,600, and insured for that sum. She was lost on her voyage. S. & Co. credited the amount received to G., and in 1857 brought an action for £2,929 4s. 9d. on their general account. G. pleaded that S. & Co. neglected to insure "Empress Eugenie" to the full extent of their advances, that he had thereby lost money, exceeding their claim which was thereby compensated, and he prayed that the action be dismissed. The appellant made no incidental demand.—In 1873, while the case was still pending, the record was destroyed by the burning of the Quebec Court House. More than two years after, G. petitioned under 37 Vict. c. 15, to recommence proceedings, and instituted the present action against the respondent as representing S. & Co. The Court of Queen's Bench, Lower Canada, was of opinion that the demand of

G., not having been made in the first case, could not be deemed to be a recommencing of the cause or proceeding of which the record was burned within the meaning of 37 Vict. c. 15, and was not a continuance of said cause or proceeding so as to suspend prescription within the meaning of ss. 7 and 21 of that Act. But the court did not consider it necessary to enter into the consideration of the question of prescription, preferring to rest their judgment on the broader ground that respondents were only bound to insure for the amount of their claim.—*Held, per Ritchie, C.J., and Strong and Gwynne, JJ., affirming the Court of Queen's Bench. (Fournier and Henry, JJ., dissenting), that the amount for which S. & Co. were bound to insure the ship under the agreement was the amount of any balances which at any time might be due to them by G., for moneys for which the ship was liable to them under the deed, and not for the cost of said ship, or the aggregate amount of all advances which they might have made, irrespective of the sums received by them to be applied on account of such advances. Appeal dismissed with costs. Gingras v. Symes, Cass. Dig. (2 ed.) 14.*

11. *Breach—Engagement to sell on commission—Damages—Evidence — Defendant's books—Supplemental demand—Settlement of accounts—Prescription—Interruption—Arts. 345, 346, C. C. P.—Technical objection not taken in court below.*—By written contract of 23rd Jan., 1868, plaintiff contracted with defendants to sell their goods in the Maritime Provinces, the engagement to continue for a period of five years, subject to co-partnership or business changes. By the contract he was to have 5% commission on all goods of defendants' manufacture and 2½% on all other goods. This commission was to be paid to him on all sales, no matter whether such sales had been effected by him or had been made direct to purchasers by defendants without his knowledge or intervention. Plaintiff was opening up an entirely new market for defendants' goods, entered upon his duties under the contract, and in two years succeeded in establishing a trade for defendants. On 5th Dec., 1870, defendants terminated the engagement, alleging that they did so in consequence of the interruption to their business by a late fire and some changes they expected to make in their business firm the ensuing year.—Plaintiff objected to his agency being terminated, and at the expiration of the five years, sued to recover a balance of \$1,000 for unpaid commissions due, and \$10,000 damages for breach of contract.—The plaintiff examined defendant Ames, who produced from defendants' ledgers a full statement of sales effected by defendants in Maritime Provinces up to 5th Dec., 1870. Thereupon plaintiff made a supplemental demand, claiming \$1,289.50 additional for unpaid commissions.—The Superior Court rejected plaintiff's claim for damages on the ground that co-partnership and business changes took place in December, 1870, in defendant's firm, and that this by the terms of the contract entitled them to terminate it as they did. As to the claim for commissions up to 5th Dec., 1870, the court held the same to be a good open existing demand, and referred the accounts to an accountant, who found \$1,705.78 due to plaintiff for commissions. This report the court by final judgment adopted, and condemned defendants in \$1,705.78 and interest from service of process

and costs.—The Queen's Bench reversed this judgment and dismissed the action, on the ground that it was proved that after each trip made by plaintiff, accounts were settled for commission due to satisfaction of plaintiff, and that there was a settlement on 29th Dec., 1869, when engagement terminated, and that the evidence produced by defendants shewed that plaintiff was fully paid for all commissions earned. *Held*, that nothing had occurred at the settlement of commission, from time to time paid by the defendants to the plaintiff upon the sales as the defendants themselves, who alone had a perfect knowledge of them, represented them to be, which would disentitle the plaintiff to have an account taken of all the sales upon which he was by his contract entitled to commission at least up to 5th Dec., 1870. The plaintiff was not aware of the large sales which had been made by defendants, and there could be no binding acquiescence when plaintiff was not aware of his rights. That the result of the account taken could not be objected to, and therefore the judgment of the Superior Court should be affirmed.—*Per Taschereau, J.* The prescription, if any, was interrupted by a letter written by defendants to plaintiff before it accrued, and *Walker v. Sweet* (21 L. C. Jur. 21) must be followed as long as it stands unreversed. The objection, that the report was not duly received in evidence in the case, according to arts. 345 and 346 C. C. P., had not been taken in the court below, and the rule in the Privy Council, that a purely technical objection not made in the court below cannot be entertained in appeal, must be followed.—Appeal allowed with costs. *Fuller v. Ames, Cass. Dig. (2 ed.) 140; Cass. S. C. Prac. (2 ed.) 144.*

12. *Breach of contract to supply meat—Sole arbiter—Decision binding on the parties—Forfeiture of deposit—Damages.*—Action for breach of contract for supplying the Windsor Hotel, Montreal, with meat, etc., from 1st May to 1st November, 1880, which contained the following clause:—"The quantity and quality of the foregoing supplies to be satisfactory to the steward of the hotel, and two hundred dollars (\$200) are now handed the Windsor Hotel Syndicate as security for the due fulfilment of the contract, to be forfeited in case of non-performance, and if at any time the hotel steward is obliged to procure supplies elsewhere through any cause or negligence of ours, any excess of cost then paid over the prices of this contract shall be chargeable against the deposit of two hundred dollars. The said deposit shall not bear interest.—This contract may be cancelled by the Windsor Hotel Syndicate at any time should they lease or sell the hotel, or should the hotel from any cause be closed before 1st November next.—Should this contract be satisfactorily fulfilled the deposit of two hundred dollars, or any balance of the same remaining in accordance with foregoing terms, shall be returnable on demand to us."—Plaintiff supplied meat until 30th June. The steward was dissatisfied and repeatedly notified plaintiff of his dissatisfaction, but did not immediately stop receiving meat. The supplies continuing unsatisfactory to the steward, and in his opinion not according to the contract, he so decided and reported his decision, and the contract was cancelled whereby the deposit became forfeited. The defendants had been obliged to expend \$168 more than the deposit in obtaining meat elsewhere.—*Held*, affirming

the Queen's Bench, that the parties having agreed to make the steward the sole judge and to abide by his decision, the plaintiff was bound by it. Further, the evidence showed that the steward's dissatisfaction was justified by the inferiority of the meat supplied, and that there was no *mala fides* on his part, but that he had acted *bonâ fide* under a reasonable sense of dissatisfaction. — Appeal dismissed with costs (Fournier and Henry, JJ., dissenting). *Brown v. Allan*, Cass. Dig. (2 ed.) 146.

13. *Breach—Damages—Repairs to printing press and freight charges—Lease with privilege of purchasing—Dilatory exceptions—Art. 120, s-s. 7 C. C. P.*—In 1878, plaintiffs made an agreement with defendant, in the form of a lease of a printing press with its appurtenances for 6 months, at a rental of \$1,000 payable in advance, obliging themselves to erect the press on the premises of defendant. The lease gave the said lessee the privilege of purchasing the press, at the expiration of the lease, for \$4,500, and provided that failing purchase, defendant would deliver the press and appurtenances at the expiration of the lease in as good order and condition as the same were at the commencement of the lease, reasonable wear and tear and accident by fire excepted, free of all charges and unbroken, free on board in Montreal, with freight paid to New York.—Plaintiffs erected a press; defendant paid \$1,000, and held the press under the lease until its expiration; and then instead of returning it continued to use it. Some time after the lease terminated, plaintiffs, considering that defendant had exercised the option to purchase took action against defendant, with *saisie conservatoire* for the purchase price, \$4,500.—The defendant pleaded in effect, "never exercised option to purchase," and that whatever remedy plaintiffs had, they had no right to a suit for the price of the press, as for goods bought and sold. The plaintiffs' action was dismissed, and this judgment was affirmed by the Court of Review.—While this suit was pending, defendant continued to use the press for 17 months, when plaintiffs obtained possession under *saisie revendication*, and removed it to New York. On arrival it was found to be in disrepair and large expenditure was necessary to put it in the condition in which it was at the time that it had been leased.—Plaintiffs then sued claiming. 1.—\$2,809.13, value of the use during the 17 months, at the rate established in the lease (\$1,000 for 6 months); 2.—\$2,809.13, as damages sustained through the use, employment and retention by defendant of the press and its appurtenances, after the expiration of the lease; 3.—\$299.35 as costs and expenses of taking down, packing, loading and removal to New York, including freight and charges.—Defendants filed dilatory exceptions (art. 120, C. C. P.), setting up that plaintiffs were not residents and no power of attorney had been produced, which were dismissed, and pleas to the merits raising only issues of fact.—The Superior Court gave plaintiffs \$2,000, for deterioration and damages, and \$160.50 for cost of transport, this judgment being affirmed.—Held, that the judgment appealed from should be affirmed (Henry, J., dissenting). *Mullin v. Roe*, Cass. Dig. (2 ed.) 219.

14. *Breach—Construction of railway—Delivery of bonds—Assignment of right to receive bonds—Special reference—Appeal to Privy Council.*—On 31st Oct., 1876, A. en-

tered into a contract with the Government of Nova Scotia for the construction of the Eastern Extension Ry. On 20th Dec., A. assigned all his right to said contract to appellants, and, on the same day, an agreement was made between appellants and the Canada Improvement Co., whereby the latter undertook to build and equip the Eastern Extension Ry. On 22nd Dec., G. agreed with the Can. Imp. Co. to do the work, for which the company agreed to pay per mile \$4,800 in cash, and \$3,750 in first mortgage bonds. As security for his performance of the agreement, G. gave to the Can. Imp. Co. a bond, with two sureties, in the penal sum of \$100,000, which bond was afterwards assigned to the Government of Nova Scotia.—G. proceeded with the work according to agreement but the mortgage bonds were not delivered as the work progressed, and the Can. Imp. Co. represented that they could not be issued at that time. G., therefore, suspended work and took proceedings against the Can. Imp. Co. for breach of contract. These proceedings were settled by a payment to G. in cash and notes, and an agreement was entered into between the appellants of the first part; the Can. Imp. Co. of the second part, and G. of the third part, which, after reciting the above facts, provided:—That the Can. Imp. Co. would deliver to G. \$80,000 of first mortgage bonds of appellant's company as soon as the same could be legally issued, and use every diligence to have them issued, and they should, so far as the parties of the first and second parts could make them, be a lien on the Truro and Pictou Branch Railway, which the Government of Canada was to hand over to the appellants, upon the Eastern Extension Railway and upon the appellant company and its property rights and privileges set forth in s. 32 of its Act of incorporation. That such bonds or other conveyances, or lien by which they might be secured, should be free from any clauses restraining a sale of the property to which such lien attached, or in any way impairing the remedy of the holders thereof in default of payment. That the whole issue of first mortgage bonds should not exceed \$1,250,000 and should bear interest at 6 per cent., and that no other security should take precedence of the bonds to be given to G. But provision might be made for giving clear titles of the company's bonds in the event of their being sold, the proceeds to be secured for the benefit of the bondholders. That the appellants covenanted and guaranteed that the bonds would be delivered to G. as above set out, and that they would, if necessary, endeavour to procure such legislation as would remedy any defects now existing in their organization. That the Government of Nova Scotia would use all means within its power to enforce the delivery of such bonds and might refuse government aid to said companies, until satisfied that G.'s right to receive the said bonds was protected and assured. That the contract between the Can. Imp. Co and G. should be cancelled, and the bond given by G. delivered up to him.—On 1st Feb., 1879, the appellants entered into an agreement with the Governments of the Dominion and of Nova Scotia relinquishing their rights to the "Pictou Branch Railway," mentioned in said agreement, and agreed to the repeal of the Act providing for the transfer of the same to the appellants, and that it should be retained by the Dominion until the Eastern Extension Railway to the Strait of Canso and the steam ferry across the strait should be completed, and then transferred to

the appellants on certain conditions. — G. claimed this to be a breach of agreement, and brought action against the appellants and the Can. Imp. Co., the latter, however, not being served with the writ. — Defendants pleaded that as to \$40,000 of the bonds the plaintiff had given an order on the Can. Imp. Co. for delivery to the Provincial Secretary of Nova Scotia, which had been accepted by the company, and was, in effect, an assignment of that portion of the bonds. The evidence of the plaintiff on the trial, in regard to such order, was that it was given on the condition that an order-in-council should be passed by the Nova Scotia Government protecting the right of the plaintiff to have the said bonds delivered to him, and the bonds given to the Can. Imp. Co., as security for the due performance by the plaintiff of the work on the Eastern Extension Railway, delivered up to plaintiff; and on these conditions being fulfilled the plaintiff was to give to the Government a formal assignment of the said mortgage bonds to the extent of \$40,000, but that such conditions were never carried out. — The plaintiff recovered, and his verdict was affirmed by the Supreme Court, whereupon defendants appealed to the Supreme Court of Canada, and, on the argument an agreement was entered into between the parties, and the Government of Nova Scotia, empowering the court to decide the case on the merits irrespective of the pleadings or any technical defence raised thereon, and limiting the amount in question to the sum of \$40,000, the balance being satisfied by a judgment recovered by G. against the Can. Imp. Co. — *Held*, affirming the judgment appealed from (4 Russ. & Geld. 436), that the agreement entered into by the appellants with the Governments of the Dominion and Nova Scotia, was a breach of the agreement made between appellants, the Can. Imp. Co. and G. — *Held*, also, that the order was given on conditions which were never carried out, and was not an assignment of the bonds, and therefore G. was entitled to recover \$40,000, with interest from the date of the breach of agreement — Appeal dismissed with costs. *Halifax & Cape Breton Coal & Ry. Co. v. Gregory*, Cass. Dig. (2 ed.) 727.

[The Privy Council refused leave to appeal and held that in deciding the case under the agreement entered into at the hearing of the appeal, the Supreme Court was not acting in its ordinary jurisdiction as a court of appeal, but under special reference, and even if it were open to give leave to appeal, the questions raised were not of sufficient public interest to depart from the rule where an appeal to the Supreme Court of Canada has failed. (11 App. Cas. 229).]

15. *Sale of land — Building restrictions — Description — Street boundaries — Construction of covenant.* — [The owners of a block of land in Toronto, bounded on the north by Wellesley Street and west by Sumach Street, entered into an agreement with B., whereby the latter agreed to purchase a part of said block, which was vacant wild land, not divided into lots, and containing neither buildings nor streets, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia Street. The agreement contained certain restrictions as to buildings to be erected on the property purchased, which fronted on the two streets north and west of it respectively, and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley Street, produced. A deed was afterwards

executed of said land pursuant to the agreement which contained the following covenants: "And the grantors . . . covenant with the grantees . . . that in case they make sale of any lots fronting on Wellesley Street Sumach Street on that part of lot 1, in the City of Toronto, situate on the south side of Wellesley Street and east of Sumach Street now owned by them, that they will convey the same subject to the same building agreement or conditions" (as in the agreement). The vendors afterwards sold a portion of the remaining land fronting on Amelia Street, a one hundred feet east of Sumach Street, and the purchaser being about to erect thereon building forbidden by the restrictive covenants in the deed, B. brought an action against the vendors for breach of said covenant, claiming that it extended to the whole block. — *Held*, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the covenant included all the property south of Wellesley Street: that the land not being divided into lots any part of it was a portion of a lot of land fronting on Wellesley and Sumach Streets, and so within the purview of the deed; and that the vendors could not be dividing the property as they saw fit narrow the operation and benefit of their own deed. *Per* Gwynne, J. The piece of land in question did not front nor abut on either Wellesley or Sumach Streets, but on Amelia Street alone and was not, therefore, literally within the covenant of the vendors. *Dumoulin v. Burnett*, xxii., 120.

16. *Sale of deals — Contract — Breach of Delivery — Acceptance — Quality — Warranty — Damages — Arts. 1073, 1473, 1507, C. C.* — [In a contract for the purchase of deals from S. et al., merchants in London, it was stipulated, *inter alia*, as follows: — "Quality — Sellers guarantee quality to be equal to the usual Etchemin Stock, and to be marked with the Beaver Brand," and the mode of delivery was f. o. b. vessels at Quebec, and payment by drafts, payable in London 120 days' sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros., at the request of P. & I. intending purchasers of the deals. When the deals arrived in London they were inspected by S. et al., and found to be of inferior quality, and S. et al., after protesting sold them at reduced rates. — In an action for damages for breach of contract. — *Held*, reversing the judgment of the court below, that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality. Strong, C.J., and Sedgwick, J., dissenting. *Stewart v. Atkinson*, xxii., 315.

17. *Principal and agent — Master and servant — Insurance agent — Duty — Appointment — Acting for rival company — Divided interest — Dismissal.* — [To act as agent for a rival insurance company is a breach of an insurance agent's agreement, "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interest of his employer and is sufficient justification for his dismissal. — Judgment of the Court of Appeal for Ontario (22 Ont. App. R. 408) affirmed. *Eschmure v. Canada Accident Assur. Co.*, xxv., 69

18. *Fire insurance — Conditions in policy — Breach — Waiver — Recognition of exist-*

risk after breach—*Authority of agent.*]—A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed, or the interest of the parties therein changed. *Held*, affirming the judgment appealed from (34 N. B. Rep. 113), that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition. *Held*, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Torrop v. Imperial Fire Assur. Co.*, xxvi., 585.

19. *Agreement in writing*—*Municipal corporation*—*Waterworks*—*Extension of works*—*Repairs*—*By-law*—*Resolution*—*Injunction*—*Highways and streets*—*R. S. Q. art. 4485*—*Art. 1033a, C. C. P.*]—By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the river Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time, and completed in the year 1892. He constructed a system of waterworks, and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir, and to make new excavations in the streets for these purposes without receiving any further authority from the council.—*Held*, reversing the judgment appealed from (Q. R. 5 Q. B. 542), (Gwynne, J., dissenting), that these were not actually necessary repairs but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town.—*Held*, further, that the resolution and the application upon which it was founded constituted a "contract in writing," and a "written agreement" within the meaning of article 1033a of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. *Ville De Chicoutimi v. Legaré*, xxvii., 329.

20. *Breach of contract*—*Evidence*—*Custom of trade*—*Local usage*—*Damages*—*Sale of goods.*]—On appeal, the Supreme Court affirmed the judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 221), which held that in an action for damages for failure to deliver goods at the time specified in a contract, a claim for the difference between the purchase prices and those at which the goods were selling at the time fixed for delivery was not too remote. *Leggat v. Marsh*, xxix., 739.

21. *Public work*—*Breach of contract*—*Appropriation of land*—*Damages*—*Interest.*]—The Supreme Court affirmed the judgment of the Exchequer Court (7 Ex. C. R. 55), Taschereau, J., dissenting.—By the judgment appealed from it was held as follows:—"1.

There may be some question as to whether *Walker v. The London and North Western Railway Company* (L. R. 1 C. P. D. 518) should be accepted as establishing a general proposition that if in contracts creating a forfeiture for not proceeding with work at the rate required, a time is fixed for its completion, the forfeiture cannot be enforced on the ground of delay after that date.—"But at all events any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work, and the contractor must, with reference to such reasonable time for completion, make default or delay in diligently continuing to execute or advance the work to the satisfaction of the engineer. The engineer is to decide, having regard to a time that in the opinion of the court is reasonable, and the contractor is to have notice of his decision."—"2. Where there is a breach of contract the damages are to be measured as near as may be by the profits the contractor would have made by completing the contract in a reasonable time."—"3. In this case the contractor claimed for loss of profits in respect of certain extra work not covered by the contract." *Held*, that inasmuch as it was not possible to say either that the engineer would have directed it to be done by him had the work remained in the suppliant's hands, or that in case the engineer had done so, that he would have fixed a price for it from which a profit would have been derived, it could not be taken into consideration."—"4. where in such a case the Crown dispossessed the contractor of his plant and used it for the purposes of the completion of the work, the contractor was held entitled to recover the value of such plant as a going concern, that is, its value to anyone situated as the contractor himself was at the time of the taking of the plant."—"5. Where the contractor was not allowed interest upon the value of such plant, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid." *The King v. Stewart*, xxiii., 483.

22. *Neglect of contractee*—*Building by-law*—*Liability of owner*—*Damages.*

See NEGLIGENCE, 1.

23. *Negligence*—*Collision*—*Action*—*Joinder of defendants*—*Company*—*Limited liability*—*Merchant Shipping Amendment Act, 1862 (Imp.)*—*Navigation of Canadian waters, 31 Vict. c. 58, s. 12 (D.)*—*Motion for judgment*—*Findings of jury*—*Weight of evidence*—*Practice.*

See NAVIGATION, 2.

24. *Breach in assertion of supposed rights*—*Government railway.*

See TORT, 1.

25. *Breach of covenant for quiet enjoyment of leased premises*—*Sale*—*Parol agreement*—*Misrepresentation.*

See DEED, 22.

26. *Pledge*—*Deposit with tender*—*Forfeiture*—*Breach of contract*—*Municipal corporation*—*Right of action*—*Damages*—*Set-off*—*Restitution of thing pledged.*

See PLEDGE, 9.

2. CANCELLATION OF CONTRACT.

27. *Rescission of agreement—Work and labour done—Finding of jury—Recovery on common counts.*—Plaintiff was employed by defendant under written agreement, not under seal, to saw lumber in his mill, of which, under the agreement, plaintiff had possession and charge.—It was contended on behalf of plaintiff at the trial that this agreement was rescinded, and that plaintiff was entitled to recover on the common counts, for the work actually done up to the time of the alleged rescission.—The jury found in favour of plaintiff upon the facts bearing upon the alleged rescission, and the Supreme Court (N.S.) refused a new trial (5 Russ. & Geld. 381).—It was contended on behalf of plaintiff that the judgment appealed from was correct, because there was sufficient evidence to warrant the finding that the agreement in question had been rescinded, and that defendant agreed to pay the plaintiff for the work done by the latter up to the time of the rescission.—On appeal to the Supreme Court of Canada, *Held*, that for the reasons given by Rigby, J., in the court below, the judgment should be affirmed (Ritchie C.J., and Strong, J., dissenting.) — Appeal dismissed with costs. *Young v. Tracey*, Cass. Dig. (2 ed.) 147.

28. *Construction of contract—Construction of statute—12 Vict. c. 18, s. 20—Notice to cancel contract—Gas supply shut off for non-payment of gas bill on other premises—Mandamus.*—An agreement to furnish gas contained an express provision that either of the contracting parties should have the right to cancel the contract by giving twenty-four hours' notice in writing. Notices were sent in writing to the consumer that his gas would be shut off at a certain number on a street named, unless he paid arrears of gas bills due upon another property. *Held*, that such notices could not be considered as notices given under the contract for the purpose of cancelling it. *Cadieux v. Montreal Gas Co.*, xxviii, 382.

NOTE.—Leave to appeal to the Privy Council was granted (1898) A. C. 718, and subsequently the Sup. Ct. decision was reversed [(1899) A. C. 589.]

29. *Municipal corporation—Waterworks—Rescission of contract—Notice—Mise en demeure—Long user—Waiver—Art. 1067 C. C.*—A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works, without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract. *Held*, that after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks, and it would, under the circumstances, be inequitable to rescind the contract. *Held*, further, that a notice specifying the particular defects to be remedied was a condition prece-

dent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. *Tor of Richmond v. Lafontaine*, xxx., 155.

30. *Contract—Duration—Right to cancel Repugnant clauses.*—A contract for supplying light to a hotel contained the following provisions: "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. . . . Special condition if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer. *Held*, reversing the judgment of the Court of Appeal (1 Ont. L. R. 73), that neither of the parties to the contract had a right to cancel it again: the will of the other during the renewed term. *Ottawa Electric Co. v. St. Jacques*, xxxi., 63.

31. *Construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts. 1065, 1691 C. C.*—The provisions of article 1691 of the Civil Code of Lower Canada do not give the owner of work being constructed under a contract at a fixed price the power of cancelling the contract in part, and maintaining it as to another part: the contract must, under that article, be either cancelled in toto or not at all. *Ville de Maisonneuve v. Banque Provinciale*, xxxiii, 418.

32. *Stock subscription—Deceit—Blank filled in without consent—Oral testimony—Error.*

See COMPANY LAW, 35.

33. *Subscription for shares—False prospectus—Misrepresentation—Concealment—Bon fide statements—Action for rescission waived*

See COMPANY LAW, 11.

34. *Promoter of company—Sale of property by—Fiduciary relationship—Non-independent directors—Rescission.*

See COMPANY LAW, 41.

35. *Rescission of sale of land—Fraudulent misrepresentation—Evidence—Executed contract.*

See No. 119, *infra*.

36. *Sale by auction—Agreement as to title—Breach—Rescission.*

See VENDOR AND PURCHASER, 22.

37. *Joint stock company—Ultra vires—Consent judgment—Action to set aside.*

See JUDGMENT, 22.

38. *Rescission of contract—Innocent misrepresentation—Common error—Failure of consideration.*

See VENDOR AND PURCHASER, 24.

39. *Misrepresentation—Artifice—Consideration—Rescission—Error—Ratification—Laches—Waiver.*

See VENDOR AND PURCHASER, 26.

40. *Cancellation of insurance policy—Fraud—Misrepresentation—Wagering policy—Endowment—Return of premiums paid.*

See INSURANCE, LIFE, 22.

41. *Public work—Breach of contract—Part performance—Appropriation of plant—Damages—Interest.*

See No. 21, *ante*.

3. CARRIERS.

42. *Carriers of goods—Bill of lading—Conditions—Bailment—Warehousemen—Liability for negligence—Transit—Connecting lines.*—One of the conditions in a contract to carry goods to P., a place beyond the terminus of the company's line, provided that the company "should not be responsible for any loss, mis-delivery, damage or detention that might happen to goods sent by them. If such loss, mis-delivery, damage or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits." *Held*, that this condition would not relieve the company from liability for loss or damage occurring during transit, even if such loss occurred beyond the limits of the company's own line. *Held, per Strong and Taschereau, J.J.*, that the loss having occurred after the transit was over, and the goods delivered at P., and the liability of the carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line P. was situate, as bailees for the shipper. (*Fournier and Gwynne, J.J.*, dissenting.) *G. T. Ry. Co. v. MacMillan*, xvi., 543.

43. *Railway—Carriage of goods—Carriage over connecting lines—Authority of agent.*—E., in British Columbia, being about to purchase goods from G. in Ontario, signed, on request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods via Grand Trunk Railway and Chicago & N. W. care Northern Pacific Railway at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G., and wrote to him "I enclose you card of advice and if you will kindly fill it up when you make the shipment send it to me, I will trace and hurry them through, and advise you of delivery to consignee." G. shipped the goods as suggested in this letter, deliverable to his own order in British Columbia. *Held*, affirming the judgment appealed from (21 Ont. App. R. 322), that on arrival of the goods at St. Paul the Northern Pacific Railway Company was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G., and not paid for. *Northern Pacific Ry. Co. v. Grant*, xxiv., 546.

44. *Railway—Carriage of goods—Connecting lines—Special contract—Fire in warehouse—Negligence—Pleading.*—Action by S., against appellants. S. purchased goods to be delivered, some to G. T. R. Co., and the C. P. R. Co., and other companies, to be, and

the same were, transferred to appellants, for carriage to Merlin, Ont., and delivered to S. There was also alleged a contract by the appellants for storage and delivery to S. when requested, and lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the appellants at Merlin. *Held*, reversing the Court of Appeal, that as to the goods delivered to the G. T. R. Co. to be transferred to the appellants, if the cause of action was one arising *ex delicto* it must fail, as the evidence shewed that the goods were received from the G. T. R. Co. for carriage under the terms of a special contract in the bill and shipping note given by the G. T. R. Co. to the consignors, and if it was an action on contract it must also fail as the contract under which the goods were received by the G. T. R. Co. provided that the company would not be liable for loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier. *Held*, further, that as to the goods delivered to the companies other than the G. T. R. Co. to be transferred to the appellants, the latter company was liable under the contract for storage; that the goods were in their possession as warehousemen, and the bills of lading contained no clause, as did those of the G. T. R. Co., giving subsequent carriers the benefit of their provisions; and that as the two courts below had held that the loss was caused by the negligence of servants of the appellants, such finding should not be interfered with. *Held*, also, that as to goods carried on a bill of lading issued by the appellants, there was an express provision that owners should incur all risk of loss of goods in charge of the company as warehousemen and that such a condition was reasonable as the company only undertakes to warehouse goods of necessity and for convenience of shippers. *Lake Erie & D. R. Ry. Co. v. Sales*, xxvi., 663.

45. *Shipping receipt—Carriers—Limitation of liability—Damages—Negligence—Connecting lines—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.*—Conditions in a shipping receipt relieving the carrier from liability for loss or damages arising out of "the safe keeping and carriage of the goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carrier, and restricting claims to the cash value of the goods at the port of shipment do not apply to cases where the goods have been wrongfully sold or converted by the carrier.—A shipping receipt with terms as above was for carriage by the defendants' and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shewn by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had

been delivered by the defendants. *Held*, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants and that they were not exempted from liability in respect thereof, at their full value, under the terms of the shipping receipt.—As the evidence shewed definitely what damages had been sustained, and there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from, ordered that the damages should be reduced to those proved in respect of the goods sold and converted. *Armour, J.*, however, was of opinion that the judgment of *Craig, J.*, at the trial should be restored. *Wilson v. Canadian Development Co.*, xxxiii., 432.

[Leave to appeal to Privy Council *refused*, July, 1903.]

46. Bill of lading—Printed conditions—Condition verbally stated—Authority of agent—Duty of carriers—Providing fit and proper transportation for perishable freight—"At owner's risk"—*Estoppel*.

See CARRIERS, 15.

47. Carriage of goods—Forwarding by connecting lines—Custody of goods—Negligence—Bill of lading.

See CARRIERS, 6.

48. Carriage of baggage—"Owner's risk"—"Against all casualties"—Exemption from liability.

See CARRIERS, 11.

49. Railways—Condition in shipping bill—Limitation of liability.

See RAILWAYS, 5.

50. Chartered ship—Perishable goods—Ship disabled by excepted perils—Transshipment—Repairs—Reasonable time—Carrier—*Bailee*.

See SHIPPING, 6.

51. Railway—Carriage of goods—Connecting lines—Special contract—Loss by fire in warehouse—Negligence—Pleading.

See RAILWAY, 6.

52. Contract—Against liability for fault of servants—Charter party—Bill of lading—Conditions of carriage—Stowage—Fragile goods—Negligence—*Freightment*.

See CARRIERS, 16.

53. Carriage of goods—Bill of lading—Limitation of time for suit—Damages from unseaworthiness—Construction of contract.

See CARRIERS, 13.

4. CONDITIONS.

54. Construction of railway—Condition precedent—Certificate of engineer—Want of diligence—*Laches*.—*McC.* entered into a contract with *McG.*, the contractor for the construction of the North Shore Railway between Montreal and Quebec, to perform works

of construction on a portion of the road, agreed "to keep open at certain times hours at his own cost and expense the line for the passage of traffic or express trains run by *McG.* without any charge the latter;" but there was a proviso "any time occupied on the road over above what may be required by the h hereinbefore mentioned, or any expense ca thereby shall be paid by the contractor *M* on a certificate to that effect signed by superintendent of the contractor."—On ac for damages caused by the interruption of work by the passing of respondent's tra. *Held*, affirming the judgment appealed f (14 *Rev. de Leg.* 422; 12 *Q. L. R.* 373), it was the duty of the plaintiff to get superintendent's certificate within a reasonable time, and not having taken any step get it until six years after the superintendent had left defendant's employment, the i ure to produce such certificate was suffic ground for dismissing the appellant's act *McCarron v. McGreevy*, xiii., 378.

55. Bonus by-law — Conditions precedent to granting aid — Railway company—Agreement with municipal corporation—Performance of conditions—Damages.]—A municipal corporation entered into an agreement with railway company by which the latter was to receive a bonus on certain conditions, one of which was that the company "should construct at or near the corner of Colborne William streets (in Toronto) a freight passenger station with all necessary accommodation, connected by switches, sidings, otherwise with said road" upon the completion of the town passing a by-law granting a necessary right of way.—*Held*, 1. That such condition was not complied with by erection of a station building not used, intended to be used, and for which pro officers, such as station master, ticket agent etc., were not appointed. *Strong, J.*, dissenting.—2. *Per Strong, J.*, that the condition only called for the construction of a building with the required accommodation and connections, and did not amount to a contract to run the trains to such station or any other use of it.—3. The words "all necessary accommodation," in the condition, required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided.—On division of opinion, the judgment appealed from (14 *Ont. App. R.* 32) stood affirmed. *Bickford v. Town of Chatham*, xvi., 235.

56. Construction of railway — Engineer certificate — Condition precedent.]—A contract for the construction of part of a railway provided that, "The said work shall in all particulars, be made to conform to the plans, specifications and directions of the party of the second part, and of his engineer by whose classifications, measurements and calculations, the quantities and amounts of the several kinds of work performed under this contract shall be determined, and we shall have full power to reject and condemn all work or materials which, in his opinion do not conform to the spirit of this agreement, and who shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive and binding upon both parties hereto. The party of the second part hereby agrees, and binds himself, that upon the certificates of his engineer that

work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay said party of the first part for the performance of the same in full for materials and workmanship. It is further agreed by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by the second party upon the estimate and certificate of his engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, 10% being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled."—Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at \$70,142.65, and after deducting the money paid to and received by the sub-contractor, and a clerical error appearing on the face of the certificate, a sum of \$4,187.32 remained due to the sub-contractor.—In an action by the sub-contractor to recover \$36,312.12, the Superior Court, (affirmed by the Queen's Bench), granted the plaintiff \$4,187.32 with interest and costs. *Held*, affirming the judgment appealed from, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover. *Guilbault v. McGreevy*, xviii., 609.

57. *Quebec harbour works — Engineer's certificate—Errors in calculation—Finality—Bulk sum contract — Extras—Deductions—Engineer's powers — Interest.*—In a bulk sum contract for various works and materials executed, performed and furnished on the Quebec harbour works, the contractors were allowed by the final certificate of the engineers a balance of \$52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882; but the certificate was only granted on 4th February, 1886. In an action by the contractors for \$181,241 for alleged balance of contract price and extra work; *Held*, 1. That the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done stated in the specifications and the quantities actually done, and therefore the certificate in this case should be corrected in that respect.—2. That interest should not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th February, 1886.—Strong and Gwynne, JJ., were of opinion that the certificate could have been reformed as regards an item for the removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs. *Peters v. Quebec Harbour Commissioners*, xix., 685.

58. *Condition precedent — Certificate of engineer—Statement of claim — Pleading—31 Vict. c. 13, s. 18 (D.)—Leave to amend.*—The petition alleged that suppliants were contractors for the building of section No. 4, Intercolonial Railway, and duly entered upon and completed their contract under the Act intitled "An Act respecting the construction of the Intercolonial Railway," within the time, and according to its terms, covenants and conditions. That in following the directions and instructions of the commissioners and engineers employed and placed in charge of the works, which directions and instructions given from time to time, as provided by the contract, the suppliants were bound to follow, and did follow, they performed a large amount of extra work not comprised in the contract, nor in the data furnished to them at the time the contract was entered into, nor in the schedules and specifications referred to in the contract and connected therewith, and not intended to be covered by the lump sum, which formed the consideration money of the contract. That they were put to great expense by delays in preparations by the commissioners and engineers, and to great loss and damage by reason of changes and alterations necessitated by the unskilful manner in which the works had been laid out by the engineers. That the suppliants were deceived and misled in making their estimates by insufficient and erroneous data in the schedule of works and quantities prepared and published by the chief engineer. That it had not been the usage, nor was it the intention of the parties, to be held to the strict letter of the contract when the schedule gave erroneous or insufficient information, entailing extra work which could be performed only with ruinous consequences, but they were entitled to be paid for such extra work. They set out at length the various kinds of extra work done and changes made, and prayed for a settlement of accounts, that they might be allowed their claim for extra work done, for the materials provided by them, for damages resulting from defects of plans, specifications and surveys, from changes made in location, grade, etc., from the negligence and want of skill of the government engineers, and for breach of the contract in being prevented from proceeding with the work, and that they might be reimbursed sums advanced during the progress of the work with interest. — The Attorney-General demurred on grounds: That it did not appear by the petition that the chief engineer of the Intercolonial Railway had certified that the work for or on account of which the suppliants claimed had been duly executed, or that the suppliants were entitled to be paid therefor or for any part thereof, nor that such certificate had been approved of by the commissioners of said railway as required by s. 18 of the Act respecting the construction of the Intercolonial Railway: that the Crown was not responsible for the damages and injuries mentioned; that it did not appear by the terms of the contract that the commissioners or their engineers were under any obligation to lay out work or furnish specifications therefor; that it appeared by the petition that the extra work claimed for was done in pursuance of directions given by the engineers as provided by the contract, and it was not alleged any extra payment was to be made therefor; that it was immaterial that the schedules of works were defective or erroneous, because such schedules were not alleged to have been warranted as accurate, but

only of probable quantities, and the demurrer denied liability for any of the other matters mentioned in the petition on the ground that the contract provided for them, or that the work, if done, was not in any way warranted by the Crown, or had been done under the directions of the engineers acting within the contract.—In the Exchequer Court, Henry, J., overruled the demurrer with costs. *Held*, that the applicant's petition was too indefinite in form, and was insufficient in not setting out the contract, and a compliance with the requirements of s. 18 of 31 Vict. c. 13 (D.), or satisfactory ground of non-compliance with the condition precedent required by that section.—Appeal allowed. Judgment of the Exchequer Court reversed, with leave to suppliant (the Crown assenting) to amend his petition, on payment of costs of appeal and demurrer, by setting out the contract and such averments as he might be advised. *The Queen v. Smith*, Cass. Dig. (2 ed.) 634.

59. *Condition precedent—Direction to jury—Implied promise—Part performance—Benefit from works done.*—In April, 1872, M. gave W. an order by letter for mill machinery, to be put in complete operation to M.'s satisfaction in a building to be provided by him. All the machinery, with the exception of a slab saw, was supplied, and the mill was put in operation in the summer of 1872. M. found fault with the machinery, and after alterations and repairs made by W. in 1873, M. put additional machinery into the mill and worked it until 1875, when it was destroyed by fire. M. had insured the whole machinery, including that supplied by W. for \$7,700, the additional machinery put in by himself being valued at \$2,500, and received the benefit of the insurance to the full amount of the loss. The contract price was \$4,250, with freight and expenses, making in all \$4,790. Some payments were made, but M. refusing to pay a balance of \$1,900, W. brought an action on assumption, adding the common counts.—At the close of plaintiffs' case a nonsuit was moved for on the ground that it was a condition precedent to M.'s liability that the work should be done to his satisfaction, and plaintiffs' evidence shewed that M. never was satisfied, but was always complaining. This being overruled, M. undertook to shew that the machinery was not as represented, but defective and in many parts had to be repaired, and that he had already paid what it was worth. Evidence was given on this issue, and W. endeavoured to shew that any defect in the working of the mill was attributable to the shifting of the foundation erected by M., and to the want of skill of the men employed by him. The trial judge left it to the jury to say whether the machinery was reasonably fit and proper for the purpose for which it was intended, and if not, directed them that M. was only bound to pay as much as it was worth. The jury returned a verdict for W. for \$1,850, having deducted \$200 for defects and \$80 for machinery not supplied.—A rule nisi to set aside the verdict and grant a new trial was made absolute by the Supreme Court (N. B.) (2 Pugs. & Bur. 11), on the ground that the learned judge should have directed the jury that "the length of time that the defendant used the machinery, the complaints he made about it from time to time, and all the circumstances connected with it, should have been left to the jury, with a direction for them to consider whether from the defend-

ant's dealings with it they could infer a new implied contract on his part to keep the machinery and pay what it was worth, though less than the contract price." *Held*, that in suing upon this contract it was not necessary for the plaintiffs to have averred, as a condition precedent to their right to recover, that the work, besides having been skilfully, properly, sufficiently and in a workmanlike manner executed, was completed to the satisfaction of the defendant.—In cases in which something has been done under a special contract, but not in strict accordance with the terms of the contract, although the party cannot recover the remuneration stipulated for in the contract because he has not done that which was to be the consideration of it, still, if the other party has derived any benefit from the work done, as it would be unjust to allow him to retain that without paying for it, the law implies a promise upon his part to pay such remuneration as the benefit conferred upon him is reasonably worth. The jury in this case having decided upon the evidence that the defendant had derived a greater benefit from the work done than was compensated by the amount he had already paid, the plaintiffs were entitled to retain the benefit of the verdict, and the rule granting a new trial should be discharged with costs. *Waterou v. Morrow*, Cass. Dig. (2 ed.) 138.

60. *Condition—Final certificate of engineer—Amended estimate.*—McG. in the written agreement for construction of several bridge reserved the option of altering the works and terminating the contract at any time upon notice and payment for work and material up to the time of notice "on production of the certificate of the engineer of the said McG. establishing amount due." McG. acted on his option and on the date of his notice his engineer certified \$14,872.13 to be due including the cost of two turn-tables, and after deducting a payment on account of a note for \$8,000. The engineer made another estimate, apparently in amendment on same date, establishing the amount at \$22,131.92 without reference to the amount of the note. Defendant contended the estimates did not establish correctly either the amount of work done or value of materials furnished, but were merely progress estimates and that plaintiffs had been fully paid all they were entitled to. Plaintiffs recovered \$15,042.44, the trial judge deducting the cost of turn-tables, and on appeal the Queen's Bench made a further reduction of \$2,006.03 for which no estimate was given.—*Held*, affirming the judgment appealed from that the certificate in question was delivered as a final estimate to shew the correct debt due on materials prepared for the works on which work was stopped by defendant. *McGreevy v. Boomer*, Cass. Dig. (2 ed.) 139.

61. *Petition of right—46 Vict. c. 27 (Q.)—Final certificate of engineer—Extras—Practice as to plea in bar not set up.*—A contract entered into between Her Majesty the Queen in right of the Province of Quebec, and S. X. Cimon for the construction of three departmental buildings at Quebec, contained the usual clauses that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered, shewing the total amount of work done, and materials furnished, and the cost of extras and the reduction in the contract price upon any

alterations. There was a clause providing for the final decision by the Commissioner of Public Works, in matters in dispute upon the taking over or settling for the works. The Commissioner of Public Works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate, declared that a balance of \$31.36 was due upon the contract price, and \$42.84 on extras. The suppliants by their petition of right claimed *inter alia* \$70,000 due on extras. The Crown pleaded general denial and payment. The Superior Court granted the suppliants \$74.20, the amount declared to be due under the final certificate of the engineer. On appeal the Queen's Bench increased the amount to \$13,198.77, with interest and costs.—*Held*, reversing the judgment appealed from, and restoring the judgment of the Superior Court, that the suppliants were bound by the final certificate given by the engineer under the terms of the contract.—*Per Fournier and Taschereau, JJ.*, dissenting, that as the final certificate had not been set up in the pleadings as a bar to the action, and there was an admission of record by the Crown that the contractor was entitled to 20 per cent. commission on extras ordered and received, the evidence fully justified the finding of the Court of Queen's Bench that the commission of 20 per cent. was still due and unpaid on \$65,837.09 of said extra work. *The Queen v. Cimon*, xxiii., 62.

62. *Electric plant—Reference to experts by court—Adoption of report by two courts—Appeal on question of fact—Arbitration clause in contract—Right of action.*—The Royal Electric Company having sued the City of Three Rivers for the contract price of the installation of a complete electric plant, which, under the terms of the contract, was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side), on an appeal affirmed the judgment of the Superior Court.—On an appeal to the Supreme Court of Canada: *Held*, affirming the judgments of the courts below, that it being found that the appellants had not fulfilled their contracts within the time specified, they could not recover.—*Held*, also, that when a contract provides that no payment shall be due until the work has been satisfactorily completed a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.—*Quere*. Whether a right of action exists although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration. *Quebec Street Railway Company v. City of Quebec* (18 Q. L. R. 205) referred to. *Royal Electric Co. v. City of Three Rivers*, xxiii., 289.

63. *Construction of contract—Inconsistent conditions—Dismissal of contractor—Architect's powers—Arbitrator—Disqualification—Probable bias—Rejection of evidence—Judge's discretion as to order of evidence.*—A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedi-

tion and with such materials and workmanship as the architect or clerk of the works may deem proper the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion (with the consent in writing of the court house committee, or commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractors. *Held*, Sedgewick and Girouard, JJ., dissenting, that this last clause was inconsistent with the above clause of the contract, and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the committee.—At the trial, the plaintiff tendered evidence to shew that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to shew that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved, and if necessary what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants.—*Held*, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling of evidence within the discretion of the trial judge. *Neelon v. City of Toronto*, xxv., 579.

64. *Bailees—Common carriers—Express company—Receipt for money parcel—Conditions precedent—Formal notice of claim—Pleading—Money had and received—Special pleas.*—Where an express company gave a receipt for money to be forwarded with the condition endorsed that the company should not be liable for any claim in respect of the package, unless within sixty days of loss or damage a claim should be made by written statement, with a copy of the contract annexed.—*Held*, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee. *Richardson v. Canada West Farmers' Ins. Co.* (16 U. C. C. P. 430) distinguished.—In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted," put in issue all material facts necessary to establish the plaintiff's right of action. Judgment appealed from (10 Man. L. R. 595) reversed. *Northern Pacific Express Co. v. Martin et al.*, xxvi., 135.

65. *Contract—Subsequent deed—Inconsistent provisions.*—C., by agreement of 6th April, 1891, agreed to sell to the Erie County

Gas Co., all his gas grants, leases, and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On 20th April, a deed was executed and delivered to the company transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Co., who immediately cut off from the works of C. the supply of gas, and an action was brought to prevent such interference.—*Held*, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained. *Carroll et al. v. Provincial Natural Gas and Fuel Co.*, xxvi, 181.

66. *Resolutive condition—Conditional sale—Arts. 379, 2017, 2083, 2085, 2089 C. C.—Hypothecary creditor—Unpaid vendor—Property real and personal—Immovables by destination—Movables incorporated with the freehold—Severance from reality.*—An action was brought by L. to revendicate an engine and two boilers under a resolutive condition (*condition résolutoire*) contained in a written agreement providing that, until fully paid for, they should remain the property of L., and that all payments on account of the price should be considered as rent for their use, and further that, upon default, L. should have the right to resume possession and remove the machinery. The machinery in question had previously been imbedded in foundations in a sawmill which had been sold separately to the defendants, and at the time of the agreement the boilers were still attached to the building, but the engine had been taken out and was lying in the mill-yard, outside of the building. While in this condition the defendants hypothecated the mill property to B., and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered. B. intervened in the action of revendication and claimed that the machinery formed part of the freehold and was subject to his hypothecs upon the lands.—*Held*, affirming the judgment appealed from (Q. R. 4 Q. B. 354), that the agreement between L. and the defendants could not be considered a lease, but was rather a sale subject to a resolutive condition with a clause of forfeiture as regards the payments made on account. But whether the agreement was a lease or a sale on condition, L. having, as respects the boilers and their accessories, consented to their incorporation with the immovable, and dealt with them while so incorporated, they became immovables by destination within the terms of art. 379 of the Civil Code, and subject to the duly registered hypothecs of the respondent. *Wallbridge v. Farwell* (18 Can. S. C. R. 1), followed. *Lainé et al. v. Béland*, xxvi, 419.

67. *Insurance, life—Conditions and warranties—Indorsements on policy—Inaccurate statements—Misrepresentations—Latent disease—Material facts—Cancellation of policy—Return of premium—Statute, construction*

of—55 Vict. c. 39, s. 33 (Ont.)]—The provision of s.-s. 2 of s. 33 of "The Insurance Corporations Act, 1892," (Ont.), limiting conditions and warranties indorsed on policy providing for the avoidance of the contract by reason of untrue statements in the applications, to cases where such statements are material to the contract, do not require the materiality of the statements to appear by indorsements, but the contract will be avoided only when such statements may subsequently be judicially found to be material, as provided by s.-s. 3.—Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. *Venner v. Sun Life Ins. Co.* (17 Can. S. C. R. 364) followed. *Jordan v. Province of the Protestant Institution*, xxviii, 554.

68. *Fire insurance—Construction of contract—"Until"—Condition precedent—Waiver—Estoppel—Authority of agent.*—Certain conditions of a policy of fire insurance required proofs, etc., within fourteen days after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained as proved in accordance with this condition. There were two subsequent clauses providing respectively that until such proofs were produced, no money should be payable by the insurer and for forfeiture of all rights of the insured if the claim should not, for the space of three months after the occurrence of the fire, be in all respects verified in the manner aforesaid. *Held*, reversing the judgment appealed from (31 N. S. Rep. 337), that the condition as to the production of proofs within fourteen days was a condition precedent to the liability of the insurer; that the force of the word "until" in the subsequent clause could not give to the omission to produce such proofs, within the time specified, the effect of postponing recovery merely until after their production; and that the clause to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period. *Commerce Union Assur. Co. v. Margeson*, xxix, 601.

69. *Construction of railway—Certificate engineer—Condition precedent.*—Where a contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company not a party to such a contract, it was to be the sole and final arbiter of all disputes between the parties, the contractor was not bound by such condition when the person named as arbiter proved to be, in fact, the engineer of the other party to the contract. Judgment appealed from (26 Ont. App. 133) affirmed. *Dominion Construction Co. v. Good & Co.*, xxx, 114.

70. *Condition as to inspection—Sale of lumber.*—A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final." *Held*, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by

buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector the contract was satisfied and the inspection final and binding on the parties. *Thomson v. Matheson*, xxx., 357.

71. *Municipal work—Condition as to subletting—Consent of council.*—Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation it is incumbent on the contractor to obtain such consent before subletting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do. — In an action against the sub-contractor the latter pleaded the want of assent by the council whereupon the plaintiff replied that the assent was withheld at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract. Issue was joined on this replication. *Held*, affirming the judgment appealed from (27 Ont. App. R. 135.), that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld and that the plaintiff had failed to prove his case on that issue. *Ryan v. Willoughby*, xxxi., 33.

72. *Insurance against fire — Condition in policy—Interest of insured — Mortgage as owner—Further insurance.*—By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property whether as owner, trustee . . . mortgagee, lessee, or otherwise is not truly stated." *Held*, that a mortgagor was sole and unconditional owner within the terms of said condition.—By another condition the policy would be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance but before being notified of the acceptance of his application the premises were destroyed by fire. *Held*, that there was no breach of said condition. *Commercial Union Assur. Co. v. Temple* (29 Can. S. C. R. 206) followed. *Western Assur. Co. v. Temple*, xxxi., 373. *Judgment appealed from* (35 N.B. Rep. 77) *affirmed*.

73. *Policy of insurance—Building and stock separately insured—Indivisibility of contract—Incumbrance on land—Misrepresentation—36 Vict. c. 44, s. 36 (Ont.)—Condition of policy.*

See INSURANCE, FIRE, 91.

74. *Policy of insurance — Conditions—Notice of assignment—Loss payable to creditors—Right of action.*

See INSURANCE, FIRE, 17.

75. *Conditions precedent—Memo on margin of policy—Countersignature.*

See INSURANCE, LIFE, 5.

76. *Free booms — Possession—Proprietary rights—Conduct of parties.*

See ESTOPPEL, 7.

77. *Condition as to arbitration—Booming and storing logs—Necessity of award—Action.*

See ARBITRATIONS, 23.

78. *Railway company—Carriage of goods—Limitation of liability—Railway Act, 1888, s. 246 (3).*

See RAILWAY, 5.

79. *Debtor and creditor—License to take possession—Bonâ fide opinion as to debtor's incapacity—Replevin—Conversion.*

See DEBTOR AND CREDITOR, 50.

80. *Marine insurance — Voyage policy — "At and from" a port — Construction of policy—Usage.*

See INSURANCE, MARINE, 24.

81. *Contract of insurance—Construction—Marine insurance—Goods shipped and insured in bulk — Loss of portion—Total or partial loss.*

See INSURANCE, MARINE, 25.

82. *Condition in policy of fire insurance—Ship insured "while running" — Variation from statutory conditions—Ontario Insurance Act.*

See INSURANCE, FIRE, 36.

5. CONSIDERATION.

83. *Implied agreement—Failure of consideration — Impossibility of performance.*—When one contracts to do work for another, the preparation for which involves outlay and expense, a corresponding agreement, in the absence of any express provision, will be implied on the part of the person with whom he contracts to furnish the work; but no such implication will be made where, from circumstances known to, and in the contemplation of, both parties at the date of the agreement to do the work it was, and continued to be beyond, the power of the party to carry out such implied agreement. *Henry, J.*, dissenting. Judgment appealed from (14 Ont. App. R. 339) affirmed. *McKenna v. McNamee*, xv., 311.

84. *Condition precedent — Certificate of engineer—Progress estimate—Final estimate—Evidence.*—B. was contractor to build railway bridges for M. who reserved the right to substitute iron for the wooden superstructures of any of them, and by notice to B. to terminate the contract at any time, paying plaintiffs for work done and materials provided up to the time of giving notice, "on production of the certificate of the engineer of the said" defendant "establishing amount due." M. acted on this provision with respect to three bridges, by notice dated 2nd October, 1875, and his engineer reported and certified under same date \$14,872.13 to be due, including \$4,100 for iron-work for two turn-tables purchased by B. for the work, and deducting payment on account by a note for \$8,000. The engineer made another estimate, apparently in amendment of his previous one, dated the same day, establishing the amount at \$22,131.93, without reference to the note for \$8,000.—M. contended that the estimates of the engineer did not establish correctly either the amount of work done or value of materials, but were merely progress estimates to enable work to progress generally under the contract, until a final examination and acceptance of the works, and that, as a matter of fact, the plaintiffs had been fully paid all they were entitled to. The Superior Court

judgment awarding B. \$15,042.44, deducting the turn-tables, was affirmed by the Queen's Bench with the exception of a further deduction of \$2,006.03 for which there appeared to have been no estimate given. *Held*, affirming the judgment appealed from, that the proper conclusion from the evidence was, that the certificate in question was delivered to B. as a final estimate, intending to represent as correct the debt of M. to B. for amount due on materials prepared for the bridges, upon which work was stopped by defendant. *McGreevy v. Boomer*, Cass. Dig. (2 ed.) 139.

85. *Construction of agreement—Right of way—Removal of timber—Necessary route.*—The plaintiff was the owner of a farm, of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber, at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed, would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber. *Held*, affirming the judgment appealed from (19 Ont. App. R. 176), that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendant's right, under the general grant of the trees, to remove the trees across the cleared land. Gwynne, J., dissenting. *Stephens v. Gordon*, xxii, 61.

86. *Construction of contract—Street railway—Permanent pavements—Arbitration and award.*—The Toronto St. Ry. Co. was incorporated in 1861, and its franchise was to last 30 years, at the expiration of which period the city could assume the ownership of the railway and property of the company on payment of the value thereof, to be determined by arbitration. The company was to keep the roadway between the rails, and for 18 inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard. The city laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with its portion of such cost in the manner and for the period that adjacent owners were assessed, under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, but refused to pay for subsequent years, on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway

was operated. An action having been brought by the city for these rates, it was held that the company was only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specific sum annua per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance, and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said street now extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matter not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends." This agreement was ratified by an Act of the Legislature passed in 1890, which also provided for the holding of the said arbitration which having been entered upon, the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim, an action was brought by the city to recover the said amount.—*Held*, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance and repair of the said streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, etc., must be considered to have been inserted *ex majori cautela* and could not do away with the express contract to relieve the company from liability.—*Held* further, that by an Act passed in 1877, a by-law made in pursuance thereof, the company was only assessable as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon the owners or occupiers after they have ceased to be such; therefore after the termination of the franchise the company would not be liable for these rates. *City of Toronto v. Toronto Street Ry. Co.* xxi, 198.

87. *Agreement respecting lands — Boundaries — Referee's decision — Boundary Arbitrations — Arts. 941-945 and 1341 et seq. C. C. P.*—The owners of contiguous farms executed a deed for the purpose of settling the boundary line between their lands, there naming a third person to ascertain and mark the true division line upon the ground, and agreeing further to abide by his decision, and to accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary, and to revalidate the strip of land lying upon his side of it.—*Held*, reversing the judgment of the Court of Queen's Bench that the agreement thus entered into was a contract binding upon the parties to be

cuted between them according to the terms therein expressed and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations. *McGoey v. Leamy*, xxviii., 545.

88. *Co-relative agreements — Illegal consideration — Nullity — Judicial notice of invalidity.*

See No. 163, *infra*.

6. CROWN CONTRACTS—PUBLIC WORKS.

89. *Public works — Claim for extras — Certificate of engineer—Condition precedent—31 Vict. c. 12 (D.)—Authority to bind the Crown.*—The suppliant contracted with the Minister of Public Works, to construct, finish, and complete, for \$78,000, a deep sea wharf at Richmond, N. S., agreeably to the plans and specifications, and under directions of the engineer in charge. By the seventh clause of contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By letter of 26th August, 1873, the Minister authorized suppliant to erect a coal floor, for the additional sum of \$18,400, and further extra work amounting to \$2,781, was performed under another letter from the department. The work was completed, and on the final certificate of the engineer in charge \$9,681, as the balance due, was paid to suppliant, who gave the following receipt, dated 30th April, 1875: "Received from the Intercolonial Railway, in full, for all amounts against the Government for works under contract as follows: 'Richmond deep water wharf, works for storage of coals, works for bracing wharf, rebuilding two stone cribs the sum of \$9,681.'" Suppliant sued for extra work alleged not to be covered by this payment, and for damages caused by deficiency in and irregularity of payments.—*Held*, affirming judgment of the Exchequer Court (4 Can. S. C. R. 543) that all work performed by the suppliant for the Government was either contract work within the plans or specifications, or extra work within the meaning of the seventh clause of the contract; that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that the written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of the suppliant to recover payment for any other extra work. Henry, J., dissenting.—*Per* Ritchie, C.J., that neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada has any power or authority express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract. *O'Brien v. The Queen*, iv., 529.

90. *Intercolonial Railway — 31 Vict. c. 13, s. 18—Certificate of chief engineer—Condition precedent—Extras—Tort against the Crown—Misrepresentation—Fraudulent misconduct of Crown servants—Forfeiture — Liquidated damages — Time limit.*—J. & S. contracted with the Intercolonial Railway Commissioners to construct and complete section No. 7

of the Intercolonial Railway for a bulk sum of \$557,750. During the progress of the work changes were made. The works were sufficiently completed to allow of rails being laid, and the line opened for traffic on the 11th November, 1870. The total amount paid on the 10th February, 1873, was \$557,750, the amount of the contract. The contractors claimed \$116,463.83 for extra work, etc., beyond what was included in their contract. The commissioners, on a report from the chief engineer, recommended that \$31,091.85 (less items of \$8,300 and \$10,354.24) be paid upon full discharge of all claims of every kind or description under the contract. This balance was tendered to suppliants and refused. The petition of right claimed \$124,663.33 from the Crown for extras outside of and beyond the written contract, alleging that by orders of the chief engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and further, that they were put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in plans and bills of works exhibited at the time of letting.—On the profile plan it was stated that best information in possession of chief engineer as to probable quantities of the several kinds of work would be found in schedules, "but contractors must understand that these quantities are not guaranteed;" and in the bill of works an abstract of all information in possession of the commissioners and chief engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate."—The contract provided that the price of \$557,750 should be held to be full compensation for all works embraced in, or contemplated by the contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or plans and specification or by reason of the exercise of any of the powers vested in the Governor-in-Council by the "Act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer, by the contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning any such claim or pretension except as provided in the 4th section of the contract, relating to alterations in the grade or line of location: and that the contract and specification should be in all respects subject to the provisions of the said Act (31 Vict. c. 13), and also, in so far as they might be applicable, to the provisions of "The Railway Act of 1868."—The Act, 31 Vict. c. 13, s. 91 enacts that no money shall be paid to any contractor until the chief engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the commissioners. No certificate was given by the chief engineer of the execution of the work.—*Held*, by the Exchequer Court of Canada, Ritchie, J., that as the contract required that any work done on the road must be certified to by the chief engineer, until he

so certified and such certificate was approved of by the commissioners, the contractors were not entitled to be paid anything; that if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work; that if such extra work was of a character so peculiar and unexpected as to be considered *dehors* the contract, then there was no such contract with the commissioners as would give the contractors any legal claim against the Crown; the commissioners alone being able to bind the Crown, and they only as authorized by statute; that there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them; but, even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown fraudulent misconduct of its servants.—In the contract it was also provided that if the contractors failed to perform the works within the time agreed upon (1st July, 1871), the contractors would forfeit all money then due and owing to them under the terms of the contract and also the further sum of \$2,000 per week for all the time during which said works remained incomplete after that date, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872. *Held*, that if the Crown insisted on a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to \$2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages. *Jones v. The Queen*, vii., 570.

91. *Liability of the Crown — Quantum meruit — Petition of right — Public work — Executory contract*—31 Vict. c. 12, ss. 7, 15, 20 — *Unauthorized expenditure — Appropriations*.]—W., a sculptor, was employed by the Dominion Government to prepare plans, models, specifications and designs, for the laying out, improvement and establishment of the Parliament Square at Ottawa; he did so, and superintended the work and construction of improvements for six months. He claimed \$50,000 for the value of his work.—31 Vict. c. 12, ss. 7 and 15 provide certain requisites for executory contracts in writing as to signing, etc., to be binding; and before any expenditure is incurred for previous sanction of Parliament, except for such repairs and alterations. Section 20 requires tenders for all works except in emergency, or where the work could be more expeditiously and economically executed by the officers and servants of the department.—*Held*, by the Exchequer Court of Canada, Richards, C.J.: That the Crown in this Dominion cannot be held responsible under a petition of right on an executory contract entered into by the Department of Public Works for the performance of certain works placed by law under the control of the department, when the agreement therefor was not made in conformity with 31 Vict. c. 12, s. 7; that under s. 15 of said Act, if Parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the Department of Public Works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded; and in this case, if Parliament has made appropriations for the works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department

under s. 20, then no written contract would be necessary to bind the Crown, and suppliant should recover for work so done. *Wood v. The Queen*, vii., 634.

92. *Tender — Acceptance — Breach — Liability of Crown — Parliamentary or departmental printing — Form of contract*.]—The clerk of the joint committee on printing, advertised for tenders for the printing, furnishing the printing papers and the binding required for the Parliament of the Dominion of Canada, and suppliants' tender was accepted by adoption of the committee's report, and a contract was executed between the suppliants and the clerk, which was contended to be acceptance, constituting a contract between suppliants and Her Majesty, entitling them to do the whole of the printing required for the Parliament of Canada, and, not having been given the same, and they claimed compensation.—*Held*, reversing the Exchequer Court, that the Parliamentary printing was a matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it.—32 & 33 Vict. c. 7, provides that printing, binding and other like work for the departments of the Government shall be done under contracts to be entered into under authority of the Governor-in-Council after advertisement for tenders. The Under Secretary of State advertised for tenders for the printing "required by the several departments of the Government." The suppliants tendered with specifications annexed, supplied by the Government, containing provisions as to performing the work and giving security. The tenders were accepted by the Governor-in-Council, and an indenture executed between the suppliants and Her Majesty, by which they agreed to perform "all jobs or lots of printing for the several departments of the Government of Canada, of every description coming within the denomination of departmental printing, and all the work and services connected therewith and appertaining thereto, as set forth in the specification annexed, in such numbers and quantities as may be specified in requisitions made from time to time by said departments." Part of the departmental printing having been given to others, the suppliants claimed compensation, contending that they were entitled to the whole of said printing.—*Held*, affirming the Exchequer Court (1 Ex. C. R. 363). Taschereau and Gwynne, J.J., dissenting, that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance, and the contract, there was a clear intention shewn that the contractors should have all the printing that should be required by the several departments of the Government, and that the contract was not a unilateral contract but a binding mutual agreement. *The Queen v. MacLean*, viii., 210.

93. *Breach — Public work — Transfer — Assent by Crown — Evidence — Cancellation — Right to recover*.]—H. C. & F. contracted with Her Majesty for a public work, and after commencement of the work, associated partners with them in the work, amongst others S. & R. (respondents), and on 30th June, 1879, the whole contract was assigned to S. & R. On 25th July, 1879, the contract was cancelled by order-in-council, on the

ground that satisfactory progress had not been made. On 5th August, 1879, S. & R. notified the minister of the transfer made to them. On 9th August, the order-in-council was sent to H. C. & F. On 14th August an order-in-council was passed stating that as the Government had never assented to the transfer and assignment of the contract to S. & R., the contractors should be notified that the contract was taken out of their hands and annulled. In consequence S. & R. ceased work, and with the consent of the minister realized their plant and presented a claim for damages, and finally H. C. & F. and S. & R. filed a petition of right claiming damages for breach of contract.—The defence set up the 17th clause of the contract which provided against assignment of the contract and, in case of assignment without consent, enabled the works to be taken out of the contractor's hands and means employed to complete them; and that in such case the contractor should have no claim for any further payment in respect of the works performed, but remained liable for loss by reason of non-completion. In the Exchequer Court, Henry, J., found that the minister knew that S. & R. were partners; that he was satisfied to have them connected with the works; that the department knew S. & R. were carrying on the works, and that S. & R. had been informed by the deputy minister that all that was necessary to be officially recognized as contractors was to send a letter to the Government from H. C. & F.—The suppliants were awarded damages.—*Held*, reversing the judgment appealed from (1 Ex. C. R. 376). Fournier and Henry, JJ., dissenting that there was no evidence of a binding assent on the part of the Crown to an assignment of the contract to S. & R., who, therefore, were not entitled to recover. 2. That H. C. & F., the original contractors, by assigning their contract put it in the power of the Government to rescind the contract absolutely, which was done by the order-in-council of the 14th August, and the contractors under the 17th clause could not recover either for the value of work actually done, the loss of prospective profits, or the reduced value of the plant. *Queen v. Smith*, x., 1.

94. *Intercolonial Railway*—31 Vict. c. 13, s. 18 (D.)—*Certificate of engineer—Condition precedent — Extra work — Forfeiture — Penalty.*—Suppliants agreed, by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 Vict. c. 13) to build, construct and complete sections three and six of the railway for a lump sum for section 3 of \$462,444, and for section 6 of \$456,946.43. In the contract it was distinctly understood, intended, and agreed that the lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the contract, or which might be required in virtue of any of its provisions or by-laws, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration, or addition made in or to such works, or in said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor-in-Council by the said Act, or in the commissioners or engineers by the said contract or by-law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension,

to all intents and purposes whatsoever, except as provided in the 4th section of the contract relating to alteration in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vict. c. 13, that the works embraced in the contracts should be fully and entirely complete in every particular and given up under final certificates and to the satisfaction of the engineers, on 1st July, 1871 (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, etc., to money due or percentage agreed to be retained, and to pay as liquidated damages \$2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving 7 clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case the contractors were to forfeit all right to money due on the works and to the percentage retained. The work was taken out of the hands of the contractors for not having been satisfactorily proceeded with.—*Held*, affirming the judgment of the Exchequer Court (1 Ex. C. R. 346). Fournier and Henry, JJ., dissenting, 1st. That by their contracts the suppliants had waived all claim for payment of extra work. 2nd. That the contractors not having previously obtained, or been entitled to, a certificate from the chief engineer, as provided by 31 Vict. c. 13, s. 18, for or on account of the money which they claimed, the petition of the suppliants was properly dismissed. 3rd. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors and charge them with the extra cost of completing the same, but that in making up that amount the court below should have deducted the amount awarded for the value of the plant and materials taken over from the contractors by the commissioners. *Berlinguet v. The Queen*, xiii., 26.

95. *Public work—Extras—Certificate of engineer—Condition precedent—Arbitration*—31 Vict. c. 12—*Costs.*—S. made a contract with the Minister of Public Works, for the construction of a bridge for a lump sum. After the completion of the bridge a final estimate was given by the chief engineer, and payment thereof made, but S. preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, and caused by changes and alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of the claimants, a new contract between the parties. *Held*, reversing the judgment appealed from (1 Ex. C. R. 301). Fournier, J., dissenting, that the engineer could not make a new contract binding on the Crown; that the claim came within the original contract and the provisions thereof which made the certificate of the engineer a condition precedent to recovery, and such certificate not having been obtained, the claim must be dismissed.—The Crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed. *The Queen v. Starrs*, xvii., 118.

96. *Public work — Extras — Intercolonial Railway*—31 Vict. c. 13, ss. 16, 17, 18 and 37 Vict. c. 15—*Change of chief engineer—Final closing certificate—Reference of claim—Report by chief engineer—Approval by commissioner or minister—Condition precedent.*—In 1879 M. filed a petition of right for \$608,000 for extra work and damages arising out of his contract for the construction of section 18 of the Intercolonial Railway without having obtained a final certificate from F., at the time chief engineer. In 1880, F. having resigned, S. was appointed chief engineer, investigated respondent's claim, and reported a balance in his favour of \$120,371. Thereupon respondent amended his petition and made a special claim for the \$120,371, alleging that S.'s report was a final certificate within the meaning of the contract, which question was submitted for the opinion of the court by special case. This report was never approved of by the commissioners nor by the Minister of Railways and Canals under 31 Vict. c. 13, s. 18. The Exchequer Court (Fournier, J.) held that suppliant was entitled to recover on the certificate of S. *Held*, reversing the judgment appealed from (1 Ex. C. R. 321), 1. *per* Ritchie, C.J., and Gwynne, J., that the report of S., assuming him to have been the chief engineer to give the final certificate under the contract, cannot be construed to be a certificate of the chief engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon. 2. *Per* Ritchie, C.J., that the contractor was not entitled to be paid anything until the final certificate of the chief engineer was approved of by the commissioners or Minister of Railways and Canals, *Jones v. The Queen* (7 Can. S. C. R. 570) followed. 3. *Per* Patterson, J., that although S. was duly appointed chief engineer, and his report may be held to be the final and closing certificate to which suppliant was entitled under clause 11 of the contract, yet as it is provided by clause 4 that any allowance for increased work is to be decided by the commissioners and not by the engineer, suppliant is not entitled to recover on S.'s certificate.—*Per* Strong and Taschereau, JJ., (dissenting), that S. was chief engineer and as such had power under clause 11 to deal with the suppliant's claim and his report was "a final closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted.—*Per* Strong, Taschereau and Patterson, JJ., that the office of commissioners having been abolished by 37 Vict. c. 15, and their duties and powers transferred generally to the Minister of Railways and Canals, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded to him by the final certificate of the chief engineer. *The Queen v. McGreevy*, xviii., 371.

97. *Contract—Public work—Authority of Government engineer to vary terms—Delay.*—Under a contract with the Dominion Government for building a bridge, the specification of which called for timber of a special kind, which the contractor could only procure in North Carolina, the Government was not obliged, in the absence of a special provision therefor, to have such timber inspected at that place, and was not bound by the act of the Government engineer in agreeing to such inspection, the contract containing a clause that

no change in its terms would be binding the Crown, unless sanctioned by order of council.—A provision that the contractor should have no claim against the Crown in reason of delay in the progress of the work arising from the acts of any of Her Majesty's servants, was also an answer to a suit by contractor for damages caused by delay in having the timber inspected. *Mayer v. The Queen*, xxiii., 454.

98. *Crown domain—Disputed territory—License to cut timber—Implied warranty of title—Breach of contract—Damages.*—The claimant applied to the Government of Canada for licenses to cut timber on ten timber belts situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant should pay certain ground-rents and bonuses, make surveys and build a mill. The claimant knew of the dispute which was at the time of and public. He paid the rents and bonuses made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, at the time six leases or licenses were current, and consequently the Government could not renew them. The leases were granted under ss. 49 and 50 of 46 Vict. c. 1 and the regulations made under the Act of 1879, provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor-in-Council."—In a claim for damages by the licensee: *Held*, 1. orders-in-council issued pursuant to 46 Vict. c. 17, ss. 49 and 50 authorizing the Minister of the Interior to grant licenses to cut timber did not constitute contracts between the Crown and proposed licensees, such orders-in-council being revocable by the Crown until acted upon by the grant of licenses under them. 2. The right of renewal of the licenses was optional with the Crown, and the claimant was entitled to recover from the Government only the money paid to them for ground-rents and bonuses. *Bulmer v. The Queen*, xxiii., 488.

99. *Constitutional law—Powers of executive councillors—"Letter of credit"—Ratification by Legislature—Obligations binding on the province—Discretion of the Government as to expenditure—Petition of right—Negotial instrument—"Bills of Exchange Act, 1891"—"The Bank Act." R. S. C. c. 120.*—The Provincial Secretary of Quebec wrote the following letter to D., with the assent of his colleagues, but not being authorized by order-in-council: "J'ai l'honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un item de 5 mille piastres qui vous seront payées immédiatement après la session, et cela à titre d'acompte sur l'impression de la 'Liste des terres de la Couronne concédées depuis 1713 jusqu'au 31 décembre 1890,' dont je vous confie l'impression dans une lettre en date du 14 janvier, 1891." "Cette somme de 5 mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement D. indorsed the letter to a bank as security for advances to enable him to do the work *Held*, affirming the judgment of the Court in *Queen's Bench*, that the letter constituted a contract between D. and the Government; that the Provincial Secretary had no power to bind

the Crown by his signature to such a document; and that a subsequent vote of the Legislature of a sum of money for printing "liste des terres de la Couronne," etc., was not a ratification of the agreement with D., the Government not being obliged to expend the money, though authorized to do so, and the vote containing no reference to the contract with D., nor to the said letter of credit. *Jacques-Cartier Bank v. The Queen*, xxv., 84.

100. *Public work—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.*—[A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent. of the value of the work done, at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, that the work certified for had been executed to his satisfaction, the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent. of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient. *Held*, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be re-opened and revised by a succeeding engineer. *Held*, also, that the contractors could proceed by action if payment on a monthly certificate was withheld, and were not obliged to wait the final completion of the work before suing. Judgment appealed from (5 Ex. C. R. 19) reversed. *Murray v. The Queen*, xxvi., 203.

101. *Contract, construction of — Public works—Arbitration—Progress estimates—Engineer's certificate—Approval by head of department—Condition precedent.*—[The eighth and twenty-fifth clauses of the appellant's contract for the construction of certain public works were as follows:—"8. That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute, with regard to work or material, or as to the meaning or intention of this contract, and the plans, specifications, and drawings shall be final, and no works or extra or additional work or charges shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor;" but before the contract was signed by the parties the words "as to the meaning or intention of this contract, and the plans, specifications and drawings" were struck out. "25. Cash payments to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the

prices agreed upon or determined under the provisions of the contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above mentioned, and upon approval of such certificate by the minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent., or any part thereof."

A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as "water-tight" embankment under the provisions of the contract and specifications relating to the works, and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contention of the contractor given by the Minister of Justice, made a certificate upon a progressive estimate for the amount thus in dispute in the usual form, but added after his signature the following words:—"Certified as regards item 5 (the item in dispute), in accordance with the letter of Deputy Minister of Justice, dated 15th January, 1896." The estimate thus certified was forwarded for payment, but the Auditor-General refused to issue a cheque therefor. *Held*, reversing the judgment appealed from (5 Ex. C. R. 293), that under the circumstances of the case the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section, and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract. *Murray v. The Queen* (26 Can. S. C. R. 203) discussed and distinguished. *Goodwin v. The Queen*, xxviii., 273.

102. *Construction of statute—Public works—Railways and canals—R. S. C. c. 37, s. 23—Contracts binding on the Crown—Goods sold and delivered on verbal order of Crown officials—Supplies in excess of tender—Errors and omissions in accounts rendered—Findings of fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 Vict. c. 16, s. 33.*—[The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" (R. S. C. c. 37), which require all contracts affecting that department to be signed by the minister, the deputy minister or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that department (Gwynne, J., *contra*).—Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra*).

Judgment appealed from (6 Ex. C. R. 39) affirmed. *The Queen v. Henderson*, xxviii., 425.

103. *Contract binding on the Crown—Public work—Formation of contract—Ratification—Breach.*—On Nov. 22nd, 1879, the Government of Canada entered into a contract with C., by which the latter undertook to do all the Government binding for five years from said date. The contract was executed under the authority of 32 & 33 Vict. c. 7, s. 6, and on Nov. 25th, 1879, was assigned to W., who performed all the work sent to him up to Dec. 5th, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's Printer, as follows: "I am directed by the Honourable, the Secretary of State, to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution, under the same rates and conditions as under the contract which has just expired." W. performed the work for two years under authority of this letter, and then brought an action for the profits he would have had on work given to other parties during the seven years.—*Held*, that the letter of the Queen's Printer did not constitute a contract binding on the Crown; that the statute authorizing such contract was not directory, but limited the power of the Queen's Printer to make a contract, except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer; and that he could not recover in respect of the work done after the original contract had expired.—On Oct. 30th, 1886, an order-in-council was passed which recited the execution and assignment of the original contract, the execution of the work by W. after it expired, and the recommendation of the Secretary of State that a formal contract should be entered into extending the original contract to Dec. 1st, 1887, and then authorized the Secretary of State to enter into such formal contract with W., but subject to the condition that the Government should waive all claims for damages by reason of non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other parties, up to the date of said extension. W. refused to accept the extension on such terms.—*Held*, that W. could not rely on the order-in-council as a ratification of the contract formed by the letter of the Queen's Printer; that the element of *consensus* enters as much into a ratification of a contract as into the contract itself; and W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.—After an appeal from the final judgment of the Exchequer Court was lodged in the Supreme Court, the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages.—*Held*, that the judge of the Exchequer Court had authority to allow the appeal, and it was properly before the Supreme Court. Judgment appealed from (6 Ex. C. R. 12) reversed. *The Queen v. Woodburn*, xxix., 112.

104. *Inquiry as to public matters—Contract binding on the Crown—Right of action—Quantum meruit—Public officer—Solicitor and client—R. S. C. c. 114, 115.*—The judgment appealed from (7 Ex. C. R. 351) held that a person appointed under R. S. C. c. 115, as commissioner to make inquiry and report

on conduct in office of an officer or servant of the Crown, could not recover for his services as such commissioner, there being no provision for such payment; that such service was not rendered in virtue of any contract but merely by virtue of appointment under the statute and that such appointment partakes more of the character of a public office than of a mere employment under a contract express or implied. The Supreme Court affirmed the judgment appealed from, Strong, C.J., and Girouard, J., dissenting. *Tucker v. The King*, xxxii., 722.

105. *Public work—Abandonment and substitution of work—Implied contract.*—The supplants contracted with the Crown to do certain work on the Cornwall canal, the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to in the specifications, namely, "all the dredging and other works connected with the deepening and widening of the Cornwall canal on section No. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By s. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done the Crown abandoned the scheme of constructing dams contemplated by the contract and adopted another plan the work on which was given to other contractors. After it was completed the supplants filed a petition of right for the profits they would have made had it been given to them.—*Held*, affirming the judgment of the Exchequer Court (7 Ex. C. R. 221), that the contract contained no express covenant by the Crown to give all the work done to the suppliant and s. 34 prohibited any implied covenant therefor. Therefore the petition of right was properly dismissed. *Gilbert Blasting & Dredging Co. v. The King*, xxxiii., 21.

106. *Public work—Payment of tolls—Obligation binding on the Crown—Negligence of public employees.*

See ACTION, 109.

107. *International railway commissioners—Tender for works—Acceptance binding on the Crown—Condition precedent—Waiver by effect of statute.*

See PUBLIC WORK, 1.

108. *Contract—Public work—Final certificate of engineer—Previous decision—Necessity to follow.*

See RES JUDICATA, 9.

109. *Contract—Binding on Crown—Verbal orders—Officials of the Crown—Goods sold and delivered.*

See PUBLIC WORKS, 5.

110. *Public work — Breach of contract — Part performance — Appropriation of plant — Damages — Interest.*

See No. 21, ante.

7. DEMISE CLAUSE.

111. *Security for debt — Demise to mortgagor — Colourable lease — Distress.*

See LANDLORD AND TENANT, 1.

8. DETERMINATION.

112. *Construction of agreement to discontinue business — Determination of agreement.* — B., a manufacturer of glassware, entered into a contract with two companies in the same trade, by which in consideration of certain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace," and the payments to B. should then cease, unless he could shew "that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day." — *Held*, affirming the decision of the Court of Review, that under this agreement B. was only required to shew that any furnace so started did not have an actual output worth more than \$100 per day on an average for a reasonable period, and that the words "could not have a production of more than one hundred dollars per day" did not mean mere capacity to produce that quantity whether it was actually produced or not. *North American Glass Co. v. Barsalou*, xxiv., 490.

113. *Contract of hiring — Duration of service — Dismissal — Notice.* — Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be determined according to the circumstances of the case (24 Ont. App. R. 296, affirmed). *Bain v. Anderson*, xxviii., 481.

114. *Agreement in lease — Payments out of rental — Determination of contract — Destruction of leased premises — Force majeure.*

See LANDLORD AND TENANT, 5.

115. *Public work — Breach of contract — Part performance — Appropriation of plant — Claim for extras — Damages — Interest.*

See No. 21, ante.

9. EMPLOYERS' LIABILITY.

116. *Injury to employee — Art. 1056 C. C. — Exoneraton from liability — R. S. C. c. 38, s. 50.*

See NEGLIGENCE, 219.

10. EXECUTED CONTRACTS.

117. *Executed contract — Agreement by agent — Authority to bind company — Sub-con-*

tractor — Adoption of agreement — Payments on account — Evidence — Question for the jury — Corporate seal — Ratification. — An agreement for fencing of a railway was as follows: — "Memo. of fencing between Muskrat river, east, to Renfrew. T. & W. M. to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for \$1.25 per rod, company to furnish cars for lumber," and signed by plaintiffs and F., who controlled nine-tenths of the stock, and publicly appeared and acted as manager of the company, although he was at one time contractor for the building of the whole railway. T. & W. M. built the fence, and the C. C. R. Co. supplied cars as agreed and had the benefit of the work. The case was tried with a jury and on the evidence, in answer to questions submitted the jury found that T. & W. M., when they contracted, considered they were contracting with the company through F., that there was no evidence that the company repudiated the contract till the action was brought, that the payments made were as of money which the company owed, which they were not paying to be charged to F., and a general verdict was found for T. & W. M. for \$12,218.51. — On appeal, *Held*, affirming the judgment appealed from (7 Ont. App. R. 646), that it was properly left to the jury to decide whether the work performed, of which the company received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence; (Ritchie, C.J., and Taschereau, J., dissenting, on the ground that there was no evidence that F. had any authority to bind the company; that T. & W. M. were only sub-contractors, and that there was no evidence of ratification.) *Held*, also, that although the contract entered into by F. for the company was not under seal, the action was maintainable. *Canada Central Ry. Co. v. Murray*, viii., 313.

(Leave to appeal refused by Privy Council, 30th June, 1883; 8 App. Cas. 574.)

118. *Corporate seal — By-law — Executed works — Manitoba Municipal Act, 1884.* — A corporation is liable on an executed contract for the performance of work, within the purposes for which it was created, which it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. Judgment appealed from (6 Man. L. R. 88) reversed. Ritchie, C.J., and Strong, J., dissenting. *Bernardin v. North Dufferin*, xix., 581.

119. *Executed contract — Sale of land — Rescission — Fraudulent misrepresentation — Evidence.* — Where the court appealed from dismissed the plaintiff's bill praying for the rescission of an executed contract, *Held*, affirming the judgment appealed from (1 Man. L. R. 46), that a clear case of fraud must be established to obtain the rescission of an executed contract, and the allegations of fraud made by the plaintiff being uncorroborated and contradicted in every particular by the defendant, neither the court below nor the court in appeal would be justified in rescinding the contract in question. Henry, J., dissenting, on the ground that the evidence bore out the allegations of fraud. *Hutchinson v. Calder*, Cass. Dig. (2 ed.) 785.

120. *Rescission—Innocent misrepresentation—Common error—Sale of land—Failure of consideration.*—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud. Judgment appealed from (6 B. C. Rep. 205) affirmed. *Cole v. Pope*, xxix., 291.

121. *Sale of patent rights—Executed and executed agreements—Specific performance.*

See PATENT OF INVENTION, 4.

122. *Municipal by-law—Special assessments—Drainage—Powers of councils as to debtor's incapacity—Replevin—Ultra vires resolutions—Executed contract.*

See MUNICIPAL CORPORATION, 90.

11. EXTRAS.

123. *Extra work—Decision of engineer—Interrogatories—Faits et articles—Taking pro confesso—Art. 229 C. C. P.*

See EVIDENCE, 160.

124. *Sale of land—Representation as to boundaries—Description—Executed contract—Rescission—Deficiency—Fraud—Compensation.*

See VENDOR AND PURCHASER, 21.

125. *Public work—Breach of contract—Part performance—Appropriation of plant—Claim for extras—Damages—Interest.*

See No. 21, ante.

12. FORMATION OF CONTRACT.

126. *Sale of land—Offer to sell—Acceptance—Condition—Completion of title—Specific performance.*—M. wrote to H. as follows:—"A. McI. agrees to take \$35,000 for property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum." H. accepted in the following terms:—"I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor N. F. H., 22 D. block, as soon as possible, so that I may get conveyance and give mortgage." *Held*, reversing the Court of Queen's Bench for Manitoba, Ritchie, C.J., and Fournier, J., dissenting, that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties, and that specific performance should not be decreed. *McIntyre v. Hood*, ix., 556.

127. *Manufacture of patented articles—Substitution of new agreement—Evidence.*—B.

was patentee of a machine called the Windsor loom, for making skirtings, etc., and in 1884, she agreed to supply the company with the looms, on which they were to manufacture goods and pay a royalty of one cent a square yard thereon, the minimum royalty to be \$50 a month. The patent was to expire in 1891. Prior to this agreement, in 1882, B. had granted to P., the head of the company, a license to manufacture blankets under another patent for a like royalty. These agreements were carried out until 1887. In the meantime B. had patented another device for making blankets, and after some correspondence, the company, agreed to take both patents for a year, paying therefor a specified royalty, which B. accepted. At the end of the year B. claimed that the original agreement was still in force and brought action for the royalties. *Held*, reversing the Court of Appeal for Ontario, Taschereau, J., dissenting, that the correspondence and other evidence showed that the agreement made in 1887 was in substitution for and superseded the original agreement, and B. had no right to claim any royalty under the latter. *Penman Manufacturing Co. v. Broadhead*, xxi., 713.

128. *Principal and agent—Sale of lands—Authority to deliver deed and receive purchase money—Memo. to agent—New agreement—Right of action.*—W. sold land under power of sale, and F. became purchaser, and paid 10% of the price, the balance to be paid in notes. Shortly after A. brought a deed to F. and demanded the notes. The deed was left with F. on his delivering to A. a writing as follows:—"Received from E. A. a deed given by W. for land bought at auction . . . The above mentioned deed I receive only to be examined, and if lawfully and properly executed to be kept, if not lawfully and properly executed to be returned to E. A. When the said deed is lawfully and properly executed to the satisfaction of my attorney, I will pay the amount of balance due on said deed, \$572, provided I am given a good warrantee deed, and the mortgage, which is on record, is properly cancelled if required." The deed was not returned to A. and he brought action for the \$572.—The verdict was for defendant, under direction of the judge, and leave reserved to plaintiff to move for a verdict in his favour for nominal damages, the purchase money having in the meantime been paid to W. On plaintiff moving for such leave the court set aside the verdict and entered verdict for plaintiff. *Held*, reversing the judgment appealed from. (19 N. B. Rep. 22), Strong, J., dissenting, that the memorandum did not constitute a new contract between plaintiff and defendant to pay the purchase money to plaintiff, who was merely the agent of W., and therefore the verdict for defendant should stand.—*Per Strong, J.* That the said writing did constitute a new agreement between the parties, but that if A. was merely an agent of W. in the transaction, he could still sue, as his principal had not interfered.—Appeal allowed with costs. *Fawcett v. Anderson*, Cass. Dig. (2 ed.) 8.

129. *Contract by correspondence—Letters after closing—Completion of contract.*—Where it is sought to establish a contract by correspondence, the whole of the correspondence relating to the matter in question which has passed between the parties must be taken into consideration; accordingly, where a letter written by plaintiff to defendant and re-

plied to by the latter made a complete contract, but, before there was any performance or breach, other letters passed from which it appeared that both parties still treated the matter as being in negotiation, it was *Held*, affirming the judgment appealed from (23 N. B. Rep. 356), that no binding contract had been concluded, between the parties.—As the rule *en banc* had been taken for a new trial only, the court refused to direct a nonsuit or verdict for the defendant, but affirmed the rule for new trial made in the court below. *Jones v. DeWolf*, Cass. Dig. (2 ed.) 767.

130. *Correspondence—Carriage of goods—Transportation Co.—Carriage over connecting lines—Bill of lading.*—Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration. *Hussey v. Horne-Payne* (4 App. Cas. 311) followed.—A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped.—Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary terms of a prior mutual assent.—*Taschereau, J.*, dissented on the ground that the correspondence in the case did not contain the contract relied on, and that the injury to the goods for which the action was brought took place while they were not under the control of the company. *North-west Transportation Co. v. McKenzie*, xxv., 38.

131. *Insurance against fire—Mutual insurance company—Notice rejecting application—Statutory conditions—R. S. O. (1887) c. 167—Waiver—Estoppel—Evidence.*—B. applied to a mutual company for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of \$46.50, being the premium for an insurance to the extent of \$1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant, and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B., and no policy was issued within the said time, which expired on March 4th, 1891. On April 17th, B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire, B. notified the manager by telegraph, and on April 29th the latter wrote returning the money remitted by B., who afterwards sent it again to the manager, and it was again

returned. B. then brought an action, which was dismissed at the hearing, and a new trial ordered by the Divisional Court and affirmed by the Court of Appeal. *Held*, affirming the judgment appealed from (22 Ont. App. R. 68), Gwynne, J., dissenting, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R. S. O. [1887] c. 167), governed such contract though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a variation of the statutory conditions, it was ineffectual for non-compliance with condition 115, requiring variations to be written in a different coloured ink from the rest of the document, and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt. *Held*, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract, and were estopped from denying that B. was insured. *Dominion Grange Mutual Fire Assur. Assn. v. Bradt*, xxv., 154.

132. *Fire insurance—Application—Owner-ship of property insured—Misrepresentation.*—A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation and occupancy of the property, or any omission to make known a fact material to the risk would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured, and of the land on which it stood, whereas it was, to his knowledge and that of the sub-agent who secured the application, situated upon the public highway. *Held*, reversing the judgment appealed from (34 N. B. Rep. 515), that as the application was more than once referred to in the policy it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition. *Norwich Union Fire Ins. Co. v. LeBell*, xxix., 470.

133. *Offer and acceptance—Telegrams—Completion—Mutuality.*—S. a grain merchant in Truro, N. S., telegraphed to C., a grain merchant in Toronto, "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each." C. replied next day, "White oats 32 half, Truro, bags two cents bushel extra." S. wired same day, "How much less can you do mixed oats for? Might work white at thirty-two, but not any more. Answer." C. answered, "Mixed oats scarce but odd cars obtainable half cent less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34 half in four bushel bags, Truro." Next day S. wired, "I confirm purchase 20,000 bushels oats, white at thirty-two; mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk," and he confirmed it also by letter. C. answered telegram at once, "Cannot confirm bagged. Am asked

half a cent for bagging. Bags extra." S. replied, "All right: Book order. Will have to pay for bagging." C. wired same day, "Too late to-day. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired, "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day, "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged parties demanded half cent for bagging. They sold before your second wire yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered and S. brought an action for damages. *Held*, reversing the judgment appealed from (33 N. S. Rep. 179), that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover. *Cole v. Sumner*, xxx., 379.

134. *Contract by correspondence—Acceptance—Mailing—Indication of place of payment—Delivery of goods sold—Arts. 85, 86 C. C.—Post Office Act.*—An offer was made by letter dated and mailed at Quebec, defendant's acceptance being by letter dated and mailed at Toronto. In a suit upon the contract in the Superior Court at Quebec, defendant (served substitutionally), opposed a judgment against him by default by petition in revocation of judgment, first by preliminary exception to the jurisdiction of the court over the cause of action and then, as incidental plaintiff, making a cross-demand for damages to be set off against plaintiffs' claim. *Held*, reversing the judgment appealed from (which affirmed Q. R. 16 S. C. 22), that in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but it is complete on the mailing of such letter in the general post-office. *Underwood v. Maguire* (Q. R. 6 Q. B. 237) overruled.—Article 85 of the Civil Code, as amended by 52 Vict. c. 48 (Que.), providing that the indication of a place of payment in any note or writing should be equivalent to election of domicile at the place so indicated, requires that such place should be actually designated in the contract. *Magann v. Auger*, xxxi., 186.

135. *Contract by agent—Sale of goods—Evidence to vary written instrument—Admission of evidence.*—Plaintiffs carried on business at Montreal under the style of "A. R. Williams & Co." and sued respondent for the price of an engine, ordered in writing, and other machinery supplied in connection with repairs to the foundry, amounting to \$495.91. The order was given through the plaintiff's agent W. The principal defence was that the company supposed it was dealing with a company carrying on business in Toronto as "The A. R. Williams Machinery Co." with which it had previous dealings, and which, at the time, had in its possession machinery belonging to defendant of the value of \$780 which it was agreed with W. should be accepted in payment for the machinery ordered. The Supreme Court, Gwynne, J., dissenting, affirmed the judgment appealed from (33 N. S. Rep. 21) which had affirmed the decision of the trial judge (33 N. S. Rep. 22) who

found that the business carried on in Montreal was distinct from that carried on in Toronto, but that at the time the order was given defendant believed it was contracting with the Toronto company, and that there were surrounding circumstances to lead to the belief that the business carried on in Montreal and Toronto were one and the same. He held that the plaintiffs were bound by the bargain made with W., and, on the ground that it was not inconsistent with the written agreement to prove that payment was to be made otherwise than in cash, he received evidence of the agreement relied on by the defendant. *Wilson v. Windsor Foundry Co.*, xxxi., 381.

136. *Interim receipt—Insurance against fire—Principal and agent—Lex loci—Lex fori—Acts of sub-agent.*—The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different. *Canadian Fire Insurance Co. v. Robinson*, xxxi., 488.

137. *Life insurance—Terms of contract—Delivery of policy—Payment of premiums.*—A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium.—Where the insured, being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms nor induced not to read it, has neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon. *Provident Savings Life Assur. Soc. v. Mowat*, xxxii., 147.

138. *Fire insurance—Void policy—Renewal—Mortgage clause.*—By s. 167 of The Ontario Insurance Act a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy. *Held*, reversing the judgment of the Court of Appeal (3 Ont. L. R. 127), and restoring that at the trial (32 O. R. 369), Girouard, J., contra, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance the renewal was likewise a nullity though the prior insurance had ceased to exist in the interval. *Held*, per Girouard, J., that the renewal was a new contract which was avoided by non-disclosure of the concealment in the application for the original policy. *London & Liverpool & Globe Ins. Co. v. Agricultural Savings & Loan Co.*, xxxiii., 94.

139. *Construction of—Contract—Policy of insurance against fire—Interim receipt—Description of premises varied by policy.*

See INSURANCE, FIRE, 75.

140. *Absence of corporate seal—Policy of insurance—Equitable relief—Estoppel.*

See COMPANY LAW, 28.

141. *Incomplete application—Cancelled policy—Negligence—Escrow—Conversion.*

See INSURANCE, MARINE, 21.

142. *Resolution of Municipal Council—By-law—Agreement under seal—Executory contract.*

See MUNICIPAL CORPORATION, 108.

143. *Time policy—Promissory representation.*

See INSURANCE, MARINE, 14.

144. *Contract binding on Crown—Breach—Ratification.*

See No. 103, *ante*.

145. *Municipal bond—Form of contract—Statute authority—Construction of statute.*

See MUNICIPAL CORPORATION, 84.

146. *Specifications for works—"From" and "to" streets—Reference to annexed plan—Construction of deed.*

See No. 179, *infra*.

13. GUARANTEE.

147. *Action en garantie—Contract—Sub-contract—Legal connexion (connexité).]*—The appellants, who had a contract with the City of Three Rivers, to supply and set up a complete electric plant, sub-let to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the City of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works, having sued the City of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents. *Held*, affirming the judgment of the courts below, that there was no legal connexion (*connexité*) existing between the contract of the defendant and that of the plaintiffs with the City of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple* was properly dismissed. *Royal Electric Co. v. Leonard*, xxiii., 298.

148. *Construction of agreement—Guarantee.*

See GUARANTEE, 1.

149. *Principal and surety—Guarantee bond—Default of principal—Non-disclosure by creditor.*

See GUARANTEE, 3.

150. *Drainage—Inter-municipal works—Guarantee—Continuing liability.*

See DRAINAGE, 8.

14. HIRING CONTRACTS.

151. *Agreement to purchase railway—Hire of rolling stock—Appeal—Arbitration and award—R. S. O. (1877) c. 50, s. 189—Consent reference.]*—B., contractor for building the E. & H. Ry., and, practically, owner thereof, negotiated with the solicitor of the C. S. Ry. for the sale to the latter of the E. & H. Ry. when built. While negotiations were pending B. went to California, and the agents who looked after the affairs of the E. & H. Ry. in his absence applied to the manager of the C. S. Ry. for some rolling stock to assist in construction. The manager of the C. S. Ry. was willing to supply the rolling stock on execution of the agreement for sale of the road which was communicated to B., who s. c. d.—12.

wrote a letter to the manager in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars and any other assistance or advantage you may have given Mr. Farquier (the agent)."—The negotiations for the purchase of B.'s railway by the C. S. Ry. having fallen through, an action was brought by the company against B. and the E. & H. Ry. Co., for the hire of the rolling stock which was resisted by B. on two grounds, one that the rolling stock was supplied in pursuance of the negotiations for sale, which had fallen through by no fault of B., and the other, that if plaintiffs had any right of action it was only against the E. & H. Ry. Co., and not against him.—By consent the matter was referred to arbitration of a County Court Judge, with provision in the submission that proceedings should be same as on reference by order of court, and that there should be a right of appeal from the award as under R. S. O. (1877) c. 50, s. 189.—The arbitrator gave an award in favour of plaintiff; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits but upheld the award. The Supreme Court of Canada held, affirming the Court of Appeal, that the arbitrator was justified in awarding the amount to the plaintiff, and that B. as well as the company was liable therefor. *Bickford v. Canada Southern Ry. Co.*, xiv., 743.

152. *Specific performance—Agreement to perform services—Relationship of parties.]*—M., on his father's death, at the age of three years, went to live with his grandfather W. who sent him to school until he was sixteen years old, and then took him into his store where he continued as the sole clerk for eight or nine years, when W. died and M. died a few days later. Both having died intestate, the administratrix of M.'s estate brought an action against the representatives of W., for the value of such services rendered by M., and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will M. would have good wages, and if he made a will he would leave the business and some other property to M. *Held*, reversing the decision appealed from (25 N. S. Rep. 172), Gwynne, J., dissenting, that there was sufficient evidence of an agreement between M. and W., that the services of the latter were not to be gratuitous, but were to be remunerated by payment of wages, or a gift by will to overcome the presumption to the contrary arising from the fact that W. stood *in loco parentis* towards M. There having been no gift by will the estate of W. was therefore liable for the value of the services as estimated by the jury. *McGugan v. Smith* (21 Can. S. C. R. 263) followed. *Murdoch v. West*, xxiv., 305.

153. *Insurance company—Appointment of medical examiner—Breach of contract—Authority of agent.]*—The medical staff of the Equitable Life Assurance Society at Montreal consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888 L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the

staff. By his commission L. was entitled to the privilege of such examinations as should be assigned to him by, or required during the absence, disability or unavailability of the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not acceptable to applicants, and he was requested to resign, which he refused to do, and another French Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against the company for damages by loss of the business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the general manager had promised him all the examinations of French Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for re-payment of amounts paid by him for such insurance. *Held*, affirming the judgment appealed from (Q. R. 3 Q. B. 513), that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure; that the manager had no authority to contract with L. for any employment other than that specified in his commission; and that he had no right of action for re-payment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment. *La-berge v. Equitable Life Assur. Soc.*, xxiv., 595.

154. *Master and servant—Contract of hiring—Duration of service—Evidence—Dismissal—Notice.*—Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case.—A business having been sold, the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms. *Held*, affirming the judgment appealed from (24 Ont. App. R. 296), which reversed Meredith, C.J., (27 O. R. 369), that as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reductions of expenses and salaries, as he had been informed that the contracts with the employees had not been assumed by the purchaser, and as upon his own evidence there was no hiring for any definite period, but merely a temporary arrangement, until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed. *Bain v. Anderson & Co.*, xxviii., 481.

155. *Breach—Measure of damages—Evidence—Notice—Wrongful dismissal.*

See NEW TRIAL, 17.

156. *Term of engagement—"For the season"—Dismissal—Remedy—Action—Mandamus.*

See MUNICIPAL CORPORATION, 158.

157. *Proprietor of newspaper—Engagement of editor—Dismissal—Breach of agreement.*

See MASTER AND SERVANT, 8.

158. *Lease for 999 years—Contrat innommé—Emphyteutis—Bail-à-rente.*

See RAILWAYS, 152.

15. ILLEGAL CONTRACTS.

159. *Impossibility of performance—Violation of building by-law passed after contract—Onus of proof.*—The contractors for the erection of a building for W. in St. John, N. B., claimed W. had prevented their carrying out the contract. The declaration contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of the city by-law, under 41 Vict. c. 7 (N.B.), passed two days after the contract was signed.—The plaintiffs were nonsuited, and the Supreme Court (N.B.) refused to set the nonsuit aside. *Held*, Henry, J., dissenting, that the by-law made the contract illegal, and, therefore, the plaintiffs could not recover. *Walker v. McMillan* (6 Can. S. C. R. 241), followed.—*Per* Henry, J., that the erection of the building would not, so far as the evidence shewed, be a violation of the by-law, and therefore the nonsuit should be set aside and a new trial ordered. *Spears v. Walker*, xi., 113.

160. *Bond—Illegal consideration—Stifling prosecution.*—In an action on a bond executed by J. to secure a debt of L. to the bank the evidence shewed that L., who had married an adopted daughter of J., was agent of the bank, and, having embezzled the bank funds, the bond was given in consideration of an agreement not to prosecute. *Held*, affirming the judgment appealed from (23 N. S. Rep. 302), that the consideration for the bond was illegal and J. was not liable thereon. *People's Bank of Halifax v. Johnson*, xx., 541.

161. *Conveyance—Illegal or immoral consideration—Intention of grantor—Character of grantee—Pleading.*—A contract for transfer of property with intent by the transferor, and for the purpose, that it will be applied by the transferee to the accomplishment of an illegal or immoral purpose is void and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it will not void the contract unless, from the particular nature of the property, and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended.—Judgment of the Court of Appeal (20 Ont. App. R. 198) affirmed, *Taschereau, J.*, dissenting. *Clark v. Hagar*, xxii., 510.

162. *Immoral consideration—Trust—Husband and wife—Evidence—Lien for costs.*—Action for money claimed as a proportion of sums received by a solicitor for stifling proceedings involving publicity in connection with a divorce suit by plaintiff's husband against her. The defendant held part of the money for his costs in the divorce suit and

divided the balance according to an agreement between him and the husband and wife. The Supreme Court (N.S.), decided that it could not lend assistance in the enforcement of the immoral agreement, vacated the judgment of the trial court, McDonald, C.J., holding that there was a cause of action but that the evidence was insufficient to justify a verdict for plaintiff, and dismissed the plaintiff's action with costs (31 N. S. Rep. 425). The Supreme Court of Canada agreed with the trial judge that the evidence was insufficient and dismissed an appeal with costs. *Byron v. Tremaine*, xxix., 445.

163. *Constitutional law—Legislative powers—B. N. A. Act, 1867—Criminal Code, 1892—R. S. C. 159—R. S. Q. art. 2920—53 Vict. c. 36 (Que.)—Lottery—Indictable offences—Contract—Illegal consideration—Co-relative agreement—Nullity—Invalidity judicially noticed—Arts. 13, 14, 989, 990 C. C.]—The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.—A contract in connection with a scheme for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful and cannot be enforced in a court of justice.—The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted, and it is the duty of the courts, *ex mero motu*, to notice the nullity of such contracts at any stage of the case and without pleading.—*Per* Girouard, J. (dissenting). In Canada, before the Criminal Code, 1892, lotteries were mere offences or contraventions and not crimes, and consequently the Act of the Quebec Legislature was constitutional. *L'Association St. Jean-Baptiste v. Brault*, xxx., 598.*

164. *Prohibited contract—Penal statute—Nullity—Railway director—Partnership with contractor—Action.]—On appeal the Supreme Court affirmed the judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 555), by which it was held that where a contract is prohibited by statute, such a contract is void, although the statute may not actually declare its nullity but merely imposes a penalty on the offender, and that where the president of a railway company secretly entered into a partnership with contractors for the construction of the road, he could not maintain an action against his partners to enforce his agreement with them. *Macdonald v. Riordon*, xxx., 619.*

165. *Unlawful consideration—Répétition de l'indu—Account—Public policy—Monopoly—Trade combination—Conspiracy—Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Arts. 989, 1000, 1067, 1077, 2188 C. C.—Matters judicially noticed.]—In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving plaintiffs interest according to the terms of the contract. *Held*, *per* Sedgewick, King and Girouard, J.J., that the evidence disclosed a conspiracy and that, although under the provisions of the Civil Code the moneys so advanced could be recovered back, yet no interest before action could be allowed thereon, as the law merely requires that the parties should be replaced in the position they respectively occupied be-*

fore the illegal transactions took place. *Roland v. Caisse d'Economie, de Québec* (24 S. C. R. 405) discussed, and *L'Association St. Jean-Baptiste de Montréal v. Brault* (30 S. C. R. 598) referred to. *Held*, also, that laws of public order must be judicially noticed by the court *ex proprio motu*, and that, in the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu*.—*Per* Taschereau, J. (dissenting.) 1. A new point should never be entertained on appeal, if evidence could have been brought to affect it, had objection been taken at the trial. 2. In the present case, the concurrent findings of both courts below, amply supported by evidence, ought not to be disturbed, and as the company itself prevented the performance of the condition of the agreement in question requiring the assent of the Government to the transfer of the binder twine manufacturing contract, its non-performance cannot be admitted as a defence to the action upon the executed contract.—Gwynne, J., also dissented on the ground that the judgment appealed from proceeded upon wholly inadmissible evidence and that, therefore, the action should have been dismissed and further, that the evidence which was received and acted on, though inadmissible for the purposes for which it was intended, shewed that the action was based upon a contract between the plaintiffs and defendant for the commission of an indictable offence; that neither party could recover either by action or by counterclaim upon such a contract and, therefore, that the incidental demand, as well as the action, should be dismissed. *Consumers Cordage Co. v. Connolly*, xxxi., 244.

[On appeal to Privy Council a new trial was granted on terms, otherwise judgment of Court of Review to stand, the order of the Supreme Court being set aside, 3rd August, 1903.]

166. *Statutory prohibition—Penal statute—Wholesale purchase—Guarantee—Validity of contract—Forfeiture—Nova Scotia Liquor License Act—Practice.]—An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect.—The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute. *Brown v. Moore*, xxxii., 93.*

167. *Bona fides—Wagering policy—Insurable interest—Payment of premiums by assignee.*

See INSURANCE, LIFE, 18.

168. *Illegal consideration—Co-relative agreements—Lottery.*

See CONSTITUTIONAL LAW, 31, 58.

16. INCAPACITY TO CONTRACT.

169. *Intention of parties—Agreement for transfer of vessel—Absolute or conditional sale—Findings of fact.]—In a suit for account of earnings of a steamer transferred to defendants by plaintiff the case had been heard and judgment given when defendants made application to put in newly discovered evidence, which was refused by the court below but allowed by the Supreme Court of Canada, which also gave leave to both parties to amend pleadings. The original answer of*

defendants alleged that the transfer of the steamer was made by plaintiff as security for all advances made or to be made, while plaintiff claimed that it was only as security for a fixed amount. After the order of the Supreme Court of Canada defendants set up a new case, namely, that the transfer was absolute in consideration of an annuity of \$1,000 to be paid to plaintiff during his life. This defence was raised in accordance with the newly discovered evidence which consisted of an agreement purporting to be executed by plaintiff to transfer to defendants said steamer and all power and control over the same in consideration of such annuity and to execute an absolute bill of sale thereof to defendant. Pursuant to the order of the Supreme Court evidence was taken of the execution of this agreement and resulted in a judgment by the judge in equity, declaring that it did not contain the true agreement between the parties, that it was executed by plaintiff while intoxicated and incapable of transacting business and that the only consideration for the transfer to defendant was the fixed sum stated by plaintiff, and he ordered an account to be taken as to the state of the general accounts between the parties. This judgment was affirmed by the Supreme Court (N. S.) *in banc*. *Held*, that upon the evidence and considering the nature of the transaction and all the circumstances attending it the courts below could not have found otherwise than they did and their decision should be affirmed. *See* *ton v. King*, xviii., 712.

17. INTEREST.

170. *Contract for construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts. 1065, 1691 C. C.—Appeal on special questions—Deferred payment—Computation of interest—Payments in advance—Rebates—Powers of appellate court.*—The municipality agreed to pay for works to be constructed by promissory notes payable in two years without interest, said notes to be delivered to the contractor on the completion of the works and to bear a date assumed to be the mean date of completion of the works as carried on in detail. The amount of the notes represented the price of the tender with average interest added, and the municipality reserved the privilege of making payments upon the acceptance of progressive estimates on the works as completed from time to time, without interest or previous notice "en déduisant les intérêts composés au taux de six pour cent par an à échoir après l'époque des paiements et lesquels étaient compris dans le prix de soumission pour la totalité des deux années." The mean date was settled as 15th December, 1899, and the notes for the balance due were delivered in 1900. The trial court allowed the municipality interest on advance payments from the dates on which they had been respectively made, both before and after 15th December, 1899, up to 15th December, 1901, but the judgment appealed from disallowed all interest prior to 15th December 1899, on the payments which were made before that date. *Held*, that upon the proper construction of the contract the method followed by the Court of Appeal as to the calculation of interest on the advance payments was correct. — The Court of Appeal, however, calculated this interest on the basis of the actual price of the works as tendered for. *Held*, reversing the

judgment appealed from on this point, that the interest should be calculated on the basis of the price actually mentioned in the contract, and upon the actual amount of the advance payments made.—Certain of the works were not executed, by orders from the municipality and, on this head, the trial court deducted \$2,442.50 from the plaintiff's claim. The judgment appealed from restored this amount and added it to the judgment in favour of the plaintiff. It appeared, however, that the plaintiff had, at least tacitly, consented to this diminution and made no protest in respect thereof. — *Held*, reversing the judgment appealed from, that, under the circumstances, the plaintiff could not claim the sum in question as damages under arts. 1065 and 1691 of the Civil Code. *Ville de Maisonneuve v. Banque Provinciale*, xxxiii., 418.

171. *Interest on mortgage—Rate of interest on loan—Rate after maturity.*

See INTEREST, 3.

172. *Public work—Breach of contract—Part performance—Cancellation—Appropriation of plant—Damages—Interest.*

See No. 21, ante.

18. MARRIED WOMAN.

173. *Married woman—Separate estate—C. S. U. C. c. 73—35 Vict. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 Vict. c. 19 (O.)*

See DEBTOR AND CREDITOR, 54.

174. *Married woman—Separate property—Conveyance—Contracts—C. S. N. B. c. 72.*

See MARRIED WOMAN, 55.

175. *Husband and wife—Judicial separation as to property—Debts incurred by husband before dissolution of community—Obligation by wife—Art. 1301 C. C.—Nullity—Public policy.*

See HUSBAND AND WIFE, 8.

176. *Marriage contract—Universal community—Don mutuel—Registry laws—Construction of contract—Divisibility—Arts. 807, 819, 1411 C. C.*

See MARRIAGE LAWS, 2.

19. MISTAKE.

177. *Misrepresentation—Quality of masonry—Instructions to follow specifications—Claim for increased price of works.*—A contractor who was led into error by verbal misrepresentations as to the quality of work expected to be done upon his contract, was held entitled to recover the increased price of completing the works "according to specifications." *Ross v. Barry*, xix., 360.

178. *Vendor and purchaser—Principal and agent—Mistake—Contract—Agreement for sale of land—Agent exceeding authority—Specific performance—Findings of fact.*—Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her, and under the mistaken impression that the offer was for the purchase of certain

swamp lots only whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her, and was set aside by the court on the ground of error, as the parties were not *ad idem* as to the subject matter of the contract, and there was no actual consent by the owner to the agreement so made for the sale of her lands. *Murray v. Jenkins*, xxviii., 565.

179. *Contract for construction of works—Specifications—“From” and “to” streets—Reference to annexed plan—Construction of deed—Mistake—Costs.*—The words “from” and “to” streets mentioned in specifications for the construction of works undertaken by an agreement in writing as shewn on a plan annexed to and declared to form part of the contract are not necessarily exclusive and, in the case in question, where the agreement provided that the works should be constructed “along Notre-Dame street from Berri street to Lacroix street as shewn on the said plan” these words mean as far as the plan shews along Notre-Dame street but not exceeding the most distant side of Lacroix street. — Mills and Armour, JJ., dissenting, were of opinion that the plan was annexed to the written agreement merely for the purposes of illustration and that the words in the agreement limited the contract so that the works undertaken would not include constructions shewn on the plan over any portion of either Berri street or Lacroix street. *City of Montreal v. Canadian Pac. Ry. Co.*, xxxiii., 396.

180. *Sale of goods—Evidence to vary written instrument—Admission of evidence.*—The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 21), which in effect held, under the special circumstances of the case, involving dealings with two companies connected in business and having almost similar names, that it was not inconsistent with a written agreement with the plaintiff to prove that defendant supposed he was dealing with another party with whom he had made other arrangements in respect to payment for goods purchased. *Wilson v. Windsor Foundry Co.*, xxxi., 381.

181. *Policy of insurance—Misdescription of risk—Representation by insured—Bona fides—Reference under arbitration clause—Estoppel—Waiver.*

See INSURANCE, LIFE, 93.

20. NOVATION.

182. *Principal and surety—Deviation from agreement—Giving time—Secret dealings with principal—Discharge of surety.*

See PRINCIPAL AND SURETY, 4.

183. *Novation—Promissory note—Discharge of maker—Reservation of rights against indorser.*

See SURETYSHIP, 3.

21. PARTIAL PERFORMANCE.

184. *Part performance—Quantum meruit—Non-fulfilment—Indebitatus counts.*—L.

agreed “to run according to his best art and skill a tunnel of 200 feet for the sum of four dollars per running foot; that \$150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work.” He made five tunnels, none of which were 200 feet, but claimed he had done in all 204 feet. In addition to the count for balance due on the agreement the plaintiff inserted in his declaration the common counts for work and labour. On appeal to the Supreme Court of Canada: *Held*, that there was not a sufficient fulfilment of the agreement, and inasmuch as L. had given no particulars, nor any evidence under the indubitatus counts, the rule absolute of the court below, ordering judgment to be entered for the defendants, should be affirmed and the appeal dismissed with costs. *Lakin v. Nuttall*, iii., 685.

185. *Condition as to time—Divisibility of contract—Completion of works.*—By a contract to remove spans from a wrecked bridge in the St. Lawrence the contractors agreed “to remove both spans of the wrecked bridge and put them ashore for the sum of \$25,000, we to be paid \$5,000 as soon as one span is removed from the channel and another \$5,000 as soon as one span is put ashore and the balance as soon as the work is completed. . . It being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season.” *Held*, reversing the judgment of the Court of Appeal, Taschereau and Davies, JJ., dissenting, that the contract was divisible, and the contractors having removed one span from the channel and put it ashore were entitled to the two payments of \$5,000 each notwithstanding the whole work was not completed in the second season. *Collins Bay Rafting and Forwarding Co. v. New York and Ottawa Ry. Co.*, xxxii., 216.

186. *Part performance—Cancellation—Quantum meruit—Setting aside award.*

See ARBITRATIONS, 12.

187. *Public work—Breach of contract—Part performance—Appropriation of plant—Damages—Interest.*

See No. 21, ante.

188. *Contract for construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts. 1065, 1691 C. C.—Appeal on special questions—Deferred payment—Computation of interest—Payments in advance—Rebates—Powers of appellate court.*

See No. 170, ante.

22. PARTNERSHIP.

189. *Joint speculation—Agreement to purchase land—Renewal of option.*

See PARTNERSHIP, 2.

190. *Partnership—Winding-up—Extra services of one partner—Remuneration for.*

See PARTNERSHIP, 25.

191. *Contact under seal—Undisclosed principal—Partnership—Amendment.*

See ACTION, 107.

23. PENAL CLAUSE.

192. *Contract — Building of engine and boiler—Time for completion—Damages—Construction of contract.*—The action was for the contract price of building an engine and boiler for defendants (appellants), and the defence was that the work was not done within the time provided for in the contract, and that defendants were entitled to deduct \$20 a day for each day's default in completion, as the agreement allowed, the balance being paid into court. The trial judge held plaintiffs entitled to recover, finding that the delay was occasioned by defendants, but he deducted a small amount as damages for delay for a time attributable to plaintiffs. The Divisional Court reversed this judgment and dismissed the action. The Court of Appeal for Ontario (21 Ont. App. R. 160), restored the original judgment, and allowed plaintiffs the amount deducted at the trial.—The Supreme Court of Canada affirmed the judgment appealed from, being of opinion that the delay was caused by the defendants themselves, and that the Court of Appeal rightly held plaintiffs entitled to recover the full contract price. *French River Tug Co. v. Kerr Engine Co.*, xxiv., 703.

193. *Public work — Breach of contract—Part performance—Appropriation of plant—Claim for extras—Damages—Interest.*

See No. 21, ante.

24. PRINCIPAL AND AGENT.

194. *Agreement with ship's husband — Breach — Action — Special assumpsit—Accord and satisfaction — Evidence — Nonsuit — Question for jury.*—W. part owner, (before the Com. Law Prac. Act, 1873,) sued V. & Co., merchants and ship-brokers in England, complaining that while he had entire charge of the vessel as ship's husband, they, being his agents, refused to follow his directions, and committed a breach of agreement not to charter or send the vessel on any voyage, except as ordered by W. or with his consent. E. V. had obtained from W. a one-fourth share in the vessel, the purchase being effected by V. & Co. On arrival of the vessel at Liverpool, V. & Co. incurred a large expense in coppering her, contrary to directions, and sent her on a voyage of which W. disapproved. W. wrote complaining and protesting, and V. & Co. replied that there could be no cause of complaint against their management, and that they would not have purchased a fourth in the vessel if they were not to have management and control on the other side of the Atlantic. Correspondence ensued, and finally W. wrote, referring to "eternal bickerings," re-asserted his right to control, stated in detail his grounds of complaint against them, and closed with the words: "To end the matter, if your brother, (E. V.) will dispose of his quarter, I will purchase it, say for \$4,200 in cash." This amount was accepted, and the transfer made to W. Defendants filed, amongst others, a plea of accord and satisfaction and the trial judge, considering it established by the letter lastly referred to, entered a nonsuit.—*Held*, on appeal, reversing the judgment of the Supreme Court of New Brunswick (2 P. & B. 70), which had affirmed the nonsuit, that the onus of proof of accord and satisfaction was

upon defendants and depended upon verbal testimony adduced, and should have been passed upon by the jury; that in the letter the expression "to end the matter" might be construed as applying to "bickerings" as to future management, and there had not been an accord and satisfaction.—*Held*, also, that the agreement having been made between W. and V. & Co. only, and, being a contract of agency apart from any question of ownership, the action was properly brought by W. in his own name. *Taschereau and Gwynne, JJ.*, dissenting. *Weldon v. Vaughan*, v., 35.

195. *Principal and agent — Sale by agent — Commission — Evidence.*—The appellant company deal in electrical supplies at Halifax and had at times sold goods on commission for the defendant, a company manufacturing electric machinery in Montreal. In 1897 the appellant telegraphed the respondent as follows:—"Windsor electric station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply was:—"Can furnish Windsor 180 Killowatt Stanley two phase complete exciter and switchboard, \$4,900, including commission for you. Transformers, large size, 75 cents per light." . . . The manager of appellant company went to Windsor but could not effect a sale of this machinery. Shortly after a travelling agent of the defendant company came to Halifax and saw the manager and they worked together for a time trying to make a sale but the agent finally sold a smaller plant to the Windsor Company for \$1,800. The Starr Company claimed a commission on this sale and on its being refused brought an action therefor.—*Held*, affirming the judgment of the Supreme Court of Nova Scotia, *Gwynne, J.*, dissenting, that the Starr Company was not employed to effect the sale actually made; that the Montreal company offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the Starr Company to such commission. *Starr, Son & Co. v. Royal Electric Co.*, xxx., 384.

196. *Principal and agent — Municipal corporation — Water commissioners — Statutory body — Powers — Action — Parties — 37 Vict. c. 79 (Ont.).*—By 37 Vict. c. 79 (Ont.) the waterworks of Windsor are under management of a Board of Commissioners who collect the revenue, pay the city any surplus therefrom, and initiate works for improving the system, the city supplying the funds. The total expenditure is not to exceed \$300,000 and not more than \$20,000 can be expended in any one year without a vote of the ratepayers.—*Held*, affirming the judgment appealed from (27 Ont. App. R. 566), that the Board is merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, not authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit was not a binding contract.—*Held*, also, that if an action could have been brought on such contract the city corporation would have been a necessary party.—*Quære*, Would not the city corporation have been the only party liable to be sued? *Macdougall v. Water Commissioners of Windsor*, xxxi., 326.

197. *Authority of agent — Agreement for towage — Quantum meruit.*

See PRINCIPAL AND AGENT, 7.

198. *Carriage of goods — Authority of railway agent—Connecting lines.*

See No. 43, ante.

199. *Vendor and purchaser—Principal and agent — Sale of lands — Authority of agent —Price of sale — Resulting trust — Conveyance to agent.*

See PRINCIPAL AND AGENT, 9.

25. PUBLIC POLICY.

200. *Restraint of trade — Exclusive rights —Public policy—Foreign corporation.*

See No. 207, infra.

26. RAILWAYS.

201. *Railway crossings—Parol agreement—Reliance on statutory provisions—Estoppel.*

See RAILWAYS, 41.

202. *Breach of contract—Railway ticket—Tort—Crown officers—Negligence.*

See RAILWAYS, 100.

203. *Purchase of railway ticket—Implied contract to produce and deliver to conductor.*

See RAILWAY, 9.

204. *Railway company — Railway ticket — Right to stop over.*

See RAILWAY, 11.

27. RATIFICATION.

205. *Public work—Formation of contract—Obligation binding on Crown—Breach.*

See No. 103, ante.

206. *Misrepresentation — Artifice—Consideration — Error — Rescission — Laches — Waiver.*

See VENDOR AND PURCHASER, 26.

28. RESTRAINT OF TRADE.

207. *Company law—Foreign corporation—Telegraph lines—Exclusive rights—Restraint of trade—Public interest—Comity of nations.*—In 1869 the E. N. A. Ry. Co., owning the road from St. John, N.B., westward to the United States boundary, made an agreement giving the W. U. Tel. Co., exclusive right for 99 years to construct and operate a line of telegraph over its road. In 1876, a mortgage on the road was foreclosed and the road sold under a decree to the St. J. M. Ry. Co., which, in 1883, leased it to the N. B. Ry. Co. for 999 years. The telegraph line was constructed by the W. U. Tel. Co. under the agreement, and continued ever since without any new agreement with the St. J. M. Ry. Co. or the N. B. Ry. Co. The W. U. Tel. Co. is incorporated by the State of New York, for the

purpose of constructing and operating telegraph lines in the State. Its charter neither allows it to engage, nor prohibits it from engaging, in business outside of the State. In 1888, the C. P. Ry. Co. completed a road from Montreal to St. John, a portion of it having running powers over the line of the N. B. Ry. Co., on which the W. U. Tel. Co. had constructed its telegraph line. The N. B. Ry. Co. having given permission to the C. P. R. Co. to construct another telegraph line over the same road, the W. U. Tel. Co. applied for and obtained an injunction to prevent its being built.—*Held*, 1. That the agreement of 1869 with the E. N. A. Ry. Co. is binding on the present owners of the road.—2. That the contract with the W. U. Tel. Co. was consistent with the purpose of its corporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations.—3. The exclusive right granted to the W. U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade.—*Per* Gwynne, J., dissenting. The comity of nations does not require the courts of this country to enforce, in favour of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land. (See *Stevens' Dig. (N.B.) p. 313.*) *Canadian Pacific Ry. Co. v Western Union Tel. Co.*, xvii., 151.

208. *Foreign corporation — Public policy — Exclusive rights.*

See COMPANY LAW, 2.

29. RETAINER.

209. *Counsel fee—Retainer — Refresher — Quantum meruit—Lex loci contractus—Lex loci solutionis.*

See COUNSEL.

30. SALE OF GOODS.

210. *Sale of perishable goods—Future delivery—Condition of prepayment—Bill of lading—Principal and agent—Vesting of ownership—Bill of exchange—Failure of consideration.*—W. purchased and shipped a cargo of corn on the order of C., drawing at ten days for the price, freight and insurance. This draft was discounted at a bank by W., and the corn insured by him for his own benefit, shipped by him under a bill of lading, which with the policy of insurance, was assigned by him to the bank. The bank forwarded the draft, policy and bill of lading to their agents, with instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by C., but the cargo arriving in damaged condition before maturity, C. refused to receive it, or to pay draft. The bank and W. sold the cargo on account of whom it might concern, credited C. with the proceeds, and W. filed a bill to recover balance of draft and interest.—*Held*, reversing the Court of Appeal for Ontario (5 Ont. App. R. 626), Strong, J.,

dissenting, that the contract was not one of agency; that the property in the corn remained by the act of W. in himself and his assignees, until after the arrival of the corn and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in W. and his assignees, C. should not bear the loss. *Corby v. Williams*, vii., 470.

211. *Sale of goods by sample—Place of inspection—Delivery—Sale through brokers—Agency—Acquiescence.*—Where goods are sold by sample the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase.—Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods unless such custom is general. Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by parties domiciled there, unless the latter are shewn to have been cognizant of it, and can be presumed to have made their contract with reference to it.—If parties in Canada contract to purchase goods in New York through brokers, first by telegram and letters, and completed by exchange of bought and sold notes, signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the form of the contract, or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract. *Trent Valley Woollen Mfg. Co. v. Oelrichs*, xxiii., 682.

212. *Sale of timber—Delivery—Time for payment—Premature action.*—By agreement in writing, I. agreed to sell and the V. H. L. Co. to purchase timber to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted. . . . Settlement to be finally made inside of thirty days in cash, less 2 per cent. for the dimension timber which is at John's Island. — *Held*, affirming the decision of the Court of Appeal, that the last clause did not give the purchaser thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance. *Victoria Harbour Lumber Co. v. Irwin*, xxiv., 607.

213. *Sale by sample—Objections to invoice—Reasonable time—Acquiescence—Evidence.*—If a merchant receives an invoice and retains it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. Judgment of the Queen's Bench, that the evidence was sufficient to rebut the presumption reversed, and trial court judgment (Q. R. 9 S. C. 128) restored.—Gwynne, J., dissented, holding that the appeal depended on mere matters of fact as to which an appellate court should not interfere. *Kearney v. Letellier*, xxvii., 1.

214. *Construction of agreement to secure advances—Sale—Pledge—Delivery of posses-*

sion—Arts. 434, 1025, 1026, 1027, 1472, 1474, 1492, 1494c, C. C.—Bailment to manufacturer.—K. B. made an agreement with T. for the purchase of the output of his sawmill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled and piled on the wharf should be paid for at prices stated; that the seller should pay the purchasers \$1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent.; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advances being made on the culler's certificates shewing receipts of logs not exceeding \$25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be stamped with their name, and that all advances should bear interest at the rate of 7 per cent. Before the river-drive commenced, the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging \$32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which were buried in snow and ice, were not stamped, but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller, under which all moveable property in his possession was seized, including a quantity of the logs in question, lying along the river-drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured, at the seller's mill.—*Held* (Taschereau, J., taking no part in the judgment upon the merits), that the contract so made between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards into which part of them had been manufactured. *King v. Dupuis dit Gilbert*, xxviii., 388.

215. *Agreement to supply goods—Property in goods supplied—Execution—Seizure.*—By an agreement between H., of the one part, and W. and wife of the other, the latter were to provide and furnish a store, and H. to supply stock, and replenish same when necessary; W. was to devote his whole time to the business; W. and wife were to make monthly returns of sales and cash balances, quarterly returns of stock, etc., on hand, and to remit weekly proceeds of sales with certain deductions. H. had a right at any time to examine the books and have an account of the stock, etc.; the net profits were to be shared between the parties; the agreement could be determined at any time by H. or by W. and wife on a month's notice.—*Held*, that the goods supplied by H. under this agreement as to stock of the business were not sold to W. and wife, and remained the property of H. until sold in the

ordinary course; such goods, therefore, were not liable to seizure under execution against H. at the suit of a creditor. *Ames-Holden Co. v. Hatfield*, xxix., 95.

216. *Sale of goods—Delivery*—"At" shed—"Into" shed or grounds adjacent.]—A tender by H. to supply coal to the Town of Goderich pursuant to advertisement thereof contained an offer to deliver it "into the coal shed, at pumping station or grounds adjacent thereto where directed by you," (that is by a committee of the council). The tender was accepted and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from the vessel on to the dock, about 80 feet from the shed and separated from it by a road.—*Held*, reversing the judgment of the Court of Appeal, that the coal was not delivered "at the coal shed" as agreed by the contract signed by the parties which was the binding document.—*Held*, also, that if the contract was to be decided by the terms of the tender the delivery was not in accordance therewith the place of delivery not being "at the pumping station or grounds adjacent thereto." *Town of Goderich v. Holmes*, xxxii., 211.

217. *Contract by—Correspondence—Sale of goods—Condition as to acceptance—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Condition precedent—Right of action.*]—The appellant, O., wrote a letter, dated 2d October, 1899, offering to supply the company with thirty-seven car loads of hay at prices mentioned "subject to acceptance in five days, delivery within six months." On 5th Oct. the company wrote and mailed a letter in reply, as follows:—"We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd instant. Please ship as soon as possible the orders you already have in hand and also get off the seven cars as early as possible as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight."—This letter was registered and, although it reached O.'s post office within the five days, yet by reason of the registration it was not received by him until the following day. On 12th Oct. O.'s agent wrote the company acknowledging the letter and saying that acceptance of the offer arrived too late and that therefore the hay could not be furnished. On 6th Nov. the company replied insisting on delivery of the hay as contracted for by the 15th of that month, and notifying O. that, in case of default, they would replace the order charging him with any extra cost and expenses.—*Held*, that the correspondence did not constitute a binding contract as the parties were never *ad idem* as to all the terms proposed. — Prior to the expiration of the six months mentioned in O.'s letter, the company, in defence to an action by him against them, counterclaimed for damages for his alleged breach of contract for delivery of the thirty-seven car loads of hay.—*Held*, that as the six months limited for making delivery had not expired, the company had no right of action

for damages, even had there been a contract, and that the filing of the counterclaim was premature. *Oppenheimer v. Brackman & Ker Milling Co.*, xxxii., 699. See 9 B.C. Rep. 343

218. *Sale of goods—Breach of warranty—Special damages—Action on contract subsequent to recovery—Evidence as to inferiority of goods delivered—Consequential damages.*

See EVIDENCE, 2.

219. *Sale of goods by agent—Undisclosed principal—Deficient delivery—Acceptance of bill of lading—Re-weighing—Notice to seller—Tender—Acknowledgment of liability—Pleading—Estoppel.*

See ACTION, 128.

220. *Sale of goods—Consignment—Delivery—Non-acceptance—Rescission.*

See SALE, 13.

221. *Sale of goods in one lot—Independent principals—Contract by agent of two firms—Lump price—Excess of authority—Ratification.*

See PRINCIPAL AND AGENT, 4.

222. *Sale of goods—Particular chattel—Representation.*

See SALE, 7.

223. *Goods sold by weight—Delivery—Loss in vendor's possession—Deposit—Damage before weighing.*

See SALE, 15.

224. *Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination—Hypothecary charges—Arts. 375 et seq. C. C.*

See SALE, 35.

225. *Sale of goods—Evidence to vary written instrument—Mistake—Admission of evidence.*

See No. 180, ante.

226. *Sale of monument by sample—Evidence of contract—Findings on contradictory evidence—Reversal on appeal—Practice.*

See EVIDENCE, 65.

31. SALE OF LAND.

227. *Contract of sale—Contre lettre—Principal and agent—Construction of contract.*]—A sale of property was controlled by a writing in the nature of a *contre lettre*, by which it was agreed as follows: "The vendor in consideration of the sum of \$2,940 makes and executes this day a clear and valid deed in favour of the purchaser of certain property (therein described), and the purchaser for the term of three years is to let the vendor have control of the said deeded property, to manage as well, safely and properly as he would if the said property was his own, and bargain and sell the said property for the best price that can be had for the same, and pay the rent, interest and purchase money when sold, and all the avails of the said property to the purchaser to the amount of \$2,940, and interest at the rate of 8% per annum from the date of these presents, and then the said purchaser shall re-deed to the vendor any part of the said prop-

erty that may remain unsold after receiving the aforesaid amount and interest." The vendor was at the time indebted to the purchaser in the sum of \$2,941. The two documents were registered. The vendor had other properties, and gave the purchaser a power of attorney to convey all his real estate in the same locality. The term of three years mentioned in the *contre lettre* was continued by mutual consent. The vendor subsequently paid amounts on account of his general indebtedness to the purchaser. It was only after the purchaser's death that the vendor claimed from the heirs of the purchaser the balance, above mentioned, of \$1,470, as owing to him for the management of his properties.—*Held*, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the proper construction of the contract was to be gathered from both documents and dealings of the parties, and that the property having been deeded merely as security it was not an absolute sale, and that plaintiff was not purchaser's agent in respect of this property.—*Held*, also, that the only action plaintiff had was the *actio mandata contraria* with a tender of his *reddition de compte*. *Hunt v. Taplin*, xxiv., 36.

228. Condition as to payment — Interest — Warranty—Payment of assessments on land—Compensation.

See WARRANTY, 1.

229. Rescission—Misrepresentation—Conveyance of land—Boundaries—Evidence of deceit—Notice—Inquiry.

See TITLE TO LAND, 2.

230. Sale of mortgaged lands—Agreement in writing—Sale of equity—Specific performance.

See SALE, 95.

231. Agreement for sale of land — Description—New contract by conveyance—Payment.

See SALE, 108.

232. Sale of land — Misrepresentations — Rescission of deed—Recovery of price.

See SALE, 75.

233. Title to land — Objections to title — Waiver—Specific performance.

See No. 245, *infra*.

234. Vendor and purchaser—Sale of lands—Waiver of objections — Lapse of time — Construction of will—Executory devise over—Defeasible title—Rescission of contract.

See WILL, 60.

235. Vendor and purchaser — Principal and agent — Mistake — Contract — Agreement for sale of land — Agent exceeding authority — Specific performance—Findings of fact.

See VENDOR AND PURCHASER, 20.

236. Agreement for sale of land — Mutual mistake — Reservation of minerals — Specific performance.

See SALE, 89.

32. SALE OF MINING RIGHTS.

237. Construction of deed — Sale of phosphate mining rights—Option to purchase other

minerals found while working — Transfer of rights.]—M. by deed sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind he shall have the privilege of buying the same from the said vendor or representative by paying the price set upon the same by two arbitrators, appointed by the parties." W. worked the phosphate mines for five years, and then discontinued it. Two years later he sold his mining rights in the land, and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B. the original vendor, M., granted the exclusive right to work mines and veins of mica on said land to W. & Co., who proceeded to develop the mica. B. then claimed an option to purchase the mica mines, under the original agreement, and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator and for damages.—*Held*, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica, as to which B. claimed the option. *Baker v. McLelland*, xxiv., 416.

238. Contract — Mining claim—Agreement for sale—Construction—Enhanced value.]—

By agreement in writing signed by both parties B. offered to convey his interest in certain mining claims to N. for a price named with a stipulation that, if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should immediately be formed and that B. should have a reasonable amount of stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims or that the agreement should be specifically performed.

—*Held*, reversing the judgment of the Supreme Court of British Columbia, that the dual agreement above mentioned was for a transfer at a nominal price in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon; and that, on breach of said trust, B. was entitled to a re-conveyance of his interest in the claims and an account of moneys received or that should have been received from the working thereof in the meantime. *Briggs v. Newswander*, xxxi., 405.

33. SALE OF PATENT.

239. Sale of patent—Future improvements.]

—By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine for which he had applied and a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The

latter received an assignment of the Canadian patent and paid a portion of the purchase, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat and they refused to pay the balance, and in an action by M. to recover the same, they demanded by counterclaim a return of what had been paid on account.—*Held*, reversing the judgment of the Court of Appeal, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for a machine described in the caveat referred to in the agreement; and that as the evidence shewed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover.—*Held*, further, Gwynne, J., dissenting, that as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked it for their own profit and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. *Bingham v. McMurray*, xxx., 159.

34. SALE OF TIMBER.

240. *Construction—Sale of timber—Failure of consideration—Right to recover back money paid.*—C., after personal examination made an agreement with W., who sold him all the pine timber standing on a lot, "such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of \$13 per hundred cubic feet," and paid \$1,000, "the balance to be paid for before the timber is removed from the lot." C. cut \$651.17 worth of first-class timber, suitable for the Quebec market, which was all of that class to be found on the lot, and sued W. to recover back the balance of the \$1,000, namely, \$348.83.—*Held*, that the true construction of the contract was that W. sold and granted to C. permission to enter upon his lot, and cut all the "good merchantable timber there growing, suitable for his purpose," and not merely "first-class timber;" and that as there was more than sufficient "good merchantable timber" still remaining on the lot to cover the balance of the \$1,000, there was no failure of consideration and plaintiff could not recover back the balance of the money he had paid.—*Per Taschereau and Gwynne, J.J., held*; That the payment of the \$1,000 was an absolute payment, the plaintiff believing and representing to defendant that there was sufficient timber to cover that amount, if not more, on the faith of which representation defendant entered into the contract, which he otherwise would not have done, and that if the plaintiff made an error, he, and not the defendant, must suffer the consequences of this error. (See 28 U. C. C. P. 293.) *Clarke v. White*, iii., 309.

241. *Cutting logs—Vesting of property—Replevin—Possession—Seizure of goods.*

See *SHERIFF*, 9.

35. SPECIFIC PERFORMANCE.

242. *Specific performance — Terms of delivery — Reasonable time — Arts. 1067, 1073, 1544, C. C.—Trade custom—Measure of dam-*

ages.—On 7th May, 1874, L. sold C. five hundred tons of hay, a memo. being made and signed by L., as follows: "Sold to G. A. C. 500 tons of timothy hay of best quality, at the price of \$21 per ton f. o. b. propellers in canal, Montreal, at such times and in such quantities as the said G. A. C. shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot, by order or draft on self, at Bank of Montreal, the same to be consigned to order of Dominion Bank, Toronto."—L. delivered 147 tons and 33 pounds of hay, after which C. refused to receive any more. L., having several times notified C. verbally and in writing, by formal protest on the 28th July, 1874, required him to take delivery of the remaining 354 tons of hay.—The action was for damages for breach of contract, and for extra expenses incurred in consequence.—On appeal, *Held*, affirming the judgment of the Court of Queen's Bench, that the contract was intended to be executed within a reasonable time; that, from the evidence of usages of the trade, the delivery, under the circumstances, was intended to be made before the new crop of hay; that C. being in default to receive the hay when required, within reasonable time of the coming in of the new crop, he was liable for the damages sustained, and that the proper measure of damages was the difference at the place of delivery between the value when acceptance was refused and the contract price with the addition of the consequent necessary expenses, the amount of which, being a matter of evidence, is properly within the province of the court below to determine. *Chapman v. Larin*, iv., 349.

243. *Executors — Powers — Sale of wild lands—Unknown quantity — Specific performance.*—A sale of a lot of wild land of unknown area at so much per acre, by executors under powers to sell such portion as might be necessary to pay debts due by their testator, proved upon survey to exceed the estimate made before the sale both as to the quantity of land and the amount necessary to meet the liabilities.—*Held*, reversing the judgment appealed from, that the purchaser at a rate per acre was entitled to conveyance of the whole of the lot so sold, and that the execution of such conveyance would not constitute a breach of trust under the will. (See 2 B. C. Rep. 67.) *Sea v. McLean*, xiv., 632.

244. *Sale of land — Specific performance — Agreement to assign mortgage in part payment — Second mortgage — Negotiable instrument.*—In a sale of land for \$4,800, L. agreed to give in part payment a second mortgage on another parcel for \$2,500, which was subsequent to first mortgage for a large amount. W. refused to accept the mortgage, and in an action on the agreement to recover the purchase money and interest represented by such mortgage it was admitted that the mortgage was not a first mortgage, that no notice had been given to W. of its being a second mortgage, nor had there been any waiver of his right to demand a first mortgage. On the contrary he had asked, "Is this a negotiable instrument?" and was told "It is all right."—*Held*, affirming the Court of Queen's Bench for Manitoba, that under the terms of the agreement plaintiff was entitled to a good marketable mortgage—that is a first mortgage upon the real estate.—*Per Ritchie, C.J.* The words "negotiable instrument" did not mean a nego-

tible instrument in the nature of a promissory note, but an instrument which could be taken into the market as a saleable instrument—*Per Strong, J.* An agreement to assign a mortgage on land by way of absolute transfer or sale, or, as in the present case, to assign a mortgage on land in payment, or part payment, of other land sold by the proposed transferee to the proposed transferor, is a contract of which a Court of Equity would decree specific performance, and in carrying out a decree for specific performance, the purchaser is always entitled to a reference as to title whatever may be the nature of the property which is the subject of the sale, the right to a reference of title not being confined to sales of real estate. A Court of Equity would not compel a party who agreed to purchase a mortgage on land simply to take any other than a mortgage of the legal estate free from all prior incumbrances. The title in such a case which the vendor of the mortgage impliedly undertakes to give is a good marketable title, which means a title to a mortgage of a legal estate in possession, just as the vendor who sells land, without saying more, impliedly agrees to shew a good title to both the mortgage debt, the money secured by the mortgage, and to the security holden for the debt, the land; and he can only shew this by proving that the legal estate free from all incumbrances has passed under the mortgage. The same rule should prevail in a court of law, the construction of contracts being the same in both jurisdictions. If the agreement had been executed the remedy of the plaintiff would have been upon any covenants which the transfer might have contained, or, if still *in fieri*, if it could be shewn there had been any waiver of the right to call for a good title, the plaintiff might be concluded; and this might have been a consequence of distinct notice to him during the negotiations that the mortgage was upon the equity of redemption only, but there was no proof of any such waiver or acceptance of notice from which it might be inferred—*Per Henry, J.* When it was stipulated in general terms that a mortgage was to be assigned the agreement could only be performed by assigning a first mortgage.—Appeal dismissed with costs. *Lynch v. Wood*, Cass. Dig. (2 ed.) 783.

245. *Specific performance — Title to land — Objections to title—Waiver.*—To entitle a party to a contract to a decree for specific performance, he must have been prompt himself in performance of the obligations devolving upon him, and always ready to carry out the contract within a reasonable time, even although time might not have been of the essence of the agreement.—Specific performance will not be decreed when the party asking performance has declared his inability to carry out the agreement on his part.—A purchaser of land who takes possession of the property and exercises acts of ownership by making repairs and improvements, will be held to have waived any objections to the title.—Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution, for the purpose of carrying out the purchase. Judgment appealed from (29 N. S. Rep. 424) affirmed. *Wallace v. Hesselin*, xxix., 171.

246. *Agreement to provide by will — Services rendered — Quantum meruit.*

See SPECIFIC PERFORMANCE, 3.

247. *Exchange of land — Time for completion — Waiver — Notice — Rescission.*

See SPECIFIC PERFORMANCE, 4.

36. STATUTE OF FRAUDS.

248. *Interest in mine — Agreement to transfer portion of proceeds of sale — Statute of Frauds.*—An agreement by the owner of an interest in a gold mine to transfer to another, in consideration of services performed in working the mine, a portion of such owner's share in the proceeds when it was sold is not a contract for sale of an interest in land within the Statute of Frauds. (24 N. S. Rep. 526, reversed). *Stuart v. Mott*, xxiii., 384.

249. *Statute of Frauds — Memorandum in writing—Repudiating contract by.*—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo., under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. Judgment appealed from (22 Ont. App. R. 468) affirmed. *Martin v. Haubner*, xxvi., 142.

250. *Partnership — Dealing in land—Statute of Frauds.*—A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. Judgment appealed from (6 B. C. Rep. 260) affirmed, Gwynne and Sedgwick, JJ., dissenting. *Archibald v. McNerhanie*, xxix., 564.

251. *Statute of Frauds — Auction sale — Name of vendor not disclosed — Unsigned contract—Subsequent correspondence.*

See VENDOR AND PURCHASER, 3.

252. *Proof — Question for jury — Parol agreement—Memo. in writing — Statute of Frauds.*

See EVIDENCE, 16.

37. STOCK JOBBING.

253. *Construction of "stock jobbing" memo. — Stock exchange custom — Sale of shares — Undisclosed principal — Marginal transfer—"Settlement"—Obligation of purchaser.*

See PRINCIPAL AND AGENT, 48.

38. SURETYSHIP.

254. *Financial agent's commission — Security for advances—Suretyship—Indorsement of unused note—Right to commission for indorsing—Consideration.*—M., by writing, agreed to become surety for McD. by indorsing a promissory note, and McD. agreed to transfer property to M. as security, to do everything necessary to be done to realize such securities, to protect M. against any loss or expense in regard thereto, or in connection with the note, to pay him a commission for indorsing, and to retire note within 6 months from date of agreement. The note was made and indorsed and the securities transferred, but was never used. In an action by M. for his commission:—*Held*, affirming the Court of Appeal for Ontario, Taschereau and Gwynne, JJ., dissenting, that M. having done everything on his part to be done to earn his commission, and having had no control over the note after he indorsed it, and being in no way

responsible for the failure to discount it, was entitled to the commission. *McDonald v. Manning*, xix., 112.

255. *Building railway—Surety for performance of — Interpretation with rights of surety.*

See SURETYSHIP, 5.

256. *Vendor and purchaser — Agreement for sale of lands — Deviation from terms — Giving time — Secret dealings—Arrears of interest — Release of lands — Discharge of surety—Novation.*

See PRINCIPAL AND SURETY, 4.

39. TENDER.

257. *Tender — Unilateral undertaking — Bond — Condition — Acceptance.*—H. tendered for construction of a railway pursuant to advertisement, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender, conditioned, within 4 days, to provide 2 acceptable sureties and deposit 5% of the amount of his tender in the Bank of Montreal, and also to execute all necessary arrangements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action on the bond:—*Held*, affirming the judgment appealed from (18 Ont. App. R. 415), that the agreement made by the bond was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the works were to be contemporaneous acts, and as no such agreement was entered into H. was not liable on the bond. *Brantford, W. & Lake Erie Ry. Co. v. Huffman*, xix., 336.

258. *Tender by firm—Assignment of interest — Alteration of specification after tender and before acceptance — Provision inserted against assignment — Incomplete contract—Locus standi — Action.*—On 1st February, 1880, the corporation of St. Gabriel called for tenders for waterworks for the village, according to plan and specification.—St. J. & Co. tendered "to do the several works of supplying and laying water pipes in this village according to plan and specification," for \$37,600.99.—The specification had no prohibition against transferring the contract. The tender of St. J. & Co., when the tenders were opened on 2nd March, was the lowest but one, that of D. & Co. By a memo. of agreement, made 5th March, 1880, between St. J. and C., doing business together under the name of St. J. & Co., and T. St. J. & C. transferred all their interest in or to and by virtue of the tender to T. for \$500, a further sum of \$500 to be paid by T. when contract should be awarded by by-law duly passed.—D. & Co. availed themselves of certain irregularities to withdraw their tender, the St. Gabriel council decided to make some changes in the plans and specifications, and at a meeting on 12th July, 1880, resolved that the specification as made by the engineer of the corporation, with the corrections as amended by the council, be accepted and

adopted, and that St. J. should be allowed two days to consider the specification and, if he should accept, that he should attend on the 15th at 3 p.m. to sign the contract.—The new specification contained the following: "The contractor will not be permitted to sub-let any portion of the work, except for the delivery of materials, without the consent of the municipal council." On 15th July, St. J. and C. went to the office of the respondent's notary to sign the contract. At the same time T. presented himself, and claimed the right to sign the contract as transferee, producing and communicating to the mayor, who was present, the document by which St. J. & Co. had transferred to him all their interest in the contract in question.—The mayor thereupon requested delay until the evening to consult the council, which was to meet in accordance with the terms of the adjournment on the 12th July, when he made a report of the respective pretensions of St. J. and C. and of T. St. J. was called upon by the members of the council to state whether T.'s pretensions were founded, and whether it was true that he was transferee of St. J. & Co.'s interests under the tender which they had submitted. The result was that the council determined not to give the contract to St. J. & Co., but sent for the next lowest tenderers, to whom they made an offer on the terms and conditions proposed to St. J. & Co. at the meeting of 12th July, and this offer being accepted it was resolved to give them the contract, and it was signed the next day.

St. J. in his own name, and as the only person interested in the tender of St. J. & Co., then instituted an action in damages for breach of the contract which he pretended was entered into between himself and respondent under the resolutions of 12th July, 1880.—The Superior Court (12 R. L. 15) dismissed plaintiff's action, holding that the evidence shewed no individual tender by St. J., but one by St. J. and C., as constituting the firm of St. J. & Co., that therefore the plaintiff had no *locus standi* to maintain the action in his own name; that, besides, under the circumstances there never had been any completed contract between the parties; the provision against assigning the contract was a material stipulation which had been violated by the assignment to T., and that the council had been justified in refusing to accept the tender.—This judgment was reversed by the Court of Review at Montreal, but restored by the Queen's Bench.—On appeal the Supreme Court of Canada, Henry, J., dissenting, affirmed the judgment of the Court of Queen's Bench.. Appeal dismissed with costs. *St. James v. Corporation of St. Gabriel*, 12th May, 1885, Cass. Dig. (2 ed.) 147.

259. *Agreement as to tender—Fraud by partners—Breach of contract—Damages.*

See PARTNERSHIP, 4.

40. TRADE CUSTOM.

260. *Sale of goods by sample — Delivery—Inspection.*

See No. 211, ante..

41. VARYING TERMS.

261. *Oral agreement in variation of written contract — Consideration.*—Defendant had

agreed in writing to accept goods in payment of two bills of exchange accepted by plaintiff, and plaintiff, having delivered the goods in payment of such bills, was subsequently sued by an indorsee of one of them, and compelled to pay it. In an action to recover the amount so paid by plaintiff, defendant offered evidence to shew that at the time the agreement in writing was made, the plaintiff orally agreed that the goods should not be taken as payment in full of the bills, and that he would pay the balance as soon as he was able. The Supreme Court affirmed the judgment appealed from (20 N. S. Rep. 210) which held that such agreement, if made, was void for want of consideration. *Cox v. Seeley*, 6th May, 1896.

262. *Railways — Expropriation of land — Title to land—Tenants in common—Propriétaires par indivis—Construction of agreement — Misdescription—Plans and books of reference — Satisfaction of condition as to indemnity — Registry laws — Estoppel — R. S. Q. arts. 5163, 5164, art. 1590 C. C.]—The provisions of the Civil Code respecting the registration of real rights have no application to proceedings in matters of expropriation of lands for railway purposes under the provisions of the Revised Statutes of Quebec.—Pending expropriation proceedings begun against lands held in common, (*par indivis*) for the purposes of appellant's railway, the following instrument was signed and delivered to the company by six out of nine of the owners *par indivis*, viz.: "Be it known by these presents that we, the legatees Patterson of the Parish of Beauport, County of Quebec, do promise and agree that as soon as the Quebec, Montmorency and Charlevoix Railway is located through our land in Parishes of Notre-Dame des Anges, Beauport and L'Ange-Gardiens, and in consideration of its being so located, we will sell, bargain and transfer to the Quebec, Montmorency and Charlevoix Railway Company, for the sum of one dollar, such part of our said land as may be required for the construction and maintenance of the said railway, and exempt the said company from all damages to the rest of the said property, and that pending the execution of the deeds we will permit the construction of said railway to be proceeded with over our said land, without hindrance of any kind, provided that the said railway is located to our satisfaction. As witness our hands at Quebec, this 11th day of June, in the year of Our Lord, one thousand, eight hundred and eighty-six." Afterwards the line of the railway was altered and more than one year elapsed without the deposit of an amended plan and book of reference to shew the deviation from the line as originally located. The company, however, took possession of the land and constructed the railway across it and, in August, 1889, the same persons who had signed the above instrument granted an absolute deed of the lands to the company for a consideration of five dollars, acknowledged to have been paid, reciting therein that the said lands had "been selected and set apart by the said railway company for the ends and purposes of its railway and being already in the possession of the said railway company since the eleventh day of June, one thousand eight hundred and eighty-six, in virtue of a certain promise of sale *sous seing privé* by the said vendors in favour of the said company." Neither of the instruments*

were registered. G. purchased the New Waterford Cove property in 1889 and, after registering his deed, executed by all the owners *par indivis*, brought a petitory action to recover that part of the property taken by the railway company, alleging that the instruments mentioned constituted a donation of the lands and did not come within the operation of arts. 5163 and 5164 of the Revised Statutes of Quebec. *Held*, that the terms of s.-s. 10 of art. 5164, R. S. Q. were sufficiently wide to include and apply to donations; that the instrument in question was not properly a donation, but a valid agreement or *accord* within the provisions of said tenth sub-section, under onerous conditions of indemnity which appeared to have been satisfied by the company; that, as the agreement stipulated no time within which the new plan should be filed and the location appeared to have been made to the satisfaction of the required proportion of the owners, it was sufficient for the company to file the amended plan and book of reference at any time thereafter; and that, as the indemnity agreed upon by six out of nine of the owners *par indivis* had been satisfied by changing the location of the railway line as desired, the requirements of art. 5164 R. S. Q., had been fully complied with and the plaintiff's action could not, under the circumstances, be maintained. *Quebec, Montmorency & Charlevoix Ry. Co. v. Gibsons; Gibsons v. Quebec, Montmorency & Charlevoix Ry. Co.*, xxix., 340.

263. *Oral agreement — Evidence — Withdrawal of questions from jury — New trial.]—D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of 5% on the selling price, such commission to include all expenses. H. failed to effect a sale. *Held*, affirming the judgment appealed from (6 B. C. Rep. 505), that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to shew that the written instructions did not constitute the whole of the terms of the contracts, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there had been a collateral oral agreement in respect to the expenses and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought to have been submitted to the jury. *Dunsmuir v. Lowenberg, Harris & Co.*, xxx., 334.*

264. *Written instrument — Collateral parol agreement — Work and labour done — Lien.*

See EVIDENCE, 221.

265. *Railways — Expropriation — Title to lands — Propriétaires par indivis — Plans, surveys, books of reference — Estoppel — Satisfaction of condition as to indemnity—Application of statute—Registry laws—Construction of agreement.*

See RAILWAYS, 32.

266. *Sale of goods — Evidence to vary written instrument — Mistake — Admission of evidence.*

See No. 180, ante.

CONTRAINTE PAR CORPS.

1. *Appeal — Jurisdiction — Amount in controversy — Secretion of estate by insolvent — Contrainte par corps — Arts. 885, 888 C. P. Q.*—On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding \$2,000, the judgment appealed from condemned the appellant, under the provisions of art. 888 C. P. Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least \$6,000. *Held*, that there was no pecuniary amount in controversy and there could be no appeal to the Supreme Court of Canada. *Clement v. Banque Nationale*, xxxiii., 343.

2. *Administration of minor's property — Account — Reliquat de compte — Discretion.*
See TUTORSHIP, 2.

CONTRIBUTORIES.

See COMPANY LAW—WINDING-UP ACT.

CONTROVERTED ELECTION.

See ELECTION LAW.

CONVENTION.

See CONTRACT—TREATY.

CONVERSION.

1. *Carrier's contract — Shipping receipt — Limitation of liability — Damages — Negligence — Connecting lines—Wrongful conversion — Sale of goods for non-payment of freight — Principal and agent — Varying terms of contract.*—A shipping receipt with conditions relieving the carrier from liability for loss or damages arising out of "the safe-keeping and carriage of the goods," even though caused by the negligence, carelessness or want of skill of the officers, servants or workmen of the carrier, without his fault or privity, and restricting claims to the cash value of the goods at the port of shipment, agreed for the carriage by the defendants' and other connecting lines of transportation, and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the season of 1899, the variation being shewn by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. *Held*, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt

without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants, and that they were not exempt from liability in respect thereof, at their full value. *Wilson v. Canadian Development Co.*, xxxiii., 432.

[Leave to appeal to Privy Council ~~refused~~, July, 1903.]

2. *Seizure of chattels — Sale of perishable goods — Order of court — Holding in medio.*

See SHERIFF, 1.

CONVEYANCE.

1. *Insolvency — Foreign assignment — Lands in Canada—Lex loci.*—An assignment and conveyance in pursuance of foreign bankruptcy proceedings is ineffectual to pass title to lands in Canada. *Macdonald v. Georgian Bay Lumber Co.*, ii., 364.

2. *Contract for sale of land — Payment of purchase money on delivery of conveyance—Duty to prepare.*—A provision in a contract for purchase of land that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser. *Fournier and Taschereau, JJs.*, dissenting. *Stevenson v. Davis*, xxiii., 629.

3. *Sale of land — Tender of conveyance—Objection—Delay—Default of vendor — Payment of interest.*

See VENDOR AND PURCHASER, 30.

4. *Conveyancing — Mortgage — Leasehold premises—Terms of mortgage—Assignment or sub-lease.*

See MORTGAGE, 9.

AND see DEED—FRAUDULENT CONVEYANCES—LEASE—MORTGAGE.

COPYRIGHT.

1. *Infringement of copyright—Textual copy —Source of information—Statutory forms—Notice on title page—Deposit of copies.*—The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted work therefor.—In works of this nature where so much may be taken by different publishers from common sources and the information given must be in the same words, the courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence.—The notice of copyright to be inserted in the title page of a copyrighted work is sufficient if it substantially follows the statutory form. The omission of the words "of Canada" in such form is not a fatal defect, and, even if a defect, it is cured by s.s. 44, s. 7 of the Interpretation Act.—Depositing in the office of the Minister of Agriculture copies of a book containing notice of

copyright before the copyright has been granted does not invalidate the same when granted. *Garland v. Gemmill*, xiv., 321.

2. *Publication of dictionary—Source of information—Infringement—Evidence—Textual copy.*—In an action for infringement of copyright in a dictionary the un rebutted evidence shewed that the publication complained of treated of almost all the subjects in the exact words used in the dictionary first published and repeated a great number of errors that occurred in the plaintiff's work. *Held*, affirming the judgment appealed from. (Q. R. 10 Q. B. 255), that the evidence made out a *prima facie* case of piracy against the defendants which justified the conclusion that they had infringed the copyright. *Cadieus v. Beauchemin*, xxxi., 370.

CORPORATE SEAL.

Executed contract—Liability of corporations.—An executed contract for purposes within its corporate powers and of which it receives benefit is binding upon a corporation although the contract was not executed under the corporate seal. *Bernardin v. North Dufferin*, xix., 581.

CORPORATION.

See COMPANY LAW—FOREIGN CORPORATIONS—MUNICIPAL CORPORATIONS—RAILWAYS—SCHOOL TRUSTEES.

COSTS.

1. APPEAL FOR COSTS, 1-5.
2. PAYMENT TO OR BY PARTIES, 6-34.
3. REFUSAL OF COSTS, 35-68.
4. OTHER CASES, 69-83.

1. APPEAL FOR COSTS.

1. *Appeal for costs—Jurisdiction—Habeas corpus—Prisoner at large.*—General costs of appeal were allowed where it appeared that at the time of instituting an appeal against an order in a matter of *habeas corpus*, the prisoner was at large. *Fraser v. Tupper*, Cass. Dig. (2 ed.) 421; Cass. Prac. (2 ed.) 54, 83.

2. *Appeal for costs—Mistake.*—Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle, which the party appealing has an actual interest in having reviewed, and which governs and affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. *Archbald v. deLisle*; *Baker v. deLisle*; *Mowat v. deLisle*, xxv., 1.

3. *Quashing appeal—Voluntary execution—Question of costs—Estoppel.*—The court may quash an appeal for costs only, although there may be jurisdiction to entertain it. *Schlomann v. Dowker*, xxx., 323.

4. *Appeal for costs—Hearing refused.*
See APPEAL, 36.

5. *Appeal for costs—Habeas corpus—Prisoner at large.*

See PRACTICE OF SUPREME COURT, 66.

2. PAYMENT TO OR BY PARTIES.

6. *Construction of will—Order on allowing appeal.*—In a case submitted for the construction of a will, upon allowing an appeal it was ordered that the costs should be paid by the respondents who were executors and trustees out of the general residue of the estate of the deceased, but if the residue should have been distributed then that costs should be contributed by the persons who should have received portions of the residue ratably according to the amounts respectively received by them. *Fisher v. Anderson*, iv., 406.

7. *Mistake—Pleading—Tender into court.*—Appellants not having tendered with their plea costs accrued up to and inclusive of its production, ordered to pay the respondent the costs incurred in the court of first instance. *The Aetna Life Insurance Co. v. Brodie*, v., 1.

8. *Cross-appeal—Motion to quash—Taxing costs.*—A motion to quash an appeal on the ground that it should not have been brought as a substantive appeal, but as a cross-appeal, was dismissed. But the respondent having succeeded in having the judgment of the court below varied (reversed on one point and affirmed on another), was allowed costs as of cross-appeal taken under rule 61. *Brunet v. Pilon*, v., at p. 356; Cass. S. C. Prac. (2 ed.) 164.

9. *Controverted election—Preliminary objections—Onus probandi.*—Costs allowed on dismissal, Strong, J., dissenting, in view of established jurisprudence followed in the court below. *Stanstead Election Case*, xx., 12.

10. *Objection taken in factum—Quashing for want of jurisdiction—Counsel fee.*—When objection to the jurisdiction is taken in the factum and motion to quash the appeal made at the earliest convenient time, general costs will be allowed and counsel fees as of a motion to quash; the counsel fee being in the discretion of the taxing officer subject to increase by order of the court or a judge. *Danjon v. Marquis* (iii., 251); *Reid v. Ramsay*; *McGowan v. Mockler*, Cass. Prac. (2 ed.), 81, 82; Cass. Dig. (2 ed.) pp. 420, 421.

11. *Certiorari—Quashing appeal for want of jurisdiction—Objection taken by court.*—On an appeal from a judgment of the Court of Queen's Bench for Manitoba making absolute a rule to quash a conviction brought up on *certiorari* from a magistrate's court, objection was taken by the court for want of jurisdiction by reason of the matter having arisen before a tribunal that was not a Superior Court. The appeal was quashed for want of jurisdiction and costs allowed to the respondent. *The Queen v. Nevins*, Cass. Dig. (2 ed.) 427; Cass. Prac. (2 ed.) 27, 81.

12. *Objection taken in factum—Want of jurisdiction—Quashing appeal.*—Where objection to the jurisdiction is taken in respondent's factum and motion to quash made at the earliest convenient time the general costs of the appeal will be given and a counsel fee as on a motion to quash. *Maire, etc., de*

Terrebonne v. Sœurs de la Providence, Cass. Dig. (2 ed.) 434; Cass. S. C. Prac. (2 ed.) 81.

13. *Appeal—Jurisdiction—Amount in controversy—Affidavits—Conflicting as to amount—The Exchequer Court Acts—50 & 51 Vict. c. 16, ss. 51-53 (D.)—54 & 55 Vict. c. 26, s. 8 (D.)—The Patent Act—R. S. C. c. 61, s. 36.*—On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, shewing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion. *Dreschel v. Auer Incandescent Light Mfg. Co.*, xxviii., 268.

14. *Abandonment of expropriation proceedings—Usurpation of lands—Illegal detention.*—After the commencement of expropriation proceedings the city took possession of lands, constructed works thereon and incorporated it with a public street. Acting under a special statute subsequently passed, the expropriation proceedings were abandoned without payment of indemnity or return of the property. The declaration in an action by plaintiff to obtain relief was defective but an amendment was ordered under s. 63, Supreme and Exchequer Courts Act for the purpose of determining the actual controversy and as defendant's conduct had been tyrannical and flagrantly illegal the plaintiff was allowed his costs in all the courts. *City of Montreal v. Hogan*, xxxi., 1.

15. *Contract for sale—Action for price—Counterclaim—Specific performance—Costs.*—In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance and paid into court the amount of the purchase money and interest, demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs, including costs on the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the court *en banc*. *Held*, reversing the judgment appealed from (33 N. S. Rep. 334), that as defendant had succeeded on his counterclaim he should not have been ordered to pay the costs before receiving his deed and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the court below *en banc*, and to the Supreme Court of Canada against plaintiff. Parties to pay their own costs in court of first instance.—*Held*, per Gwynne, J. Defendant should have all costs subsequent to the payment into court. *Millard v. Darrow*, xxxi., 196.

16. *Controverted election—Change of solicitors—Payment of costs—Stay of proceedings on appeal.*—While an appeal was pending, on 1st October, 1901, motion was made for a change of solicitors of record and was granted on deposit being made of \$400 to secure former solicitor's costs. Thereupon s. c. d.—13

counsel for appellant stated that an agreement for postponement of the hearing had been come to and the order for postponement was made accordingly. *Beaudin, K.C.*, then asked leave to present a petition to have a new petitioner appointed on the ground that the postponement was the result of fraudulent collusion between the new solicitors and the former petitioner who had been paid to abandon proceedings. Leave for the application was granted after notice in order that, if collusion was proved, the order to postpone might be rescinded. On 22nd November another motion to change solicitors was made and granted, on consent of parties, the hearing being ordered to be peremptorily fixed for the term then in session and not later than 29th November. This date for hearing was fixed by the court *suo motu*. On 29th November appellant's counsel applied to stay proceedings till costs of the solicitor on the record from 1st October to 22nd November had been paid. The order was refused and the hearing ordered to proceed forthwith. Upon appellant's counsel stating that the case could not be distinguished from the *Two Mountains Election Case* (31 Can. S. C. R. 437) the appeal was dismissed with costs. *Terrebonne Election Case*, 29th November, 1901.

17. *Provincial bonds—Succession duties—Exempted securities—Sale under will—Duty on proceeds—Proceedings by or against the Crown—Costs.*—Costs will be given for or against the Crown as in other cases. Jurisprudence of Privy Council and Supreme Court of Canada stated as settled by a number of cases specially referred to. *Lovitt v. Attorney-General of Nova Scotia*, xxxiii., 350.

18. *Increased counsel fee—Application in chambers—Quashing appeal.*

See PRACTICE OF SUPREME COURT, 65.

19. *Misconduct of administrator—Refusal to facilitate liquidation of estate—Personal litigation—Order charging his share with costs.*

See EXECUTORS AND ADMINISTRATORS, 2.

20. *Security—Special bail—Exoneretur—Practice.*

See APPEAL, 3.

21. *Assignment for benefit of creditors—Lien of execution creditor—Costs of appeal—Limitation of appeal.*

See APPEAL, 341.

22. *Quebec License Act, 1878—Refusal of license—Tender—Mandamus.*

See LIQUOR LAWS, 13.

23. *Application for appeal per saltum—Taxation of fee.*

See APPEAL, 186, 317, 318.

24. *Filing factum—Motion for non pros.—Indulgence on terms.*

See PRACTICE OF SUPREME COURT, 29.

25. *Adding parties—Transfer of plaintiff's interest—Attempt to get party responsible for costs—Costs on motion.*

See PRACTICE OF SUPREME COURT, 226.

26. Appeal—Obstructions by party—Settling case—Order extending time—Special order as to costs in both courts.

See PRACTICE OF SUPREME COURT, 79, 122.

27. Reimbursement of costs paid under Supreme Court order—Reversal of judgment by Privy Council.

See PRACTICE OF SUPREME COURT, 67.

28. Solicitor and client—Fund in court—Lien—Priority of payment.

See SOLICITOR, 9.

29. Appeal — Incomplete record—Case remitted to trial court—Directions as to costs.

See PRACTICE OF SUPREME COURT, 36.

30. Appeal—Cross-appeal to Privy Council—Practice—Stay of proceedings—Costs ordered to be costs in the cause.

See PRACTICE OF SUPREME COURT, 231, 232.

31. Appeal—Jurisdiction—Special leave—R. S. C. c. 135, ss. 40, 42—Form of application and order—Cross-appeal to Privy Council—Inscription pending such appeal—Stay of proceedings—Costs allowed.

See PRACTICE OF SUPREME COURT, 232.

32. Telephone pole—Negligence—Party to suit—Costs on unnecessary proceeding.

See NEGLIGENCE, 192.

33. Appeal per saltum — Motion granted with costs to be costs in the cause.

See PRACTICE OF SUPREME COURT, 195.

34. Stamps on election petition—Technical objections to form—Prête-nom—Preliminary objections—Abandonment of proceedings—Reinstatement—Costs—Matter of procedure.

See ELECTION LAW, 118.

3. REFUSAL OF COSTS.

35. Appeal standing dismissed on equal division—Discretion of court in awarding costs saved—38 Vict. c. 11, s. 38.]—By the Act 38 Vict. c. 11, s. 38, the Supreme Court of Canada being authorized, in its discretion, to order payment of costs of appeal, the decision in this case, being on an equal division that the respondent should not have costs, did not necessarily prevent the majority of the court from ordering the payment of costs of appeal in other cases of an equal division of opinion amongst the judges. *The Liverpool and London and Globe Insurance Co. v. Wyld*, i., 605, at pp. 693-696.

36. Court equally divided—Costs refused.]—The practice of the court has been to refuse costs when the court has been equally divided. *Curry v. Curry*, 13th March, 1880, Cass. Dig. (2 ed.) 676; *McLeod v. N. B. Ry. Co.*, v., 283; *Côté v. Morgan*, vii., 1. *McCallum v. Odette*, vii., 36; *Shield's v. Peak*, viii., 579; *Milloy v. Kerr*, viii., 474; *Megantic Election Case*, viii., 169; *Trust and Loan v. Lawra-son*, x., 679; see also Cass. S. C. Prac. (2 ed.), 83. *Costs are now allowed—See Practice of the Supreme Court No. 63, note.*

37. Mutual error—Preliminary exception—Jurisdiction—Objection taken by court—Divi-

sion of costs.] — Either through erroneous views held in common by both parties or by mutual agreement to let the matter pass in silence a question as to the jurisdiction of the court to hear an appeal was not raised but the case was argued on the merits. The court raised the question *proprio motu* and quashed the appeal without costs. *Bank of Toronto v. Les Curé, etc., de la Nativité de la Sainte Vierge*, xii., 25.

38. Quashing appeal—Objection taken by court.] — Where an appeal is quashed for want of jurisdiction it will be quashed without costs, if the objection has been taken by the court itself. *Major v. City of Three Rivers*, 18 C. L. J. 122, 17th November, 1882, Cass. Dig. (2 ed.) 422; *Gladwin v. Cummings*, 3rd November, 1883, Cass. Dig. (2 ed.) 426; *Gendron v. McDougall*, 4th March, 1885, Cass. Dig. (2 ed.) 429; *Bank of Toronto v. Les Curé, etc., de la Nativité*, xii., 25; *Monette v. Lefebvre*, xvi., 387.

39. Printing of case—Unnecessary matter—One-third cost deducted.] — The cost of printing unnecessary and useless matter in case was not allowed on taxation. *L'Heureux v. Lamarche*, xii., at p. 465; Cass. Dig. (2 ed.) 674.

40. Claim on public works contract—Waiver of legal rights—Costs withheld from Crown.]—Where a claim against the Government was referred to arbitration, the Crown not insisting on its strict legal rights and the claimants thereby put to great expense, the Crown was deprived of costs in all the courts. *The Queen v. Starrs*, xvii., 118.

41. Quashing appeal—Objection taken by court—Jurisdiction.]—On quashing an appeal for want of jurisdiction on suggestion by a member of the court at the hearing no costs were allowed. *Accident Ins. Co. of N. A. v. McLachlin*, xviii., 627.

42. Objections taken for first time on appeal—Amending answers.]—Where objections were taken for the first time on appeal the appellant was not allowed costs. *Canada Southern Ry. Co. v. Norvell*; *Canada Southern Ry. Co. v. Cunningham*; *Canada Southern Ry. Co. v. Duff*; *Canada Southern Ry. Co. v. Gatfield*, Cass. Dig. (2 ed.) 34; Cass. S. C. Prac. (2 ed.) 83.

43. Motion to quash—Want of jurisdiction—Delay in application—Refusal of costs.]—On quashing an appeal for want of jurisdiction the court refused costs because a motion to quash had not been made at the earliest convenient opportunity. *Gendron v. McDougall*, Cass. Dig. (2 ed.) 429; Cass. S. C. Prac. (2 ed.)

44. Taxation in Supreme Court of Canada—Solicitor and client.]—An application for an order directing registrar to tax costs between solicitor and client was refused, the Chief Justice stating that the question was duly considered by the judges at the organization of the Supreme Court, and it was not thought advisable to regulate costs between solicitor and client. *Boak v. Merchants Mar. Ins. Co.*, Cass. Dig. (2 ed.) 677.

45. Counsel fee—Advocate arguing appeal in person as respondent.] — The respondent who was an advocate, argued his appeal in

person. Motion to tax counsel fee was refused. Fournier and Henry, J.J., dissenting. *Charlevoix Election* (Case Valin v. Langlois), Cass. S. C. Prac. (2 ed.) 140.

46. *Application for habeas corpus—Appeal in favorem libertatis.*—Costs are not given, as a general rule, in *habeas corpus* matters. In *re Johnson*, Cass. Dig. (2 ed.) 329, 677; S. C. Prac. (2 ed.) 53, 83.

47. *Libel—Slander—Privileged statements—Public interest—Charging corruption against political candidate—Challenging to sue—Justification—Costs.*—The defendant had caused a defamatory statement to be printed in a newspaper, and on a separate fly-sheet, and circulated through the constituency, during a Parliamentary election, with a printed challenge to the plaintiff and others implicated in the charges made to justify their innocence by taking an action for damages in case they were not guilty, and offering at the same time to make a deposit to cover the costs of suit.—The Supreme Court of Canada, in affirming the judgment of the Court of Queen's Bench for Lower Canada (which had reversed the judgment of the Superior Court in favour of the plaintiff, and dismissed the action with costs), refused to allow costs under the circumstances. Strong, C.J., dissented, being of opinion that the Superior Court judgment for \$100 damages with costs as of an action for that amount should be restored. *Gauthier v. Jeannotte*, xxviii., 590.

48. *Assignment for benefit of creditors—Fraudulent preference—Bribery.*—Where the appellant was an inspector of an insolvent estate and participated in arrangements intended to secure a fraudulent preference to a particular creditor the appeal was allowed with costs but the action against him was dismissed without costs and an order made that no costs should be allowed in any of the courts below. *Brigham v. Banque Jacques-Cartier*, xxx., 429.

49. *Action for personal injuries—Prescription—Failure to plead exception—Judicial notice of limitation—Dismissal of action—Arts. 2188, 2262, 2267 C. C.*—In an action for bodily injuries where the extinction of the right of action by prescription was not pleaded or raised in the courts below and upon an appeal the prescription was judicially noticed and the action dismissed, the appeal was allowed without costs. *City of Montreal v. McGee*, xxx., 582.

50. *Construction of written contract—Specifications—"From" and "to" streets—Reference to annexed plan—Mistake—Apportionment of costs.*—Where the contentions of neither party were fully adopted, the appeal was allowed without costs in the Supreme Court of Canada. *City of Montreal v. Canadian Pac. Ry. Co.*, xxxiii., 396.

51. *Appeal—Jurisdiction—Objection taken by court—Quashing appeal.*

See APPEAL, 109, 111.

52. *Irrelevant matter in factum—Censure of solicitor—Loss of costs.*

See PRACTICE OF SUPREME COURT, 28.

53. *Equal division of opinion—Judgment below standing affirmed—Dismissal of appeal without costs.*

See ELECTION LAW, 73.

54. *Appeal—Equal division of opinion—Dismissal without costs.*

See APPEAL, 163.

55. *Appeal—Equal division of opinion—Dismissal without costs.*

See LIQUOR LAWS, 2.

56. *Scandalous reflections in appellant's factum—Ordered to be taken off files—Costs withheld.*

See PRACTICE OF SUPREME COURT, 15.

57. *Expropriation of land—Award less than amount offered—Special matter considered by arbitrators—Refusal of costs.*

See ARBITRATIONS, 28.

58. *Application to court—Setting down Exchequer Court appeal—Hearing—Lapse of time—New point of practice—Costs withheld.*

See PRACTICE OF SUPREME COURT, 114.

59. *Appeal failing upon equal division of court—Practice—Costs refused.*

See RIDEAU CANAL LANDS, 2.

60. *Question of jurisdiction—Failure to object in factum—Mitigation of costs.*

See APPEAL, 368.

61. *Quashing for want of jurisdiction—Objection taken in factum—Costs allowed on motion only.*

See APPEAL, 184.

62. *Quashing appeal—Objection taken by court—Costs withheld.*

See APPEAL, 110, 111.

63. *Question of jurisdiction—Objection taken by court—Costs withheld.*

See APPEAL, 113.

64. *Taxation of witnesses—Controverted election—Disallowance in cases not appealed.*

See PRACTICE OF SUPERIOR COURT, 177.

65. *New objection taken on appeal—Prescription—Costs withheld.*

See LIMITATIONS OF ACTIONS, 22.

66. *Appeal—Jurisdiction—Award by drainage referee—R. S. C. c. 135, s. 24—Costs withheld—Objection taken by court.*

See APPEAL, 52.

67. *Appeal—Dismissal for want of prosecution—Application to reinstate refused without costs—Notice—Practice.*

See PRACTICE OF SUP. COURT, 95, 96, 97.

68. *Appeal—Jurisdiction—Final judgment—R. S. C. c. 135, s. 24—Costs reduced.*

See PRACTICE OF SUP. COURT, 68.

4. OTTIER CASES.

69. *In Exchequer Court—Security for costs—Time for application—Petition of right—Discretionary order.*—Per Fournier, J., in the Exchequer Court of Canada. Where, by a letter addressed to the suppliant, the Secretary of the Public Works Depart-

ment stated, that he was desired by the Minister of Public Works to offer the sum of \$3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused, on the ground that the power of ordering a party to give security for costs, being a matter of discretion and not of absolute right, the Crown in this case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. Application for security for costs in the Exchequer Court must be made within the time allowed for filing statement in defence, except under special circumstances. *Wood v. The Queen*, vii., 631.

70. *Action by firm of solicitors—Set-off—Mutual debts—Appeal—Final judgment.*—In an action by a firm of attorneys for costs defendants cannot set off a sum paid by one of them to one of the attorneys for special services rendered by him, there being no mutuality and the payment not being for the general services covered by the retainer to the firm.—*Per Taschereau, J.* The judgment of the Court of Appeal affirming the Divisional Court judgment on appeal from a report of the taxing officer on a reference is not a final judgment from which an appeal lies to the Supreme Court of Canada. *McDougall v. Cameron; Bickford v. Cameron*, xxi., 379.

71. *Supreme and Exchequer Courts of Canada—Parol evidence—Quantum meruit.*—In proceedings before the Supreme and Exchequer Courts of Canada an attorney has the right to establish the *quantum meruit* of his services by oral evidence in an action for his costs. *Paradis v. Bossé*, xxi., 419.

72. *Distraction—Motion to amend pleadings.*—In appeal, where distraction of costs has not been asked for by the pleadings, or by the factum, it should be asked for when judgment is rendered. If not then asked for, any subsequent application must be made to the court upon notice to the other side. See *Converse v. Clarke*, 12 L. C. R. 402; *The Waterworks Co. of Three Rivers v. Dostaler*, 18 L. C. J. 196; *Lator v. Campbell*, 7 Legal News, 163. *Letourneau v. Dansereau*, Cass Dig. (2 ed.) 677; Cass. S. C. Prac. (2 ed.) 84.

73. *Estoppel—Loss of right of appeal—Acquiescence in judgment—Reception of costs by appellant.*—The judgment appealed from gave certain costs to the appellant which were taxed and paid to him out of moneys in court to the credit of the cause. A motion to quash the appeal was made on the ground that by accepting these costs the appellant has acquiesced in the judgment appealed from by taking a benefit thereunder. Held, that the reception of these costs was in no way inconsistent with the appeal against the construction the judgment placed upon the will in dispute in the case. *In re Ferguson; Turner v. Bennett; Turner v. Carson*, xxviii., 38.

74. *Appeal—Discretion of court appealed from—Costs.*—It is only when some fundamental principle of justice has been ignored, or some other gross error appears that the Supreme Court will interfere with the discretion of provincial courts in awarding or withholding costs. *Smith v. St. John City Ry. Co.; Consolidated Electric Co. v. Atlantic*

Trust Co.; Consolidated Electric Co. v. Pratt, xxviii., 603.

75. *Drainage—Qualification of petitioner—"Last revised assessment roll"—R. S. O. (1897) c. 226—Costs of non-appealing party.*—The judgment appealed from (1 Ont. L. R. 156, 292) reversed the trial court judgment (32 O. R. 247) and held that the "last revised assessment roll" governing the status of petitioners in proceedings under the Drainage Act, was the roll in force at the time the petition was adopted by the municipal council and referred to the engineer for report, and not the roll in force at the time that the by-law was finally passed. The contractor had been made party in the Court of Appeal for Ontario and appeared at the hearing, but did not himself appeal. The judgment appealed from held that the effect of allowing the appeal did not give him any costs on the appeal. The Supreme Court affirmed the judgment appealed from. *Challoner v. The Township of Lobo*, xxxii., 505.

76. *Privy Council judgment—Rule in Supreme Court—Special circumstances.*

See PRACTICE OF SUPERIOR COURT, 229.

77. *Lien by solicitor—Money deposited in court—Opposition en sous ordre—Art. 753 C. C. P.—Sub-collocation.*

See OPPOSITION, 16.

78. *Judgment dismissing appeal—Non-procedendo—Default of appearance.*

See PRACTICE OF SUPERIOR COURT, 91.

79. *Execution for costs of Supreme Court judgment—Stay of proceedings—Amount in dispute—Appeal—Jurisdiction.*

See PRACTICE OF SUP. COURT, 249.

80. *Stay of proceedings in court below—Subsequent reference—Order as to costs generally.*

See APPEAL, 323.

81. *Taxation in suit against school trustees—Application by ratepayer—Jurisdiction of provincial courts—Interference on appeal.*

See APPEAL, 179.

82. *Immoral agreement—Trust—Lien for costs—Evidence—Husband and wife.*

See CONTRACT, 162.

83. *Counterclaim by solicitor against sheriff's fees—Signed bill of costs—Set-off.*

See SOLICITOR, 10.

COUNSEL.

Right of action for fees—Retainer—Refresher—Fishery commission—Petition of right—Quantum meruit—Lex loci.—An advocate of the Province of Quebec, one of Her Majesty's counsel, was retained by the Government of Canada as of counsel for Great Britain before the Fishery Commission at Halifax pursuant to the Treaty of Washington. As to terms of retainer, the judge in the Exchequer Court found "that each of the counsel engaged was to receive a refresher equal to the retaining fee of \$1,000, that they were to be at liberty to draw on a bank at Halifax

for \$1,000 a month during the sittings of the commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded by the commissioners was \$5,500,000. The suppliant claimed \$10,000 as his remuneration, in addition to \$8,000 already received by him. *Held, per Fournier, Henry and Taschereau, JJ.*, that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that \$8,000 awarded him in the Exchequer Court was a reasonable sum.—*Per Fournier, Henry, Taschereau and Gwynne, JJ.* By the law of the Province of Quebec, counsel and advocates can recover for fees stipulated for by an express agreement.—*Per Fournier and Henry, JJ.* By the law also of the Province of Ontario counsel can recover for such fees.—*Per Ritchie, C.J.* As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec; that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie.—*Per Strong, J.* The terms of the agreement, as established by the evidence, shewed, in addition to an express agreement to pay the suppliant's expenses, only an honorary and gratuitous undertaking on the part of the Crown to give additional remuneration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered; and the suppliant could therefore recover only his expenses in addition to the amount so paid.—*Per Gwynne, J.* By the Petition of Right Act, s. 19, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances. By the laws in force there prior to 23 & 24 Vict. c. 34 (Imp.), counsel could not, at that time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover.—*The Queen v. Doutre, vi., 343.*

[NOTE.—On appeal to the Privy Council, it was *Held*, 1. that in Quebec an advocate is entitled, in the absence of special stipulation, to sue for and recover on a *quantum meruit* in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the bar.—2. That in the absence of stipulation to the contrary, express or implied, Mr. Doutre must be deemed to have been employed upon the usual terms upon which such services are rendered, and that his status in respect both of right and remedy was not effected either by the *lex loci contractus* or the *lex loci solutionis*. — 3. That the Petition of Right Act, 1876, s. 19, s.s. 3, does not in such case bar the remedy against the Crown by petition. 9 App. Cases 745.]

COUNTERCLAIM.

1. *Solicitor and client—Action by sheriff for fees—Pleading—Setting off claim for overcharges in bills paid—Signed bill of costs.*—

In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested, because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. *Taylor v. Robertson, xxxi., 615.*

2. *Action for price of land—Tender and deposit—Demand of deed with warranty.*

See COSTS, 15.

3. *Contract by correspondence—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Condition precedent—Right of action.*

See CONTRACT, 217.

COUNTY COURTS AND JUDGES.

1. *Statute—Amending Act—Retroaction—Sale of lands—Judgments and orders.*—Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following session the Legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment." *Held, Sedgewick, J.*, dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments and not to orders and judgments of the County Courts. *Held, further*, reversing the judgment of the King's Bench (13 Man. L. R. 419), *Davies, J.*, dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force but not from the date on which they were made. *Held, per Sedgewick, J.*, that the clause had no retroactive operation at all. *Schmidt v. Ritz, xxxi., 602.*

2. *Powers of judge—Scrutiny of votes—Inquiry into corrupt acts.*

See CANADA TEMPERANCE ACT, 1.

3. *Municipal inquiry—Judicial functions—Inferior tribunal—R. S. O. (1887) c. 184, s. 477.*

See PROHIBITION, 1.

4. *Jurisdiction—Legislative authority—Provincial courts—Speedy trials—Criminal procedure—Administration of justice.*

See CONSTITUTIONAL LAW, 22.

5. *Appeal—Jurisdiction—Case originating in County Court—Transfer to High Court.*

See **APPEAL**, 115.

6. *Appeal—Jurisdiction—52 Vict. c. 37, s. 2 (D.)—Appointment of presiding officers—County Court Judges—55 Vict. c. 48 (Ont.)—57 Vict. c. 51, s. 5 (Ont.)—58 Vict. c. 47 (Ont.)—Construction of statute—Appeal from assessment—Final judgment—"Court of last resort."*

See **APPEAL**, 114.

7. *Sheriff—Trespass—Sale of goods by insolvent—Bona fides—Judgment of inferior tribunal—Estoppel—Res judicata—Bar to action—Fraudulent preferences—Pleading.*

See **INSOLVENCY**, 22.

COURT.

1. *Jurisdiction—Action for redemption—Foreign lands—Lex rei sitae—Action in personam.]—An Ontario Court will not grant a decree for redemption of a mortgage on lands in Ontario at suit of a judgment creditor of a mortgagor, whose judgment being registered is, by statute in Manitoba, a charge upon the lands, the judgment creditor and mortgagee both having domicile in Ontario.—The only locus standi the judgment creditor would have in an Ontario Court would be to have direct relief against the land by means of a sale to which relief he would be restricted in such a case in a suit in the courts of Manitoba, and a decree for a sale would not have been enforceable in the latter province.—A court of equity will, where personal equities exist between two parties over whom it has jurisdiction, though such equities may refer to foreign lands, give relief by a decree operating not directly upon the lands, but directly in personam, but such relief will never be extended so far as decreeing a sale in the nature of an equitable execution. *Henderson v. Bank of Hamilton*, xxiii., 716.*

2. *Constitution of Election Court—Substitution of new court—Change of name—Controlled election.*

See **ELECTION LAW**, 101.

3. *Criminal jurisdiction—Oyer and terminer—Commission—Supreme Court of B. C.—Constitution.*

See **HABEAS CORPUS**, 2.

4. *Jurisdiction—Municipal corporation—Opening road allowances—C. S. U. C. c. 54—R. S. O. (1887) c. 184, ss. 524, 531.*

See **MUNICIPAL CORPORATIONS**, 160.

5. *Inferior tribunal—Judge of County Court—Municipal inquiry—R. S. O. (1887) c. 184, s. 477.*

See **PROHIBITION**, 1.

6. *Lessor and lessee—Overholding tenant—Claim for use and occupation—Jurisdiction—Arts. 887, 888 C. C. P.*

See **LANDLORD AND TENANT**, 23.

7. *Inferior tribunals—Taxing costs—Interference by appellate court.*

See **APPEAL**, 179.

8. *Appeal—Jurisdiction—52 Vict. c. 37, s. 2 (D.)—Appointment of presiding officers—County Court judges—55 Vict. c. 48 (Ont.)—57 Vict. c. 51, s. 5 (Ont.)—58 Vict. c. 47 (Ont.)—Construction of statute—Appeal from assessment—Final judgment—"Court of last resort."*

See **APPEAL**, 114.

9. *Divisional Court—Appeal direct—R. S. C. c. 135, s. 26, s.-s. 3—Order in chambers.*

See **APPEAL**, 329.

10. *Appeal—Forfeiture—Waiver—Ouster of jurisdiction—Objection taken by court.*

See **APPEAL**, 432.

11. *Criminal law—Perjury—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute—R. S. O. arts. 5551, 5561—Criminal Code, s. 145.*

See **CRIMINAL LAW**, 24.

12. *Construction of statute—Special leave to appeal—"Judge of court appealed from"—Jurisdiction—R. S. C. c. 135, s. 42.*

See **APPEAL**, 336.

COURT HOUSES.

1. *Removal from shire town—R. S. N. S. (5 ser.) c. 20, 1.*

See **MUNICIPAL CORPORATION**, 81.

2. *Municipal corporation—Construction of statute—55 Vict. c. 42, ss. 397, 404, 469, 473 (Ont.)—City separated from county—Maintenance of court house and goal—Care and maintenance of prisoners.*

See **ARBITRATIONS**, 30.

COURT OF EQUITY.

Agreement as to boundaries—Statute of Frauds—Purchaser for value—Notice—Discretionary jurisdiction.

See **BOUNDARY**, 2.

COURT OF PROBATE.

Jurisdiction—Accounts of executors and trustees—Res judicata.

See **TRUSTS**, 12, 14.

COURT OF REVIEW.

1. *Jurisdiction—Judgment in Court of Review—Judgment in first instance varied—Art. 43 C. P. Q.—54 & 55 Vict. c. 25, s. 3, ss. 3—Construction of statute.]—Where the Superior Court, sitting in Review, has varied a judgment, on appeal from the Superior Court, by increasing the amount of damages, the judgment rendered in the court of first instance is not thereby confirmed, and consequently there cannot be an appeal direct from the judgment of the Court of Review to the Supreme Court of Canada under the provisions of the third sub-section of section three, c. 25 of the statutes of 54 & 55 Vict. (D.), amending the*

Supreme and Exchequer Courts Act. *Simpson v. Palliser*, xxix., 6.

2. *Jurisdiction—New trial—Entering judgment on verdict—34 Vict. c. 4, s. 10 (Que.)—35 Vict. c. 6, s. 13 (Que.)*

See RAILWAYS, 108.

3. *Appeal from Court of Review—Appeal to Privy Council—Appealable amount—54 & 55 Vict. (D.) c. 25, s. 3, s.-ss. 3 & 4—C. S. L. C. c. 77, s. 25—Arts. 1115, 1178 C. C. P.—R. S. Q. art. 2311.*

See STATUTE, 145.

4. *Appeal—Right of appeal to Privy Council—Construction of statute—Final judgment—R. S. C. c. 135, ss. 24 (j), 28 & 29-54 & 55 Vict. c. 25, s. 3 (D.)*

See APPEAL, 197.

5. *Legislative jurisdiction—Appeals from Court of Review—54 & 55 Vict. c. 25, s. 3 (D.)*

See CONSTITUTIONAL LAW, 31.

6. *Parties on appeal—Practice—Proceeding in name of party deceased—Amendment on review—Jurisdiction—Interference with discretion on appeal.*

See APPEAL, 139.

COVENANT.

1. *Lease for one year—Dominion license to cut timber—Warranty of title—Quiet enjoyment.*

See CROWN LANDS, 92.

2. *Mortgage—Married woman—Implied contract—Disclaimer.*

See MARRIED WOMAN, 4.

AND see CONTRACT—MARRIAGE LAWS.

CRIMINAL CONVERSATION.

Statute of Limitations—Adulterous intercourse—Damages.—The Statute of Limitations is not a bar to an action for criminal conversation where the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought. Judgment appealed from (27 Ont. App. R. 703) affirmed.—*Quære*, Does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action? *King v. Bailey*, xxxi., 338.

CRIMINAL LAW.

1. *Larceny—Unstamped promissory note—Valuable security—32 & 33 Vict. c. 21 (D.)—Form of indictment.*—S. was indicted, tried and convicted for stealing a note for the payment and value of \$258.33, the property of A. McC. and another. The evidence shewed that the note was drawn by A. McC. and C. R., and made payable to S.'s order and was given by mistake to S., it being supposed that \$258.33 was due to him, instead of \$175.00.

The mistake being immediately discovered, S. returned the note to the drawers, unstamped and undorsed, in exchange for another note of \$175.00, but S. afterwards, on the same day stole the note, caused it to be stamped, indorsed it, and tried to collect it. *Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that S. was not guilty of larceny of "a note" or of "a valuable security" within the meaning of the statute, and that the offence of which he was guilty was not correctly described in the indictment. *Scott v. The Queen*, ii., 349.

2. *Reserved case—Obtaining money under false pretences—Preferment of indictment—Delegation of authority by Attorney-General—32 & 33 Vict. c. 29, s. 28—Quashing indictment.*—Under 32 & 33 Vict. c. 29, s. 28, the Attorney-General cannot delegate to the judgment and discretion of another the power which he is authorized personally to exercise in directing that an indictment for obtaining money by false pretences should be laid before the grand jury; and it being admitted that the Attorney-General gave no directions with reference to the indictment, in the case reserved, a motion to quash should have been granted. [The judgment appealed from (1 Dor. Q. B. 126) was reversed and the conviction set aside.] *Abrahams v. The Queen*, vi., 10.

3. *Indictment—Misjoinder of counts—Manslaughter—Evidence.*—An indictment contained two counts, one charging murder, the other manslaughter of the same person, on the same day. Upon "a true bill," found, a motion to quash the indictment for misjoinder was refused, the prosecutor electing to proceed on the first count only, and the prisoner was found guilty of manslaughter. *Held*, affirming the Supreme Court of New Brunswick (5 P. & B. 449), that the indictment was good and that as the crime charged in the second count was involved in that charged by the first count the prisoner could not be prejudiced and the trial had been regular.—The prisoner was convicted of manslaughter in killing his wife, who died 10th November, 1881. The immediate cause of death was acute inflammation of the liver, which might be occasioned by a blow or a fall against a hard substance. On 17th October preceding her death, the prisoner had knocked his wife down with a bottle; she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.—The reserved questions were whether the evidence of assaults and violence prior to 10th November or 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment? *Held*, affirming the judgment appealed from, that the evidence was properly received, and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner. *Theal v. The Queen*, vii., 397.

4. *Negative averments—Indictment for perjury—Evidence of special facts.*—D., in answering to *faits et articles* on the contestation of a *saisie arrêt*, or attachment, stated, among other things, "1st, that he, D., owed nothing for his board; 2nd, that he, D., from about the

beginning of 1880 to towards the end of the year 1881, had paid the board of one F., the rent of his room, and furnished him with all the necessities of life with scarcely any exception: 3rd, that he, F., during all that time, 1880 and 1881, had no means of support whatever." D. being charged with perjury, in the assignments of perjury and in the negative averments, the facts sworn to by D. in his answers were distinctly negatived in the terms in which they were made. *Held*, that under the general terms of the negative averments it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on *faits et articles*, and the conviction could not be set aside because of the admission of such proof. Even if the evidence was inadmissible there being other charges in the same count which were pleaded to, a judgment given on a general verdict of guilty on that count would be sustained. *Dovnie v. The Queen*, xv., 358.

5. *Procedure—Indictment for rape—Conviction for assault with intent—Attempt—R. S. C. c. 174, s. 183—Punishment.*—An assault with intent to commit a felony is an attempt to commit such felony within the meaning of s. 183 of R. S. C. c. 174.—On an indictment for rape a conviction for assault with intent to commit rape is valid.—On such conviction the prisoner was held properly sentenced to imprisonment under R. S. C. c. 162, s. 38. *John v. The Queen*, xv., 384.

6. *Trial—Felony—Jury attending church—Preacher's remarks—Influence on jury—Expert testimony.*—In the course of a trial for murder by shooting the jury attended church in charge of a constable, and the clergymen directly addressed them, referring to the case of a man hanged for murder in P. E. I., and urging if they had the slightest doubt of the guilt of the prisoner they were trying, to temper justice with equity. The prisoner was convicted. *Held*, affirming the judgment of the Court of Crown Cases reserved in Nova Scotia, that, although the remarks of the clergyman were highly improper, it could not be said that the jury were so influenced by them as to affect their verdict.—A witness was called at the trial to give evidence as a medical expert and in answer to the Crown prosecutor he said, "there are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body. *Held*, Strong and Fournier, JJ., dissenting, that by his preliminary statement, the witness had established his capacity to speak as a medical expert, and it not having been shewn by cross-examination, or other testimony, that there were no such *indicia* as stated, his evidence as to the distance at which the shot was fired was properly received. *Prepper v. The Queen*, xv., 401.

7. *Trial—Crown cases reserved—R. S. C. c. 174, ss. 246, 249—Summoning jury—Personation of juror—Irregularity—Cured by verdict.*—B., found guilty of feloniously administering poison with intent to murder, moved in

arrest of judgment on the ground that one of the jurors who had tried the case had not been returned as such. The general panel of jurors contained the names of Joseph L. and Moise L. The special panel for the term of the court, at which the prisoner was tried, contained the name of Joseph L. The sheriff served Joseph L.'s summons on Moise L., and returned Joseph L. as the party summoned. Moise L. appeared in court, answered to the name of Joseph, and was sworn as a juror without challenge when B. was tried. On a reserved case, *Held*, per Ritchie, C.J., and Taschereau, and Gwynne, JJ., that the point should not have been reserved by the judge at the trial, it not being a question arising at the trial within the meaning of R. S. C. c. 174, s. 259, *Held*, also, per Taschereau and Gwynne, JJ., affirming the judgment of the Court of Queen's Bench, that assuming the point could be reserved, R. S. C. c. 174, s. 246 clearly covered the irregularity complained of. Strong and Fournier, JJ., dissented. *Brisebois v. The Queen*, xv., 421.

8. *Assault on constable—Serving summons—Indictable offence—Competency of wife as witness—Defendant—R. S. C. c. 162, s. 34; R. S. C. c. 174, s. 216.*—An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of the Canada Temperance Act is an assault on a peace officer in the due execution of his duty and indictable under R. S. C. c. 162, s. 34.—On the trial of an indictment for such assault the wife of the defendant is not a competent witness on his behalf. *McFarlane v. The Queen*, xvi., 393.

9. *Indictment—Names of deceased—Alias dictus—Proof of names—Variance.*—Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all.—J. was indicted for the murder of A. J., otherwise called K. K., and, on trial, was convicted of manslaughter. Deceased was known by the name of K. K., but there was no evidence that she ever went by the other name. *Held*, affirming the Court of Crown Cases Reserved (Quebec), that this variance between the indictment and the evidence did not invalidate the conviction for manslaughter. *Jacobs v. The Queen*, xvi., 433.

10. *Criminal procedure—Error—Crown challenges—Standing aside jurors a second time—Question of law not reserved at trial—R. S. C. c. 174, ss. 164, 259 & 266.*—When a panel had been gone through and a full jury had not been obtained the Crown on the second calling over the panel was permitted, against the objection of the prisoner, to direct eleven of the jurymen on the panel to stand aside a second time, and the judge presiding at the trial was not asked to reserve and neither reserved nor refused to reserve the objection. After conviction and judgment a writ of error was issued.—*Held*, per Taschereau, Gwynne and Patterson, JJ., affirming the judgment appealed from, that the question was one of law arising on the trial which could have been reserved under R. S. C. c. 174, s. 259, and the writ of error should, therefore, be quashed.—Per Ritchie, C.J., and Strong and Fournier, JJ. That the question arose before the trial commenced and could not have been reserved, and as the error of law appeared on the face of the record the remedy by writ of error was applicable. *Brisebois v. The Queen* (15 Can. S. C. R. 421) referred to.—Per Ritchie, C.J.,

and Strong, Fournier and Patterson, J.J., that the Crown could not without shewing cause for challenge direct a juror to stand aside a second time. *The Queen v. Lacombe* (13 L. C. Jur. 259) overruled.—*Per Gwynne, J.* That all the prisoner could complain of was a mere irregularity in procedure which could not constitute a mis-trial. *Morin v. The Queen*, xviii., 407.

11. *Extradition—Forgery—Uttering forged order for payment of money—Forged indorsement—Trying for offence other than that for which prisoner extradited—Appeal—Demurrer.*—The prisoner was tried at the October Term, 1884, of the Supreme Court at Halifax, the indictment, charging—1. That the said J. C. did feloniously offer, utter, dispose of and put off, knowing the same to be forged, a certain check or order for the payment of money, which said forged order is as follows, that is to say—

“No. E. 43460.

Halifax, N.S., February 13th, 1884.
Merchants' Bank of Halifax:

Pay William McFatridge, or order, two hundred and twenty-four dollars and seventeen cents (\$224.17).

(Sgd.) Longard Bros.

And indorsed as follows: “W. McFatridge.”

With intent to defraud.—2. That the said J. C. afterwards, to wit, on the day and year aforesaid, having in his custody and possession a certain other order for the payment of money, which said last mentioned order is as follows, that is to say—

No. E. 43460.

Halifax, N.S., February 13th, 1884.
Merchants' Bank of Halifax:

Pay William McFatridge, or order, two hundred and twenty-four dollars and seventeen cents (\$224.17).

(Sgd.) Longard Bros.

—He, the said James Cunningham, afterwards, to wit, on the day and year last aforesaid, at Halifax aforesaid, feloniously did forge on the back of said last mentioned order a certain indorsement of said order for the payment of money, which said forged indorsement is as follows, that is to say, “W. McFatridge,” with intent to defraud.—3. That the said J. C. afterward, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off, a certain other forged order for the payment of money, which forged order is as follows, that is to say—

No. E. 43460.

Halifax, N.S., February 13th, 1884.
Merchants' Bank of Halifax:

Pay William McFatridge, or order, two hundred and twenty-four dollars and seventeen cents (\$224.17).

(Sgd.) Longard Bros.

And indorsed “W. McFatridge.”

With intent thereby then to defraud.—Counsel for prisoner, before the jury were sworn, objected to the jurisdiction of the court on the ground that the indictment charged an offence or offences different from that for which the prisoner was extradited, to which plea the Attorney-General demurred. Judgment was pronounced sustaining the demurrer and the trial proceeded. The prisoner was convicted on the first and third counts of the indictment, and acquitted on the second.—At

the close of the trial counsel for prisoner renewed his application. The C.J. agreed to reserve a case for the opinion of the judges and submitted:—(1) Whether the prisoner was indicted and tried for another and different offence, or other and different offences, than that for which he was extradited at the instance of the Government of Canada; and if so, whether the court had jurisdiction to try and convict the prisoner of such offence or offences.—(2) Whether the evidence on the part of the Crown, as reported herewith, is sufficient to sustain a conviction on the first and third counts of the indictment or on either of those counts. The papers put in evidence on the trial to be considered and read as part of the case.—The majority of the Supreme Court (N.S.), *Held*, that the prisoner was properly convicted on the third count (6 R. & G. 31.) *Held, per Fournier, Henry and Taschereau, J.J., (Ritchie, C.J. and Strong, J., dissenting)*, that evidence of the uttering of a forged indorsement of a negotiable check or order is insufficient to sustain a conviction on a count of an indictment charging the uttering of a forged check or order. On the second question reserved, therefore, the judgment of the court below should be reversed and the prisoner ordered to be discharged.—*Per Ritchie, C.J.* The question raised by the demurrer was not properly before the Court in Appeal, the court below having been unanimous with respect to it.—*Per Strong, J.* The court below rightly held, on the authority of *Rex v. Faderman* (Den. C. C. 572), that the question raised by the demurrer was not properly before the court, the Chief Justice having given judgment on the demurrer overruling it at the trial. Moreover, there was nothing in the law under which the prisoner was extradited to prevent the court from trying him for any offence for which he was, according to the law of the Dominion, justiciable before it.—Appeal allowed. *Queen v. Cunningham*, Cass. Dig. (2 ed.) 194.

12. *Criminal proceeding—Contempt of court.*—Contempt of court is a criminal proceeding. *Ellis v. The Queen*, xxii., 7.

13. *Criminal appeal—Criminal Code, 1892, s. 742—Undivided property of co-heirs—Fraudulent appropriations—Unlawfully receiving—R. S. C. c. 164, ss. 65, 83, 85.*—Where on a criminal trial a motion for a reserved case made on two grounds is refused, and on appeal to the Court of Queen's Bench (appeal side), that court is unanimous in affirming the decision of the trial judge as to one of such grounds, but not as to the other, an appeal to the Supreme Court can only be based on the one as to which there was dissent.—A conviction under s. 85 of the Larceny Act, R. S. C. c. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under s. 65.—A fraudulent appropriation by the principal, and a fraudulent receiving by the accessory, may take place at the same time and by the same Act.—Two bills of indictment were presented against A. and B. under ss. 83 and 85 of the Larceny Act. By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use \$7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same. The second count charged B. (the appellant) with having unlawfully received the \$7,000, the property of the heirs which had

before then been unlawfully obtained and taken and appropriated by said A., the taking and receiving being a misdemeanour under s. 85, c. 164, R. S. C. at the time when he so received the money. A. who was the executor of C.'s estate, and the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving. On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A., who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. Lacoste, C.J., dissenting, held the conviction good. At the trial it was proved that A. and B. agreed to appropriate the money, and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of the money, took it to B.'s store, and handed it to him saying: "Here is the bundle; take good care of it." On the same evening, he absconded to New York.—On appeal to the Supreme Court of Canada: *Held*, affirming the judgment of the court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted under s. 85, c. 164, R. S. C., of receiving it knowing it to have been unlawfully obtained. Gwynne, J., dissenting. *McIntosh v. The Queen*, xxiii., 180.

14. *Betting on election—Stakeholder—R. S. C. c. 159, s. 9—Accessories—R. S. C. c. 145, s. 7.*—The depositary of money staked by two individuals on the result of an election for the House of Commons is guilty of a misdemeanour under R. S. C. c. 159, s. 9 (Crim. Code, s. 204), and the bettors are accessories to the commission of the offence. *Reg. v. Dillon* (10 Ont. F. R. 352) overruled. *Walsh v. Trebilcock*, xxiii., 695.

15. *Will—Devise—Death of testator caused by devisee—Felonious act.*—No devisee can take under the will of a testator, whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. Taschereau, J., dissenting. *Lundy v. Lundy*, xxiv., 650.

16. *The Criminal Code, s. 575 — Persona designata—Officers de facto and de jure—Chief constable—Common gaming house—Confiscation of gaming instruments, moneys, etc.—Evidence—The Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.*—Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. Girouard, J., dissenting.—The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*.—In an action to revindicate the moneys so seized, the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so

as to be a competent witness in his own behalf in the Province of Quebec.—*Per Strong, C.J.* A judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revindication. *O'Neill v. Attorney-General of Canada*, xxvi., 122.

17. *Appeal—Jurisdiction—Criminal Code, 1892, ss. 742-750 — New trial—Statute, construction of.*—An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of Appeal under the provisions of the Criminal Code, 1892, ss. 742 to 750 inclusively.—The word "opinion" as used in the second subsection of section seven hundred and forty two of "The Criminal Code, 1892," must be construed as meaning a "decision" or "judgment" of the Court of Appeal in criminal cases. *Viau v. The Queen*, xxix., 90.

18. *Construction of statute—20 & 21 Vict. c. 54, s. 12 (Imp.)—Application—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.*—The Imperial Act, 20 & 21 Vict. c. 54, s. 12, provides that "Nothing in this Act contained, nor any proceeding conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not passed; . . . and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or re-payment of any trust property misappropriated."—*Held*, affirming the judgment of the Supreme Court of British Columbia (5 B. C. Rep. 571), that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts.—*Semble*, that the section only covered agreements or securities given by the defaulting trustee himself.—*Quare*, Is the said Imperial Act in force in British Columbia?—If in force it would not apply to a prosecution for an offence under R. S. C. c. 264 (Larceny Act), s. 58.—Action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 264, s. 58 [not re-enacted in Crim. Code, 1892].—*Held*, that the alleged criminal act, having been committed before the Code came into force, was not affected by its provisions and the covenant was illegal at common law. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act. *Major v. McCraney*, xxix., 182.

19. *Appeal—Habeas corpus—Extradition—Necessity to quash.*—By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135), "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal. *Held*, that the matter was *coram non judice* and there was no necessity for a motion to quash. *In re Lazier*, xxix., 630.

20. *Crime—Lottery—Indictable offence—Criminal Code, 1892—R. S. C. 159—R. S. Q. art. 2920—53 Vict. c. 36 (Que.)*—*Per Girouard, J.* dissenting. In Canada before the

Criminal Code, 1892, lotteries were mere offences or contraventions and not crimes, and consequently the Act of the Quebec Legislature was constitutional. *L'Association St. Jean-Baptiste v. Brault*, xxx., 598.

21. *Manslaughter—Indictment against body corporate—Crim. Code, s. 213—Fine.*]—Under s. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control—The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment.—As s. 213 provides no punishment for the offence the common law punishment of a fine may be imposed on a corporation indicted under it.—Judgment appealed from (7 B. C. Rep. 247) affirmed. *Union Colliery Co. v. The Queen*, xxxi., 81.

22. *Conspiracy—Robbery—Withdrawal of conspirator—King's evidence.*]—The accused was convicted at Dawson, in the Yukon Territory, on an indictment for conspiracy, and it appeared that he had before the commission of the offence refused to take part in the proposed robbery as it was "too strong for him," but remained willing to share in the result. After the robbery accused gave information which led to the arrest and conviction of his fellow conspirators. The trial judge reserved a case for the opinion of the Supreme Court as to whether or not the withdrawal relieved the accused from criminal liability as a party to the robbery, notwithstanding that he remained with a guilty mind, being ready to accept his share of the stolen property and doing nothing to prevent the commission of the crime. Upon hearing counsel for the Crown, no one appearing on behalf of the convict, the conviction was affirmed. *Rea v. Harris*, 22nd May, 1902.

23. *Appeals in criminal cases—Construction of 60 & 61 Vict. c. 34 (D.)*]—Appeals to the Supreme Court of Canada in criminal cases are regulated solely by the provisions of the Criminal Code. *Rice v. The King*, xxxii., 480.

24. *Perjury—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute—R. S. Q. arts. 5551, 5561—Criminal Code, s. 145.*]—The hearing of a charge by a magistrate, assuming to act as a justice of the peace having authority to hear it, is a judicial proceeding within the meaning of s. 145 of the Criminal Code and a person swearing falsely upon such hearing may be properly convicted of perjury, notwithstanding that the magistrate had no jurisdiction over the subject matter of the complaint. Judgment appealed from (Q. R. 11 K. B. 477) affirmed, the Chief Justice and Mills, J., dissenting. *Drew v. The King*, xxxiii., 228.

25. *Canada Evidence Act, 1893—Husband and wife—Competency of witness—"Communication"—Construction of statute—Privilege—Directions by legal adviser—Practice—Reference to Hansard debates—Method of interpretation.*]—Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused but may also be compelled to testify. Mills, J., dissenting.—Evidence by the wife of the person accused of acts performed by her under directions of coun-

sel sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills, J., dissenting.—*Per Girouard, J.* (dissenting). The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo, de facto* or *de corpore*. Sexual intercourse is such a communication and in the case under appeal neither the evidence by the accused that bloodstains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received.—*Per Mills, J.* (dissenting). Under the provisions of the Canada Evidence Act, 1893, and its amendments the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.—*Per Taschereau, C.J.* The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. *Gosselin v. The King*, xxxiii., 255.

26. *Criminal conviction—Affirmation by full court—Judges absent at hearing or judgment—Unanimous decision—Appeal to Supreme Court.*]—A criminal case reserved on points of law was argued before the Chief Justice and a judge of the Court of Queen's Bench, (Ont.) and on 4th February, 1878, the same judges affirmed the conviction. The full court should be constituted of the Chief Justice and two puisne judges. On appeal to the Supreme Court, under 38 Vict. c. 11, s. 49; *Held*, that, although the conviction had been affirmed by but two judges, the decision was unanimous and, therefore, not appealable. *Amer v. The Queen*, ii., 592.

27. *Criminal law—Cross-examination of prosecutrix on trial for rape—New trial—Discharge of prisoner.*

See EVIDENCE, 1.

28. *Procedure in criminal cases—"The Speedy Trials Act"—Legislative jurisdiction—Provincial courts.*

See CONSTITUTIONAL LAW, 22.

29. *Agent of creditor—False representations—Fraud—Ratification—Indictable offence.*

See DEBTOR AND CREDITOR, 17.

30. *Criminal Code, ss. 275, 276—Canadian subject marrying abroad—Jurisdiction of Parliament.*

See BIGAMY.

AND see CERTIORARI—HABEAS CORPUS.

CROWN.

1. ACTIONS BY OR AGAINST THE CROWN, 1-17.
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1. ACTIONS BY OR AGAINST THE CROWN.

1. *Public work—Government railway—Negligence of Crown servant—Prescription—50 & 51 Vict. c. 16—Arts. 2262, 2267, 2188, 2211, C. C.—R. S. C. c. 38.]—Held*, that even assuming that under the common law of Quebec, or by R. S. C. c. 38, or 50 & 51 Vict. c. 16, or any statutes in force at the time of the injury received, the Crown could be held liable for an injury caused by negligence of its servants, where such injury was received more than a year before the filing of the petition of right, the action was prescribed under arts. 2262 and 2267 C. C. *The Queen v. Martin*, xx., 240.

2. *Action against provincial government—Style of cause—Amendment.]—In an action against the Government of Quebec, the Supreme Court of Canada, at the hearing ordered the style of cause to be amended by substituting the name of "Her Majesty the Queen" for the "Province of Quebec."* *Grant v. The Queen*, xx., 297.

3. *Parol agreement—Part performance—Carriage of mails—Authority to bind the Crown—R. S. C. c. 35.]—An action will not lie against the Crown for breach of a contract for carrying mails for 9 months at the rate of \$10,000 a year, made by parol with the Postmaster-General and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than \$1,000 it could not be made without the authority of an order-in-council, and if temporary it was revocable at the will of the Postmaster-General. Judgment appealed from (2 Ex. C. R. 386) affirmed.* *Humphrey v. The Queen*, xx., 591.

4. *Suretyship—Postmaster's bond—Penal clause—Lex loci contractus—Negligence—Laches of Crown officials—Release of sureties—Arts. 1053, 1054, 1131, 1135, 1927, 1929-1965 C. C.]—In an action by the Crown on the information of the Attorney-General for Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the Security to be given by the Officers of Canada" (31 Vict. c. 37; 35 Vict. c. 19) and "The Post Office Act" (38 Vict. c. 7); *Held*, Sir Henry Strong, C.J., dissenting, that the right of action under the bond was governed by the law of the Province of Quebec. *Held*, further, that such a bond was not an obligation with a penal clause within the application of articles 1131 and 1135 of the Civil Code of Lower Canada. *Held*, also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of*

Quebec except where altered by statute. *Black v. The Queen*, xxix., 693.

5. *Contract—Right of action—Public officer—Solicitor and client—R. S. C. cc. 114, 115—Inquiry as to public matters—Remuneration of commissioner—Quantum meruit.]—The judgment appealed from (7 Ex. C. R. 351), held, that a person appointed under R. S. C. c. 115, as commissioner to make inquiry and report on conduct in office of an officer or servant of the Crown, could not recover for his services as such commissioner, there being no provision for such payment; that such service was not rendered in virtue of any contract, but merely by virtue of appointment under the statute and that such appointment partakes more of the character of a public office than of a mere employment under a contract express or implied. The Supreme Court affirmed the judgment appealed from, Strong, C.J., and Girouard, J. dissenting. *Tucker v. The King*, xxxii., 722.*

6. *Provincial bonds—Succession duties—Exempted securities—Sale under will—Duty on proceeds—Proceedings by or against the Crown—Costs.]—Costs will be given for or against the Crown as in other cases. Jurisprudence of Privy Council and Supreme Court of Canada stated as settled by a number of cases specially referred to. Lovitt v. Atty.-Gen. of Nova Scotia, xxxiii., 350.*

7. *Plea of prescription—Translatory title—Ratification—Improvements on lands held for public uses—Petition of right—Pleadings—9 Vict. c. 37 (Can.)—Arts. 2211, 2251, 2206 C. C.—Arts. 116, 473 C. C. P.*

See TITLE TO LAND, 76.

8. *Action for tort—Fraud or misconduct by Crown servants—Misrepresentation—Time contract—Forfeiture—Liquidated damages—Claim for extras—Condition precedent—Engineer's certificate—31 Vict. c. 13—Inter-colonial Railway.*

See CONTRACT, 90.

9. *Public work—Binding contract—Unauthorized expenditure—Appropriations by Parliament—Petition of right—Quantum meruit—31 Vict. c. 12, ss. 7, 15, 20.*

See CONTRACT, 91.

10. *Government railway—Breach of contract—Damages—Petition of right—37 Vict. c. 16 (D).*

See TORT, 1.

11. *Acceptance of bond—Execution—Instrument signed in blank—Estoppel—Proximate cause.*

See EVIDENCE, 153.

12. *Setting aside letters patent—Suits by Attorney-General—Res judicata—Estoppel.*

See TITLE TO LAND, 130.

13. *Judgment in former suit—Attorney-General of Canada impleaded—Estoppel as against Crown.*

See RES JUDICATA, 2.

14. *Act confirming title—Estoppel—Pleading.*

See TITLE TO LAND, 132.

15. *Territorial and prerogative rights—Beneficial interest—Actions by Dominion Government—Exchequer Court—Information of intrusion—Subsequent action—Practice.*

See CONSTITUTIONAL LAW, 23.

16. *Interest against the Crown—Supreme Court Act—R. S. C. c. 135, s. 52.*

See INTEREST, 6, 7.

17. *Injury from public work—Negligence of Crown officials—Right of action—Liability of the Crown—50 & 51 Vict. c. 16, ss. 16, 23, 58—Jurisdiction of Exchequer Court—Prescription—Art. 2261 C. C.*

See NEGLIGENCE, 201.

2. CANADIAN WATERS; FISHERIES; NAVIGATION, ETC.

18. *Constitutional law—Navigable waters—Title to alveus—Dedication of public lands—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.*—The user of a bridge over a navigable river for 35 years is sufficient to raise a presumption of dedication—If a province before confederation, had so dedicated the bed of a navigable river for the purposes of a bridge, that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit, and the obstruction of the slightest possible degree. *The Queen v. Moss*, xxvi., 322.

19. *Public work—Navigation of River St. Lawrence—Negligence—Repair of channel—Parliamentary appropriation—Discretion as to expenditure.*—Action for damages to SS. "Arabia" sustained by striking an obstruction in the River St. Lawrence ship channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear, and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150) held that the channel was not a public work after the work of deepening was completed, and even if it was, no negligence had been proved to make the Crown liable under s. 16, (c) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by Parliament for that purpose was not obliged to expend the appropriation as such matters were within the discretion of the Governor-in-Council and Minister, who were responsible only to Parliament in respect thereof. — The Supreme Court affirmed the judgment appealed from. *Hamburg American Packet Co. v. The King*, xxxiii., 252.

20. *B. N. A. Act, 1867, ss. 91, 92, 109—31 Vict. c. 60 (D.)—Protection and regulation of fisheries—Navigable streams—Fishing license—Ungranted lands—Riparian rights.*

See FISHERIES, 2.

21. *Property in beds of harbours—Grant of foreshore—B. N. A. Act, 1867, s. 108—25 Vict. c. 19 (P. E. I.).*

See HARBOURS, 1.

22. *Unauthorized grant—Halifax harbour—Trespass.*

See NAVIGATION, 1.

23. *Foreshore of harbour—Title to—Grant to railway of user—Interference with access to—Jus publicum.*

See CONSTITUTIONAL LAW, 24.

3. CONTRACT; LIABILITY.

24. *Public work—Agreement binding on Crown—Damages to property—Parol undertaking to indemnify by officer of the Crown.*—Where by the Government Railway works in St. John the pipes for city water supply were interfered with, the cost reasonably and properly incurred to restore the property to its former safe and serviceable condition, may be recovered under arrangement with the Chief Government Railway Engineer, and upon his undertaking to indemnify the city. Judgment appealed from (2 Ex. C. R. 78) affirmed, Strong and Gwynne, JJ., dissenting on the ground that the chief engineer had no authority to bind the Crown to pay damages beyond any injury done. *The Queen v. St. John Water Commissioners*, xix., 125.

25. *Payment by departmental authority—Salaries of license inspectors—Approval by Governor-in-Council—Liquor License Act, 1883, s. 6—Action—Ultra vires.*—Claim by license commissioners for moneys paid to license inspectors with the approval of the Department of Inland Revenue, in excess of the salaries fixed 2 years later by order-in-council under s. 6 of the Liquor License Act, 1883. *Held, per Fournier, Taschereau and Patterson, JJ.*, affirming the judgment appealed from (2 Ex. C. R. 293), that the Crown could not be held liable for any excess of the salary fixed and approved of by the Governor-General-in-Council.—*Per Strong, J.* The Act under which appellant was appointed having been declared *ultra vires* the petition of right was not maintainable. *Burroughs v. The Queen*, xx., 420.

26. *Crown lands—Dominion license to cut timber—Implied covenant—Warranty of title—Quiet enjoyment.*—Licenses granted and actually current in 1884 and 1885 conferred upon the licensee "full right, power and license to take and keep exclusive possession of the said lands except as hereinafter mentioned for and during the period of one year from the 31st December, 1883, to 31st December, 1884, and no longer."—*Quere.* Though this was in law a lease for one year of the lands comprised in the license, was the Crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment? *Bulmer v. The Queen*, xxiii., 488.

27. *Contracts binding on the Crown—Public works—Extras—Certificate of engineer—Authority of subordinate officers—31 Vict. c. 12 (D.).*

See CONTRACT, 89.

28. *Acceptance of tender—Contract binding on the Crown—Condition precedent—Certificate of chief engineer—Abolition of office—Waiver.*

See PUBLIC WORK, 1.

29. *Parliamentary printing—Departmental printing—Tender — Acceptance—Obligation binding on the Crown—Form of contract.*

See CONTRACT, 92.

30. *Transfer of contract—Acquiescence by public officers—Binding assent—Cancellation—Breach.*

See CONTRACT, 93.

31. *Contract with Crown—39 Vict. c. 3, ss. 4 & 8 (P. E. I.)—Disqualification of member in Provincial Assembly—Candidate for House of Commons.*

See ELECTION LAW, 70.

32. *Parol agreement—Part performance—Carriage of mails—Authority to bind the Crown—R. S. C. c. 35.*

See No. 3, ante.

33. *Government contract — Damages for breach—Interest.*

See INTEREST, 4.

34. *License to cut timber—Implied warranty—Breach of contract.*

See No. 92, infra.

35. *Petition of right—Contract for public work—Extras—Final certificate.*

See CONTRACT, 61.

36. *Construction of public work—Interference with public rights—Injury to private owner.*

See PUBLIC WORK, 3.

37. *Public work — Terms of contract — Authority of Government engineer to vary—Delay.*

See CONTRACT, 97.

38. *Liability for tort—Injury to property on public work—50 & 51 Vict. c. 16 (D.).*

See CONSTITUTIONAL LAW, 25.

39. *Constitutional Law—Powers of executive councillors—"Letter of Credit"—Obligations binding on Provincial Legislatures—Government expenditures—Negotiable instrument—"Bills of Exchange Act, 1890" "The Bank Act," R. S. C. c. 120.*

See CONSTITUTIONAL LAW, 39, 99.

40. *Contracts binding on the Crown—Goods sold and delivered on verbal orders by Crown officials—Supplies in excess of tender—Errors and omissions in accounts—Interest against the Crown.*

See PUBLIC WORKS, 5.

41. *Contract binding on the Crown—Public work—Formation of contract — Order-in-council—Ratification—Breach.*

See CONTRACT, 103.

42. *Interest against the Crown—Supreme Court Act—R. S. C. c. 135, s. 52.*

See INTEREST, 6, 7.

43. *Interest on duties improperly levied—Liability of the Crown.*

See INTEREST, 10.

44. *Construction of contract—Public works — Arbitration — Progress estimates — Engineer's certificate—Appeal by head of department—Final estimates — Condition precedent.*

See CONTRACT, 101.

4. CRIMINAL MATTERS.

45. *Reserved case—Trial—Empaneling jury — Personation of juror — R. S. C. c. 174, s. 259.*

See CRIMINAL LAW, 7.

46. *Criminal procedure—Challenging jurors — Standing aside a second time.*

See CRIMINAL LAW, 10.

5. DAMAGES ; NEGLIGENCE.

47. *Government railway—43 Vict. c. 8—Damage from overflow of water—Negligence—Boundary ditches.]—Held, affirming the judgment appealed from (2 Ex. C. R. 396), that under 43 Vict. c. 8, confirming the agreement of sale to the Crown of the Rivière du Loup branch of the Grand Trunk Railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879 unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear, by the evidence relied on, to have been caused by the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed. *Morin v. The Queen*, xx., 515.*

48. *"Public work" — Negligence—Militia class firing—Government rifle range—Officers and servants of the Crown—Injury to the person—50 & 51 Vict. c. 16, s. 16c (D.).—R. S. C. c. 41, ss. 10, 69.]—A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16 (c).—The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the militia.—*Girouard, J.*, dissented. Judgment appealed from (6 Ex. C. R. 425) affirmed. *Larose v. The King*, xxxi., 206.*

49. *Negligence of servants — Public work—Tolls—Contract—Liability as carrier.*

See ACTION, 109.

50. *Public work—Agreement binding on Crown—Damages to property—Parol undertaking to indemnify—Officer of the Crown.*

See No. 24, ante.

51. *Public work — Government railway—Negligence of Crown servant—Prescription—50 & 51 Vict. c. 16—Arts. 2262, 2267, 2188, 2211 C. C.—R. S. C. c. 38.*

See No. 1, ante.

52 *Negligence — Servants of Crown — Common employment—Law of Quebec—50 & 51 Vict. c. 16.*

See NEGLIGENCE, 29.

53. *Suretyship—Postmaster's bond—Penal clause — Lex fori — Negligence — Laches of Crown officials — Release of sureties.*

See No. 4, ante.

54. *Public work—Navigation of River St. Lawrence — Negligence — Repair — Parliamentary appropriation—Discretion as to expenditure.*

See No. 19, ante.

55 *Injury from public work — Negligence of Crown officials — Right of action—Liability of Crown—50 & 51 Vict. c. 16, ss. 16, 23, 58 — Jurisdiction of Exchequer Court—Prescription — Art. 2261 C. C.*

See NEGLIGENCE, 195.

6. ESCHEATS AND FORFEITURES.

56. *Constitutional law — Legislative jurisdiction—Escheat—R. S. O. (1877) c. 94—B. N. A. Act (1867) ss. 91, 92, 102 & 109.]—On appeal to the Supreme Court the parties agreed that the appeal should be limited to the question, as to whether or not the Government of Canada or of the province was entitled to estates escheated to the Crown for want of heirs.—Held, Ritchie, C.J., and Strong, J., dissenting, that the Province of Ontario does not represent Her Majesty in matters of escheat in said province, and therefore the Attorney-General for Ontario could not appropriate the property escheated to the Crown in this case for the purposes of the province, and that the Escheat Act, c. 94, R. S. O. was *ultra vires*.—Per Fournier, Taschereau and Gwynne, JJ. That any revenue derived from escheats is by s. 102 of the B. N. A. Act 1867, under the control of the Parliament of Canada as part of the Consolidated Revenue Fund of Canada, and no other part of the Act exempts it from that disposition. *Mercer v. Attorney-General for Ontario*, v., 538.*

[On appeal to the Privy Council this judgment was reversed, 8 App. Cas. 767.]

57. *Public domain—Escheat for want of heirs — Proceedings by information — Want of parties — Limitation of action — Incorporation of escheated lands.*

See TITLE TO LAND, 131.

7. HIGHWAYS; BRIDGES; FERRIES.

58. *Municipal corporation — Highways — Old trails in Rupert's Land — Substituted roadways — Necessary way — R. S. C. c. 50, s. 108—Reservation in Crown grant—Dedication — User — Estoppel — Assessment of lands claimed as highway — Evidence.]—The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government survey thereof does not give rise to a presumption that the lands over which they passed were dedicated as public highways.—The land over which an old*

travelled trail had formerly passed, leading to the Hudson Bay trading post at Edmonton, N.-W. T., had been enclosed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor shewn upon registered plans of sub-division, and laid out upon the ground had been adopted as a boundary in the descriptions of lands abutting thereon in the grants thereof by letters patent from the Crown.—Held, reversing the decision of the Supreme Court of the North-West Territories, that under the circumstances, there could be no presumption of dedication of the lands over which the old trail passed as a public highway either by the Crown or by the private owner notwithstanding long user of the same by settlers in that district prior to the Dominion Government survey of the Edmonton Settlement. *Heimick v. Town of Edmonton*, xxviii., 501.

59. *Liability for acts of agents — Quebec turnpike roads — Legislative acknowledgement — Debentures.*

See QUEBEC TURNPIKE TRUST, 1.

60. *Constitutional law — Navigable waters — Title to alveus — Dedication of public lands — Presumption — User — Obstruction to navigation — Public nuisance — Balance of convenience.*

See No. 18, ante.

61. *Highway—Old trails in Rupert's Land —Substitution of new way — Dedication.*

See DEDICATION, 1.

62. *B. N. A. Act (1867) s. 111—8 Vict. c. 90 (Can.)—Reversion of toll bridge—Indemnity—Liability of Province of Canada—Remedial process.*

See STATUTE, 154.

63. *Ferry license — Interference — Tortious breach of contract—Bridges within ferry limits — R. S. C. c. 97.*

See FERRIES, 2.

8. OFFICERS AND SERVANTS OF THE CROWN.

64. *Notice of action—Contractor to build Government railway—44 Vict. c. 25, s. 109—"Employee."]*—Section 109, Government Railway Act, 1881, provides that "no action shall be brought against any officer, employee or servant of the department for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month's previous notice in writing." Held, reversing the judgment appealed from (20 N. S. Rep. 30), Ritchie, C.J., and Gwynne, J., dissenting, that a contractor with the Minister of Railways and Canals as representing the Crown, for the construction of a branch of the Intercolonial Railway, is not an "employee" of the department within this section. *Kearney v. Oakes*, xviii., 148.

65. *Action for tort — Fraud or misconduct of Crown servants—Misrepresentation—Time contract — Forfeiture — Liquidated damages — Claim for extras — Condition precedent — Engineer's certificate — 31 Vict. c. 13—Intercolonial Railway.*

See CONTRACT, 90.

66. *Negligence of Crown servants—Common employment—Law of Quebec—50 & 51 Vict. c. 16.*

See NEGLIGENCE, 29.

67. *Government of Quebec — Retired official — Commutation of pension — Interest of wife — Transfer.*

See PENSION DE RETRAITE.

68. *Public work — Government railway—Negligence of Crown servant — Prescription—50 & 51 Vict. c. 16—Arts. 2262, 2267, 2188, 2211 C. C.—R. S. C. c. 38.*

See No. 1, ante.

69. *Government railways — Liability for act of employee—R. S. C. c. 38, s. 50.*

See NEGLIGENCE, 219.

70. *Public work — Negligence — Militia class firing—Government rifle range—Officers and servants of the Crown — 50 & 51 Vict. c. 16, s. 16c (D.)—R. S. C. c. 41, ss. 10, 69.*

See No. 48, ante.

71. *Contract — Right of action — Public officer—Solicitor and client—R. S. C. cc. 114, 115—Inquiry as to public matters—Remuneration of commissioner — Quantum meruit.*

See No. 5, ante.

72. *Injury from public work — Negligence of Crown officials—Right of action—Liability of Crown—50 & 51 Vict. c. 16, ss. 16, 23, 58—Jurisdiction of Exchequer Court — Prescription — Art. 2261 C. C.*

See NEGLIGENCE, 195.

9. PREROGATIVE.

73. *Insolvent bank—Winding-up proceedings — Priority of Crown as simple contract creditor — Estoppel—Acceptance of dividends — Waiver—45 Vict. c. 23.]—The Bank of P. E. Island became insolvent, and a winding-up order was made. The bank was indebted to Her Majesty in \$93,494.20, public moneys of Canada, on deposit to the credit of the Receiver-General. The first claim filed at the request of the respondent (liquidator of the bank), did not specially notify the liquidator that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15% each were afterwards paid, and on the 28th February, 1884, there was a balance due of \$65,426.95, and respondent was notified that Her Majesty intended to insist upon the prerogative right to be paid in full. At this time there was on hand a sum sufficient to pay the claim in full. The Supreme Court (P. E. I.) held that Her Majesty the Queen, represented by the Minister of Finance, and the Receiver-General, had no prerogative or other right to receive the whole amount, but only a right to receive dividends as an ordinary creditor of the bank. Held, reversing the judgment appealed from, 1. That the Crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceed-*

ings in insolvency by 45 Vict. c. 23. 2. That the Crown had not waived its right* to be preferred in this case by the form in which the claim was made, and by the acceptance of two dividends. *The Queen v. Bank of Nova Scotia*, xi., 1.

74. *Prerogative — Insolvent bank — Assets—R. S. C. cc. 120, 124—Deposit by insurance company — Priority of note-holders.]—The prerogatives of the Crown exist in British colonies to the same extent as in the United Kingdom. *The Queen v. Bank of Nova Scotia* (11 Can. S. C. R. 1) followed.—The Queen is the head of the constitutional Government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government.—The Crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors is not interfered with by the provisions of the Bank Act (R. S. C. c. 120, s. 79), giving note-holders a first lien on such assets, the Crown not being named in such enactment. Gwynne and Patterson, JJ., *contra*.—Held, per Gwynne, J., that under legislation of the old Province of Canada, left unrepealed by the B. N. A. Act, no such prerogative could be claimed in the Provinces of Ontario and Quebec; the court would not, therefore, be justified in holding that such a right attached, under the B. N. A. Act, in one Province of Canada which does not exist in them all.—An insurance company, in order to deposit \$50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R. S. C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed the Government claimed payment in full of this money as money deposited by the Crown. Held, reversing the judgment appealed from (27 N. B. Rep. 351), Strong, J., dissenting, that it was not the money of the Crown but held by the Finance Minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors. *Maritime Bank v. The Queen*, xvii., 657.*

75. *Prerogative—Provincial rights—Insolvent bank—Note-holder's lien.]—The Government of each Province of Canada represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the province. *The Queen v. Bank of Nova Scotia* (11 Can. S. C. R. 1) followed. Gwynne, J., dissenting.—Under s. 79 of the Bank Act (R. S. C. c. 120), note-holders have the first lien on the assets of an insolvent bank in priority to the Crown. Strong and Taschereau, JJ., dissenting. Judgment appealed from (27 N. B. Rep. 379) varied. *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick*, xx., 695.*

[Affirmed by Privy Council in respect to holding on prerogative, 8 Times L. R. 677.]

76. *Territorial and prerogative rights—Beneficial interest — Actions by Dominion Government—Exchequer Court—Information of intrusion—Subsequent action—Pra*

See CONSTITUTIONAL LAW, 99

10. PUBLIC LANDS AND TIMBER.

- (a) *Dominion Lands*, 77-80.
- (b) *Mines and Minerals*, 81-84.
- (c) *Sales, Grants, and Licenses*, 85-102.
- (d) *Taxes and Dues*, 103-108.

(a) *Dominion Lands*.

77. *Railway belt—Reserve in British Columbia*—47 Vict. c. 14, s. 2 (B.C.)—*Provincial grant—Title to land.*—By s. 11 of the order-in-council admitting the Province of British Columbia into confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the Governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on 19th December, 1883, the legislature of British Columbia passed the statute 47 Vict. c. 14, by which:—"From and after the passing of this Act there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the main land of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the order-in-council, s. 11, admitting the Province of British Columbia into confederation." On 20th November, 1883, by public notice the Government of British Columbia reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, F., to comply with the provincial statutes, filed a survey of land within said belt which was finally accepted on 13th January, 1885, and letters patent under the great seal of the province issued to F. The Attorney-General of Canada by information of intrusion sought to recover possession of the land, and the Exchequer Court dismissed the information with costs. — *Held*, reversing the judgment of the Exchequer Court, Henry, J., dissenting, that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the Crown for the use and benefit of Canada. *The Queen v. Farwell*, xiv., 392.

78. *Laying out and ascertaining ordinance lands—Reversion of lands not used for canal purposes—Vesting of lands in Crown.*

See RIDEAU CANAL LANDS, 2.

79. *Foreshore of harbour—Provincial grant—B. N. A. Act, 1867—Estoppel—Act confirming title.*

See TITLE TO LAND, 132.

80. *Title to land—Railway belt in British Columbia—Unsurveyed lands—Pre-emption—Federal and provincial rights*—47 Vict. c. 6 (D.)

See CONSTITUTIONAL LAW, 72.
S. C. D.—14

(b) *Mines and Minerals*.

81. *Patent—Reservation of coal—Order-in-council—Agreement.*—Certain Crown lands in Quebec had been granted to the suppliants, as assignees of one Kaye, the applicant for said lands, from which the Crown contended the coal thereon was reserved, which was the sole question in issue. The Exchequer Court (3 Ex. C. R. 157), held that there being no express or implied agreement to the contrary the suppliants were entitled to a grant conveying such mines and minerals as would pass without express words.—The Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the appeal with costs. *The Queen v. Canadian Agricultural Coal, and Colonization Co.*, xxiv., 713.

82. *Mining law — Royalties — Dominion Lands Act—Publication of regulations—Renewal of license—Payment of royalties—Voluntary payment*—R. S. C. c. 54, ss. 90, 91.]—The Dominion Government, by regulations made under The Dominion Lands Act, may validly reserve a royalty on gold produced by placer mining in the Yukon though the miner, by his license has the exclusive right to all the gold mined. Taschereau and Sedgewick, J.J., dissenting.—The "exclusive right" given by the license is exclusive only against quartz or hydraulic licenses or owners of surface rights and not against the Crown. Taschereau and Sedgewick, J.J., dissenting.—The provision in s. 91 of The Dominion Lands Act that regulations made thereunder shall have effect only after publication for four successive weeks in the *Canada Gazette* means that the regulations do not come into force on publication in the last of four successive issues of the *Gazette*, but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of 4th September, they were not in force until the 11th, and did not affect a license granted on 9th September.—Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment.—One of the regulations of 1889 was that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year." *Held*, per C. J. and Girouard and Davies, J.J., reversing the judgment of the Exchequer Court (7 Ex. C. R. 414), Sedgewick, J. *contra*, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only, but he did so subject to the terms of any regulations made since such grant was issued.—The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.—Regulations in force when a license issued were shortly after cancelled by new regulations imposing a smaller royalty. *Held*, that the new regulations were substituted for the others and applied to said license. *The King v. Chappelle*; *The King v. Carmack*; *The King v. Tweed*, xxxii., 586.

[Leave to appeal to Privy Council granted, March, 1903; 40 Can. Gaz. p. 569.]

83. *Mines and minerals—Placer mining regulations—Staking claims—Overlapping locations—Renewal grant—Unoccupied Crown lands.*—In August, 1899, M. staked and received a grant for a placer mining claim on Dominion Creek, Yukon, which, however, actually included part of an existing creek claim previously staked by W. In 1900 he applied for and obtained a renewal grant for the same area, W.'s claim having lapsed in the meantime, and was continuously in undisputed possession of that area, with his stakes standing from the time of his original location until March, 1901, when S. and T. staked bench claims for the lands embraced in W.'s expired location which had been overlapped by M.'s claim, as being unoccupied Crown land. *Held*, affirming the judgment appealed from, Davies and Armour, J.J., dissenting, that the application for the renewal grant by M., after W.'s claim had lapsed, for the identical ground he had originally staked and continuously occupied, gave him a valid right to the location without the necessity of a formal re-staking and new application and that, following the rule in *Osborne v. Morgan* (13 App. Cas. 227), the possession of M. under his renewal grant should not be disturbed. *St. Laurent v. Mercier*, xxxiii., 314.

84. *Railway subsidy—Dominion Lands Act—Reservation in grant.*—By an equal division of opinion, the Supreme Court affirmed the decision of the Exchequer Court (8 Ex. C. R. 83), by which it was held that lands granted as subsidy to railways under 53 Vict. c. 54 (D.), were subject to the existing regulations respecting reservation of baser minerals in the grants thereof, notwithstanding that there was no reference thereto in the orders-in-council allotting the lands to the railway and that the grant was expressed in the statute to be a free grant subject merely to cost of survey. *Calgary and Edmonton Ry. Co. v. The King*, 29th April, 1903.

[Leave to appeal to the Privy Council was granted, July, 1903.] *Can. Mag.*, vol. xii., p. 400; 33 *Can. S.C.R.* 667.

(c) *Sales, Grants, and Licenses.*

85. *Permits to cut timber (Man.)—Rights of holders—Dominion Lands Act, 1879, s. 52—Trespass.*—On 21st November, 1881, Sinnott obtained a permit from the Crown timber agent, Manitoba: "To cut, take and have for their own use from that part of range 10 E. that extends five miles north and five miles south of the C. P. Ry. track, the following quantities of timber, 2,000 cords of wood and 25,000 ties, permit to expire on 1st May, 1882." A similar permit was granted to Sinnott on 10th February, 1882, to cut 25,000 ties. In February, 1882, under leave granted by an order-in-council of 27th October, 1881, Scoble cut timber for the purposes of the construction of the C. P. Ry., from the lands covered by the permit of 21st November, 1881. Sinnott claimed by their "permit" the sole right of cutting timber on said lands until the 1st May, 1882, and prayed that Scoble might be restrained by injunction from cutting timber on said lands, and ordered to account for the value of the timber cut. Scoble justified under the order-in-council of the 27th October, 1881, and denied the exclusive possession or title to the lands or standing timber.—The plaintiffs applied *ex parte* for, and obtained,

an interim injunction against the defendants. At the hearing Miller, J., made the injunction perpetual, and ordered a reference to ascertain the damages caused plaintiffs by the cutting of the timber by defendants. On re-hearing, this decree was reserved and a decree made dismissing the bill with costs and directing an account to be taken of the damages sustained by reason of the interim injunction.—*Held*, that the decree made on re-hearing should be affirmed, that the permit in question did not come within the provisions of the Dominion Lands Act of 1879, and did not vest in the plaintiffs any estate, right or title in the tract of land upon which they were permitted to cut, nor did it prevent the Government giving like licenses, or others of equal authority, to other persons, as long as there was sufficient timber to satisfy the requirements of the plaintiffs' licenses. *Sinnott v. Scoble*, xi., 571.

86. *Crown lands—Setting aside grant—Error and improvidence—Evidence.*—In an action to set aside letters patent for error and improvidence under the Manitoba Act, *per* Patterson, J.—In the construction of the statute 35 Vict. c. 3, amended by 35 Vict. c. 52, effect must be given to the term improvidence as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the court to form a definite opinion as to the relative strength of opposing claims. *Fonseca v. Attorney-General of Canada*, xvii., 612.

87. *Location tickets—Transfer of rights—Registration—Waiver by Crown—Cancellation*—23 Vict. c. 2, ss. 18 & 20 (*Can.*)—32 Vict. c. 11, s. 13 (*Q.*)—36 Vict. c. 8 (*Q.*)—A location ticket of Crown land was granted to H. in 1863. In 1872 H. put on record with the department that by arrangement with the Crown Lands Agent, he had performed settlement duties on another lot known as the homestead lot. In 1874, H. transferred his rights to appellant, paid all moneys due with interest on the lots, registered the transfer under 32 Vict. c. 11, s. 18 (*Que.*), and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878, the commissioner cancelled the location ticket for default to perform settlement duties. *Held*, reversing the judgment appealed from (*M. L. R.* 2 Q. B. 316), Taschereau, J., dissenting, that the registration by the commissioner in 1874, of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected. *Holland v. Ross*, xix., 566.

88. *R. S. O. (1887) c. 25—License to cut timber—Renewals—Free grants—Patent—Interference with rights of patentee.*—By s. 3, R. S. O. (1887) c. 25, the Lieut.-Gov.-in-Council may appropriate any public lands . . . as free grants to actual settlers, etc., and by s. 4 such grants or appropriations shall be confined to lands . . . within the tract or territory defined in that section. By s. 10 pine trees on lands located or sold within limits of the free grant territory aft

March, 1880, shall be considered as reserved from the location, and shall be the property of Her Majesty, and s. 11 enacts that patents of such lands located or sold shall contain a reservation of all pine trees on the land, and that any licensee to cut timber thereon may, during the continuance of his license, enter upon the uncleared portion and cut and remove trees, etc.—The company held a license, issued 30th May, 1888, to cut timber on land within the free grant territory, but which had not been appropriated under s. 3 of the Act. A license was first issued to the company in 1873 and had been renewed each year since that time. The license authorized the cutting of timber on lands unlocated and sold at its date; lands sold or located while it was in force; pine trees on lots sold under orders-in-council of 27th May, 1869, and pine trees, when reserved, on lots sold under order-in-council of 3rd April, 1880, upon the location described on back of license. — Regulations made by order-in-council of 27th May, 1869, provided that "all pine trees on any public land thereafter to be sold, which at the time of such sale or previously was included in any timber license, shall be considered as reserved from such sale and shall be subject to any timber license covering or including such land in force at the time of such sale, or granted within three years from the date of such sale, etc. All trees remaining on the land at the time the patent issues shall pass to the patentee." A patent for a lot in the free grant territory was issued to S. on 13th March, 1884.—On the back of the license was a schedule of lots included in the location with the date of sale or location, and the sale or location of S.'s lot was mentioned. The company claimed the right to cut timber on said lot which had not been appropriated by the L. G. in *C. Held*, affirming the judgment appealed from (17 Ont. App. R. 322), that the provisions of R. S. O. (1887) c. 25, ss. 10, 11, relating to the pine trees in the territory, only apply to such lots as have been specifically appropriated under s. 3; that the license of the company, though renewed from year to year, was only an annual license; that the license issued in 1888 did not give the holders a right under the regulations of 27th May, 1869, to the timber on land patented in 1884, and that the company had notice, by their license of 1888, that the lot in question had been patented to S. more than three years previously. *Lakefield Lumber and Mfg. Co. v. Shairp*, xix., 657.

89. *Right of pre-emption—Lands reserved—Agricultural settlers* — 47 Vict. c. 14 (B.C.)]—By 47 Vict. c. 14, s. 8 (f) (B.C.), land conveyed to the E. & N. Ry. Co. was, for 4 years from the date of the Act, thrown open to the actual "settlers for agricultural purposes," coal and timber land excepted. H. and W. respectively claimed rights of pre-emption under this Act. *Held*, affirming the Supreme Court (B.C.), that the Act did not confer a right of pre-emption to lands not within the pre-emption laws of the province; that only "unreserved and unoccupied lands" came within those laws and the lands claimed had long before been reserved for a town site; and that the claimants were not upon the lands as "actual settlers for agricultural purposes," but had entered with express notice that the lands were not open for settlement. *Hoggan v. Esquimault & Nanaimo Ry. Co.*; *Waddington v. Esquimault & Nanaimo Ry. Co.*, xx., 235.

[In *Hoggan v. Esquimault & Nanaimo Ry. Co.*, the Privy Council affirmed this decision. (1894) A. C. 429.]

90. *R. S. O. art. 5976—Timber licenses—Official plan—Description—Rebate—Art. 992 C. C.—Practice—Title of cause.*]—Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before it issues, and after its issue works on lands and makes improvements on a branch of a river which he believed formed part of his limits, but was subsequently ascertained by survey to form part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale. *Fournier, J.*, dissenting.—*Per Patterson, J.*, the licensee's remedy would be by action to cancel the license under art. 992 C. C., with a claim for compensation for moneys expended.—This action was instituted against the Government of Quebec, but when the case came up for hearing on the appeal to the Supreme Court, the court ordered that "Her Majesty the Queen" be substituted for that of "Government of the Province of Quebec." *Grant v. The Queen*, xx., 297.

91. *Title—Grant of non-existent sub-division—Description—Boundaries—Patent improvidently granted.*]—Action for trespasses by defendant during 1878-79-80 and 1881, upon land alleged to be part of lots 34 and 35 in concession C. in the Township of Etobicoke, Ontario, and to be plaintiff's property, and damages for the cutting and removal of timber, and injunction to restrain future trespass.—Defendant contended that the land was not part of lots 34 and 35 in concession C, but part of lots 34 and 35 in concession B, and was his property.—Both parties derived title under H. J. B., who executed a mortgage dated 30th April, 1856, to S. F., comprising among other lands lots 34 and 35 in concession B, of Etobicoke.—On foreclosure of that mortgage, a final order was made 1st March, 1874, for the sale of the mortgaged lands, and under it lots 34 and 35 in concession B, of Etobicoke, were sold to J. M. to whom the lots were conveyed by the administrator and the sole devisee of the mortgage, by deed dated 10th April, 1875. On 8th May, 1875, J. M. conveyed to J. B. lots 34 and 35, in broken front, concession B. and on 14th July, 1875, J. B. conveyed to defendant lots 34 and 35, in broken front, concession B.—By deed, 27th October, 1857, after the mortgage H. J. B., the mortgagor, conveyed to plaintiff seven acres, more or less, composed of parts of lots 34 and 35 in concession B, known as the Ox-bow, described by metes and bounds, which is the land in question. Defendant did not dispute that plaintiff acquired the equity of redemption subject to the mortgage, but contended that by sale under the decree, title passed to the purchaser free from the equity as being a part of lots 34 and 35, in concession B, the whole of which lots were included in the mortgage and sold to J. M. Plaintiff contended that the land, although erroneously described in the deed of it to him, as part of lots 34 and 35 in concession B, really formed part of lots 34 and 35 in concession C, and was, therefore, not included in the mortgage, and in the alternative, that if the land did not form part of concession C, it formed part of broken front in front of, and separate from lots 34 and 35 in concession B, and therefore

was not included in the mortgage—On 2nd April, 1883, after action, the Crown granted plaintiff a piece of land said to contain 3 and 75-100ths acres, and being the north bend of the Oxbow or land in question, describing it by metes and bounds as being lot 35 in concession C, of Etobicoke. *Held*, reversing the judgment appealed from, that the evidence established that there were no such lots as 34 and 35 in concession C; that the various descriptions in the patents and other title deeds also shewed that the lands in dispute formed parts of lots 34 and 35 in concession B, and therefore the description in the mortgage was sufficient to include such lands, and the defendant was entitled to a declaration that he was seized in fee; and that the patent was void, as having been improvidently granted. *Johnson v. Crosson*, Cass. Dig. (2 ed.) 848.

92. *Disputed territory—License to cut timber—Implied warranty of title—Breach of contract—Damages.*—The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground rents and bonuses, make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, at the time six leases or licenses were current, and consequently the Government could not renew them. The lease was granted under ss. 49 and 50 of 46 Vict. c. 17, and the regulations made under the Act of 1879 provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor-in-Council."—In a claim for damages by the licensee:—*Held*, 1. Orders-in-council issued pursuant to 46 Vict. c. 17, ss. 49 and 50, authorizing the Minister of the Interior to grant licenses to cut timber, did not constitute contracts between the Crown and proposed licensees, such orders-in-council being revocable by the Crown until acted upon by the granting of licenses under them.—2. The right of renewal of the licenses was optional with the Crown, and the claimant was entitled to recover from the Government only the moneys paid to them for ground rents and bonuses.—The licenses which were granted and actually current in 1884 and 1885 conferred upon the licensee "full right, power, and license to take and keep exclusive possession of the said lands, except as hereinafter mentioned for and during the period of one year from the 31st December, 1883, to the 31st December, 1884, and no longer."—*Quere*, though this was in law a lease for one year of the lands comprised in the license was the Crown bound by any implied covenant to be read into the license for good right and title to make the lease, and for quiet enjoyment? *Bulmer v. The Queen*, xxiii., 488.

93. *Scire facias—Title to land—Annulment of letters patent—Tender—Sale or pledge—Vente à réméré—Concealment of material fact—Arts. 1274-1279 R. S. Q. — Registration—*

Transfer of Crown lands—Art. 1007 C. P. Q. —Art. 1553 C. C.—The locatée of certain Crown lands sold his rights therein to B., reserving the right to redeem the same within nine years, and subsequently sold the same rights to M., subject to the first deed. These deeds were both registered in their proper order in the registry office for the division and in the Crown lands office at Quebec. M. paid the balance of Crown dues remaining unpaid upon the land and made an application for letters patent of grant thereof in which no mention was made of the former sale by the original locatée. In an action by *scire facias* for the annulment of the letters patent granted to M., *Held*, Taschereau, J., dissenting, that the failure to mention the *vente à réméré* in the application for the letters patent was a misrepresentation and concealment which entitled the Crown to have the grant declared void and the letters patent annulled as having been issued by mistake and in ignorance of a material fact, notwithstanding the registration of the first deed in the Crown land office. *Fonseca v. Attorney-General for Canada* (17 Can. S. C. R. 612) referred to. *Held*, further, Taschereau, J., dissenting, that it is not necessary that such an action should be proceeded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent. *The Queen v. Montminy*, xxix., 484.

94. *Scire facias — Crown lands — Grant made in error—Adverse claim—Cancellation—32 Vict. c. 11, s. 26 (Que.) — R. S. Q. 1299.*—The provisions of the Quebec statute respecting the sale and management of public lands (32 Vict. c. 11, R. S. Q. art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist. (Judgment appealed from reversed, and Q. R. 18 S. C. 520, restored.) *The King v. Adams*, xxxi., 220.

95. *Timber licenses—Sales by local agent—Location ticket—Suspensive condition—Title to lands—Art. 1085 C. C.—Arts. 1269 et seq. and 1309 et seq. R. S. Q.*—During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown Lands Agent made a sale of part of the lands covered by the license, and issued location tickets or licenses of occupation therefor under the provisions of arts. 1269 et seq. of the Revised Statutes of Quebec, respecting the sale of Crown lands. Subsequently the timber license was renewed, but, at the time the renewal license was issued, there had not been any express approval by the Commissioner of Crown Lands of the sales so made by the local agent as provided by art. 1269 R. S. Q. *Held*, affirming the judgment appealed from, Taschereau and Davies, J.J., dissenting, that the approval required by art. 1269 R. S. Q. was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown for which the timber license had been validly issued. *Leblanc v. Robitaille*, xxxi., 582.

96. *Dominion Lands Act—Homestead patent—Equitable or statutory title.*

See TITLE TO LAND, 98.

97. *Grants under Manitoba Act — Setting aside letters patent — Evidence—Error—Improvidence—Res judicata—Estoppel against the Crown.*

See TITLE TO LAND, 130.

98. *Action en bornage—R. S. Q. arts. 4153, 4154, 4155.*

See BOUNDARY, 3.

99. *Crown grant — Disseisin of grantee—Tortious possession—Statute of Maintenance, 32 Hen. 8, c. 9.*

See TITLE TO LAND, 83.

100. *Dedication — User — Presumption of dedication—Public nuisance.*

See CONSTITUTIONAL LAW, 5 and 81.

101. *Grant of land—Title—Possession.*

See TITLE TO LAND, 102.

102. *Dominion license to cut timber on Crown lands—Implied contract—Warranty of title—Quiet enjoyment.*

See No. 92, ante.

(d) Taxes and Dues.

103. *Assessment — Beneficial interest — Exemption from taxation — R. S. O. (1887) c. 193, s. 7, ss. 1.—Property of a bank became vested in the Dominion Government and a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale:—Held, affirming the judgment appealed from (17 Ont. App. R. 421), that the Crown having a beneficial interest in the land it was exempt from taxation as Crown lands. Quirt v. The Queen, xix, 510.*

104. *Sale and grant by letters patent—Sale for taxes.*

See ASSESSMENT AND TAXES, 37.

105. *Sale of timber limits—Bonus on transfer—Payment by purchaser.*

See SALE, 75.

106. *Dues for booms and timber slides — Lien — Agreement to secure arrears.*

See CHATTEL MORTGAGE, 18.

107. *Leased lands—Occupation for Crown purposes—Municipal taxation—Exemption.*

See ASSESSMENT AND TAXES, 40.

108. *Yukon administration — Franchise granted over Dominion lands—Tolls.*

See CONSTITUTIONAL LAW, 78.

11. PUBLIC WORKS.

109. *Public work — Agreement binding on Crown — Damages to property — Parol undertaking to indemnify — Officer of the Crown.*

See No. 24, ante.

110. *Public work — Government railway—Negligence of Crown servant—Prescription—50 & 51 Vict. c. 16—Arts. 2262, 2267, 2188, 2211 C. C.—R. S. C. c. 38.*

See No. 1, ante.

111. *Government buildings — Supply of water to—Water rates—Discount for prompt payment — Refusal of discount.*

See MUNICIPAL CORPORATION, 199.

112. *Public work—Obstruction to canal—Use of canal.*

See EXPROPRIATION, 2

113. *Public work — Negligence — Militia class firing — Government rifle range — Officers and servants of the Crown — 50 & 51 Vict. c. 16, s. 16c (D.)—R. S. C. c. 41, ss. 10, 69.*

See No. 48, ante.

114. *Public work — Navigation of River St. Lawrence — Negligence — Repair—Parliamentary appropriation — Discretion as to expenditure.*

See No. 19, ante.

115. *Injury from public work — Negligence of Crown officials — Right of action—Liability of Crown — 50 & 51 Vict. c. 16, ss. 16, 23, 58 — Jurisdiction of Exchequer Court — Prescription—Art. 2261 C. C.*

See NEGLIGENCE, 188.

12. RAILWAYS AND RAILWAY AID.

116. *Government railways—Public work—Crown officers — Misfeasance—Non-feasance — Tort — Negligence — Right of action — “The King can do no wrong”—Carriers — Contract — Railway ticket.*

See RAILWAYS, 100.

117. *Government railway — Breach of contract — Damages — Petition of right — 37 Vict. c. 16 (D.)*

See TORT, 1.

118. *Public work — Government railway—Negligence of Crown servant — Prescription — 50 & 51 Vict. c. 16—Arts. 2262, 2267, 2188 2211 C. C.—R. S. C. c. 28.*

See No. 1, ante.

119. *Public work — Agreement binding on Crown — Damage to property — Parol undertaking to indemnify — Officer of the Crown.*

See No. 24, ante.

120. *Government railway—48 Vict. c. 8—Damage from overflow of water — Negligence — Boundary ditches.*

See No. 47, ante.

121. *Railway subsidy — Application — Discretion — Trust — Petition of right.*

See CONSTITUTIONAL LAW, 55.

122. *Government railway—Liability for act of employee — R. S. C. c. 38, s. 50.*

See NEGLIGENCE, 30.

13. WAIVER.

123. *Insolvent bank — Winding-up proceedings — Priority of Crown as simple contract creditor — Estoppel — Acceptance of dividends*—45 Vict. c. 23.

See No. 73, ante.

124. *Forfeiture of right of appeal—Waiver—Condition precedent—Petition of right—Arts. 1020, 1209, 1220 C. P. Q.*

See APPEAL, 432.

CURATOR.

1. *Substitution — Action against former curator — Intervention — Art. 154 C. C. P.*
See SUBSTITUTION, 1.

2. *Purchase of trust estate — Negotiorum gestor—Mandate — Action for account—Release — Parties to suit.*

See ACCOUNT, 4.

AND see ADMINISTRATORS — ASSIGNMENT — GUARDIAN.

CUSTOMS DUTIES.

1. *Article imported in parts—Rate of duty—Scrap brass—Good faith*—46 Vict. c. 12, s. 153 — *Subsequent legislation — Legislative declaration.*—A., manufacturer of an "Automatic Sprinkler," a brass device composed of several parts, was desirous of importing the same into Canada, with the intention of putting the parts together there and selling the completed articles on the market. He interviewed the appraiser of hardware at Montreal, explained to him the device and its use, and was told that it should pay duty as a manufacture of brass. He imported a number of sprinklers and paid the duty on the several parts, and the Customs officials then caused the same to be seized, and an information to be laid against him for smuggling, evasion of payment of duties, under-valuation, and knowingly keeping and selling goods illegally imported, under ss. 153, 155, of the Customs Act, 1883. *Held*, reversing the Exchequer Court (1 Ex. C. R. 373), that there was no importation of sprinklers, as completed articles, and the Act not imposing a duty on parts of an article, the information should be dismissed.—*Held*, also, that the subsequent passage of an Act, 48-49 Vict. c. 61, s. 12, re-enacted by 49 Vict. c. 32, s. 11, imposing a duty on such parts was a legislative declaration that it did not previously exist. *Grinnell v. The Queen*, xvi., 119.

2. *Teas in transit through United States to Canada*—52 Vict. c. 14—*Tariff Act (1886), item 781—R. S. C. c. 33, s. 10.*—Plaintiffs made two shipments of tea from Japan to New York for transportation in bond to Canada. In one case the bills of lading were marked "in transit to Canada;" in the other the teas appeared upon the consular invoice made at the place of shipment to be consigned to plaintiff's brokers in New York for transhipment to Canada. On arrival of both lots at New York, and pending sale thereof in Canada, they were allowed to be sent to a bonded warehouse as unclaimed goods for some five or six months

and were finally entered at the New York Customs House for transportation to Canada, and forwarded to Montreal. There was nothing to show that plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws or regulations of the United States or of Canada with respect to the transportation of goods in bond. — *Held*, affirming the judgment appealed from (2 Ex. C. R. 126), Gwynne, J., dissenting, that as it clearly appeared that the tea was never entered for sale or consumption in the United States; that it was shipped from there within the time limited by law for goods in transit to remain in a warehouse; and that no act had been done changing its character during transit, it was therefore "tea imported into Canada from a country other than the United States but passing in bond through the United States" and under R. S. C. c. 33, s. 10, not liable to duty as goods exported from the United States to Canada. *Carter, Macy & Co. v. The Queen*, xviii., 706.

3. 50 & 51 Vict. c. 39, *Items 88 and 173—Exemption from duty—Steel rails for use on railways—Application to street railways.*—The exemption from duty in 50 & 51 Vict. c. 39, item 173, of "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways, which are subject to duty as "rails for railways and tramways of any form," under item 88. *Strong, C.J., and King, J., dissenting. Toronto Railway Co. v. The Queen*, xxv., 24.
Memo. See (1896) A. C. 551.

4. *Customs duties — Duties on goods — Foreign-built ships—Customs' Tariff Act, 1897, s. 4.*—A foreign-built ship owned in Canada which has been given a certificate from a British Consul and comes into Canada for the purpose of being registered as a Canadian ship is liable to duty under section 4 of the Customs' Tariff Act, 1897.—A taxing Act is not to be construed differently from any other statute. *The King v. Algoma Central Ry. Co.*, xxxii., 277.

[Affirmed on appeal by Privy Council, 40 Can. Gaz. 400.]

5. *Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition—Presumption as to good faith*—Arts. 1047, 1049 C. C.]—The Crown is not liable, under the provisions of articles 1047 and 1049 C. C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act. *Wilson v. The City of Montreal* (24 L. C. Jur. 222) approved, *Strong, C.J., dubitante.*—*Per Strong, C.J.* The error of law mentioned in arts. 1047 and 1049 C. C. is the error of the party paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those articles. *The Toronto Railway Co. v. The Queen* (4 Ex. C. R. 262; 25 Can. S. O. R. 24; [1896] A. C. 551) discussed. *The Algoma Ry. Co. v. The King* (7 Ex. C. R. 239) referred to. Judgment appealed from (7 Ex. C. R. 287) affirmed. *Ross v. The King*, xxxii., 532.

6. *Duty payable to the Crown—Classification—Legislation subsequent to importation—Future rights—Right of appeal.*

See APPEAL, 51.

7. *Revenue—Imported goods—Tariff Act—Retrospective legislation—R. S. C. c. 32—57 & 58 Vict. c. 33 (D.)—58 & 59 Vict. c. 23 (D.)*

See LEGISLATION, 1.

CUSTOM OF PORT.

See SHIPPING.

CUSTOM OF TRADE.

1. *Breach of contract—Evidence—Custom of trade—Local usage—Damages—Sale of goods.*—On appeal the Supreme Court affirmed the judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 221), which held that a custom of trade by which orders were filled by manufacturers according to the dates when received had been sufficiently proved and was binding, but that an alleged custom denied by most manufacturers in similar business could not be considered uniform or universal or binding upon the parties. *Marsh v. Legatt*, xxix., 739.

2. *Commercial usage—Loading part on coast of South America—Guano Islands—Evidence—Construction of policy.*

See INSURANCE, MARINE, 19.

3. *Shipment of grain—Transshipment in transit—Continuing original bills of lading.*

See BILL OF LADING, 3.

4. *Voyage policy—"At and from" a port—Construction of policy—Usage.*

See INSURANCE, MARINE, 24.

5. *Sale of goods by sample—Sale through brokers—Trade usage—Delivery—Inspection.*

See CONTRACT, 211.

6. *Sale of shares—Marginal transfer—Stock exchange custom—Undisclosed principal—"Settlement"—Obligation of purchaser—"Stock jobbing."*

See BROKER, 3.

DAMS.

See EASEMENT—RIVERS AND STREAMS—SERVITUDE—WATERCOURSES.

DAMAGES.

1. ASSESSMENT; MEASURE OF DAMAGES; RIGHT OF ACTION, 1-38.
2. BREACH OF COVENANT, 39-43.
3. COMMON FAULT, 44-46.
4. DAMNUM ABSQUE INJURIA, 47, 48.
5. DISCRETIONARY AWARD, 49-53.
6. EXPROPRIATIONS, 54-59.
7. INJURIA SINE DAMNUM, 60.
8. JOINT TORT FEASORS, 61-63.
9. LIBEL, 64-67.
10. LICENSED FERRY, 68.
11. LIMITATION OF ACTION, 69.

12. NEGLIGENCE; PROXIMATE CAUSE, 70-75.

13. NUISANCE, 76-78.

14. PENAL CLAUSE, 79.

15. WAIVER, 80-82.

16. WARRANTY, 83, 84.

1. ASSESSMENT; MEASURE OF DAMAGES; RIGHT OF ACTION.

1. *Negligence—Death of wife—Damages to husband as administrator—Benefit of children—Loss of household services—Care and training of children.*—Although on the death of a wife, caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services, accustomed to be performed by the wife, which would have to be replaced by hired services, may be a substantial loss for which damages may be recovered, and so also may be the loss to the children of the care and moral training of their mother. Judgment of the Court of Appeal for Ontario (11 Ont. App. R. 1) affirmed. *St. Lawrence & Ottawa Ry. Co. v. Lett*, xi., 422.

[The Privy Council refused leave to appeal; 6 Can. Gaz. 583.]

2. *Assessment—Material loss—Injured feelings—Misdirection as to solatium—New trial—Art. 1056 C. C.*—In an action of damages brought for the death of a person by the consort and relations under art. 1056, C. C. which is a re-enactment and reproduction of the C. S. L. C. c. 78, damages by way of *solatium* for the bereavement suffered cannot be recovered. Judgment appealed from (M. L. R. 2 Q. B. 25) reversed and new trial ordered. *Canadian Pacific Ry. Co. v. Robinson*, xiv., 105.

3. *Death of parent—Bereavement—Negligence—Art. 1056 C. C.—Solatium—Pecuniary loss—Verdict—Cross-appeal—Practice.*—In an action for damages, the descendants of L., killed driving down a street, alleged to have been at the time of the accident in a bad state of repair, by being thrown from a sleigh, the trial judge (without a jury), granted \$1,000 damages by way of *solatium* for bereavement (M. L. R. 2 S. C. 56). Held, reversing the judgment of the Court of Queen's Bench, that the verdict could not be upheld on the ground of *solatium*, and as the respondents had not filed a cross-appeal to sustain it on the ground that there was sufficient evidence of a pecuniary loss for which compensation could be claimed, the action must be dismissed with costs. *City of Montreal v. Labelle*, xiv., 741.

4. *Assessment of damages—Action for negligence—Deduction of life insurance.*—A deduction of insurance on the life of deceased from the amount of a verdict upon entering judgment was held to be improper. *Grand Trunk Ry. Co. v. Beckett*, xvi., 713.

5. *Discretion as to award—Interference on appeal—Evidence—Error in fact or law—Partiality.*—The amount of damages awarded in the discretion of the trial judge should not be interfered with on appeal, unless clearly unreasonable and unsupported by the evidence, or for error in law or fact, or partiality of the judge. *Levi v. Reed* (6 Can. S. C. R. 482), and *Gingras v. Desilets*, Cass. Dig. (2 ed.) 212, followed. *Cossette v. Dun*, xviii., 222.

6. *Use and occupation — Estimating damages—Prescription — Quasi delict—Pleading.*]—In assessing damages for use and occupation of lands it is not merely the value of the property for agricultural purposes should be considered, but its different and even prospective capabilities should be taken into consideration (See *Mayor of Montreal v. Brown*, 2 App. Cas. 184).—In the case in question not only was the keeping logs in safety a prospective use which might be made of plaintiff's lands, but the actual use to which the property was put by defendants. If land be well adapted for a particular purpose, as this was, and there are those who require it for such purpose, the value of the property is to be determined, not by what it might be worth if used for other purposes, but by the value which its exceptional adaptation to special purposes gives it in the estimation of those conversant with property of that description and capable of speaking of the value of the fair use of such property. The evidence justified the finding of the Superior Court, that the property was worth \$400 per annum. (See 7 Q. L. R. 286; 15 R. L. 514). *Breakey v. Carter*, Cass. Dig. (2 ed.) 463.

7. *Libel in newspaper—Additional libel in plea—Incidental demand—Excessive damages—Reduction of verdict or new trial.*]—Action for \$10,000 damages for the publication of an article which appeared in the Toronto "Mail" 8th December, 1884. Defendant filed a plea which plaintiff alleged contained an additional libel and he filed an incidental demand claiming \$5,000 further damages. At the trial the jury returned a verdict for plaintiff, \$6,000 for the libel contained in the newspaper, and of \$4,000 for the additional libel contained in the defendant's plea.—The Court of Review ordered judgment on the verdict and rejected a motion by defendant in arrest of judgment, for judgment *non obstante veredicto* and for a new trial. The Queen's Bench dismissed an appeal (M. L. R. 4 Q. B. 84). *Held*, that upon the plaintiff consenting to reduce the verdict to \$6,000, the appeal should stand dismissed without costs, the plaintiff to have his costs in the court below, and that in the event of his not consenting to a reduction of the verdict there should be a new trial; plaintiff to signify his election by filing a consent to that effect with the Registrar within ten days.—The respondent (plaintiff) filed the necessary consent to a reduction of the verdict and judgment went accordingly. *Mail Printing Co. v. Laflamme*, Cass. Dig. (2 ed.) 493.

8. *Increasing award without cross-appeal—R. S. O. (1887) c. 44, ss. 47, 48—Supreme Court, rule 61—Notice by statute.*]—Under the Ont. Jud. Act, and S. C. Rule 61, the Supreme Court of Canada has power to increase an award for damages to a respondent without a cross-appeal.—*Per Strong, C.J.* The statute is sufficient notice to the appellant that the court may pronounce such a judgment as arbitrators ought to have given. *Town of Toronto Junction v. Christie*, xxv., 551.

9. *Operation of electric power house—Vibration, smoke and noise—Assessment of damages—Reversal on appeal.*]—In reversing the judgment appealed from, the Supreme Court, in the interest of both parties, assessed damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present and future, resulting from

the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise, the record was ordered to be transmitted to the trial court to have the amount of damages determined. *Gareau v. Montreal Street Railway Co.*, xxxi., 463.

10. *Action for personal injuries—Assessment of damages—Future sufferings.*]—When in an action for bodily injuries there is but one cause of action, damages must be assessed once for all. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effects of the original injury. *City of Montreal v. McGee*, xxx., 582.

11. *Common law liability—Employer and employee—Defective ways, works or plant—Assessment of damages.*]—Where an injury has occurred by reason of defendant's neglect to provide the best known or conceivable appliances to prevent accidents, the employer is subject to common law liability and the assessment of damages should be left to the reasonable discretion of the jury. *Balch & Peppard v. Romburgh*, 12th June, 1900.

12. *Principle of assessment—Average estimate.*]—The assessment of damages by taking the average estimate of the witnesses examined is wrong in principle—*G. T. Ry. Co. v. Coupal* (28 Can. S. C. R. 531) followed. *Fairman v. City of Montreal*, xxxi., 210.

13. *Contract—Drainage — Inter-municipal works—Assessment of damages—Guarantee—Continuing liability.*]—The City of Montreal, having a sewer sufficient for all its purposes within its limits and through lands lying on a lower level than those of the adjoining municipalities of Ste. Cunégonde, St. Henri and Westmount, entered into an agreement in writing with Ste. Cunégonde by which the last named city was permitted to connect its sewers with the Montreal sewer in question for drainage purposes, and by the same agreement, the City of Montreal consented that the City of Ste. Cunégonde should allow the two other municipalities to make connections with its sewers, so connected, in such a manner that waters coming from such three higher municipalities should be drained through the Montreal sewer. The privilege was granted on condition that the connection with the Montreal sewer should be made by Ste. Cunégonde at its own cost and to the entire satisfaction of the Montreal engineers; that Ste. Cunégonde should guarantee Montreal against all "damages which might result whether from the connection of said sewers or works necessary" in connection therewith, as well to the City of Montreal as to other persons or corporations and Ste. Cunégonde bound itself to pay and reimburse to the said City of Montreal all sums of money that the latter might be "called upon and condemned to pay on account of such damages and the costs resulting therefrom." In case of the Montreal sewer becoming insufficient, and its capacity requiring to be increased, or a new sewer constructed, it was provided that Ste. Cunégonde should contribute proportionately to the cost of constructing the new works. The Ste. Cunégonde sewer was accordingly connected, and the other municipalities, upon entering into similar agreements with the City of Ste. Cunégonde, were permitted by Ste. Cunégonde to make connections with its sewers w^h

their lands were also drained through the Montreal sewer, the agreements of the two last municipalities binding them as the *arrière-garants*, respectively, of the City of Ste. Cunégonde. In an action by the City of Montreal to recover from Ste. Cunégonde damages which it had been compelled to pay for the flooding of cellars by waters from the sewer in question, the *arrière-garants* were made parties by the principal defendant on demands in warranty: *Held*, that the guarantee in question bound the several higher municipalities for all damages resulting not only from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from time to time on account of the user by them of the Montreal sewer for drainage purposes. *Held*, also, that, as the City of Montreal had not obliged itself to construct additional or new works within any fixed time in case of insufficiency, the adjoining municipalities were not relieved from any of their liabilities on account of postponement of construction of such works by the City of Montreal. *Held*, further, that the judgment awarding damages against the City of Montreal being a matter between third parties and not *res judicata* against the other municipal corporations interested, the said City of Montreal was only entitled to recover by its suit against Ste. Cunégonde, such damages as might be shewn to have resulted from the connection and user of the sewers under the agreement; that the City of Montreal, when sued, was not obliged to summon its warrantor into the action for damages, but could, after condemnation, recover such damages by separate action under the contract; that it was not, by the terms of the contract, a condition precedent to action by the City of Montreal, that it should first submit to a judicial condemnation in liquidation of such damages; and that, as between the City of Ste. Cunégonde and the *arrière-garants*, their contracts bound them, respectively, to pay such damages, with interest and costs in proportion to the areas drained by them respectively into the Montreal sewer. *City of Montreal v. City of Ste. Cunégonde; City of Ste. Cunégonde v. City of St. Henri; City of Ste. Cunégonde v. Town of Westmount*, xxxii., 135.

[Leave to appeal to the Privy Council was refused on application by the Town of Westmount, July, 1902.]

14. *Assessment of damages—Estimating by guess—Concurrent findings—Reversal on appeal—New trial.*—[The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both courts below. *Armour, J.*, however, was of opinion that the proper course was to order a new trial. *Williams v. Stephenson*, xxxiii., 323.

15. *Assessment of damages—Reservation of recourse for future damages—Expropriation—Res judicata—Right of action.*—[A lessee of premises used as an ice house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises, and, in his statement

of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpired term of the lease, *Held*, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation and, therefore, the plaintiff's action was properly dismissed by the courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same cause. *City of Montreal v. McGee*, 30 Can. S. C. R., 582, and *Chaudière Machine and Foundry Co. v. Canada Atlantic Ry. Co.* (33 Can. S. C. R. 11) followed. *Anctil v. City of Quebec*, xxxiii., 347.

16. *Measure of damages—Lessee of pew disturbed in possession.*

See ACTION, 41.

17. *Breach of contract—Delivery—Specific performance—Measure of damages—Assessment by court below.*

See CONTRACT, 242.

18. *Mode of assessment—Verdict—General damages and loss of rent.*

See NEGLIGENCE, 1.

19. *Articles 1515, 1518 C. C.—Assessment by expertise ordered.*

See SALE, 103.

20. *Measure of damages—Evidence—Breach of contract—Notice—Wrongful dismissal.*

See NEW TRIAL, 17.

21. *Cancellation of contract for public work—Breach—Value of work done—Prospective profits—Reduced value of plant.*

See CONTRACT, 93.

22. *Husband and wife—Tenancy by the courtesy—Insurable interest in wife's property—Measure of damages.*

See INSURANCE, FIRE, 82.

23. *Measure of damages—Infringement of patent—Profits received—Evidence—Royalty.*

See PATENT OF INVENTION, 6.

24. *Access to navigable waters—Obstruction—Remedy of owner—Measure of damages.*

See RAILWAYS, 68.

25. *Fault of servant—Art. 1054 C. C.—Vindictive damages—Assessment of damages.*

See NEGLIGENCE, 116.

26. *Assessment—Interference with franchise—Abatement—Nominal damages.*

See TOLLS, 1.

27. *Assessment—Life insurance—Reduction of verdict.*

See RAILWAYS, 47.

28. *Mis-trial—Misdirection—Prejudice to defendant—New trial—Consent to reduction of damages.*

See LIBEL, 2.

29. *Ancient lights—Long user—Measure of damages—Misdirection—New trial.*

See EASEMENT, 4.

30. *Action of warranty—Negligence—Obstruction of street—Assessment of damages—Questions of fact.*

See APPEAL, 232.

31. *Liability for loss—Measure of damages.*

See PRINCIPAL AND AGENT, 49.

32. *Lease—Negligence—Hire of tug—Conditions—Repairs—Compensation—Presumption of fault—Evidence—Measure of damages.*

See NEGLIGENCE, 143.

33. *Purchase of insolvent estate—Refusal to complete—Action by curator—Completion after judgment—Subsequent action for incidental expenses.*

See INSOLVENCY, 49.

34. *Floatable waters—Constitution of statute—"The Saw-logs Driving Act," R. S. O. (1887) c. 121—Arbitration—Action on award—River improvements—Detention of logs.*

See WATERCOURSES, 4.

35. *Illegal detention of lands—Measure of damages.*

See EXPROPRIATION, 11.

36. *Exchequer Court appeal—Assessment of damages—Interference with findings of Exchequer Court judge.*

See APPEAL, 241.

37. *Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Art. 5535 R. S. Q.—Arbitration—Condition precedent—Assessment of damages.*

See RIVERS AND STREAMS, 6.

38. *Contract for construction of works—Deductions for portions omitted—Partial cancellation of contract—Arts. 1065, 1691 C. C.—Deferred payments—Computation of interest—Payments in advance—Rebates.*

See CONTRACT, 31.

2. BREACH OF COVENANT.

39. *Pledge—Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Compensation and set-off—Restitution of thing pledged—Arts 1966, 1969, 1971, 1972, 1975 C. C.—Practice on appeal—Irregular procedure.]* C. on behalf of J. C. & Co., a firm of contractors of which he was a member, deposited a sum of money with the City of Montreal as a guarantee of the good faith of J. C. & Co. in tendering to supply gas for illuminating and other purposes to the city and the general public within the city limits at certain fixed rates, lower than those previously charged by companies supplying such gas in Montreal, and for the due fulfilment of the firm's contract entered into according to the tender. After the construction of some works and laying of pipes in the public streets, J. C. & Co. transferred their rights and privileges under the contract to another company and ceased oper-

ations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit which was refused by the city council which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by J. C. & Co. of their contract. After the transfer, however, the companies supplying gas in the city reduced the rates to a price below that mentioned in the tender so far as the city supply was affected, although the rates charged to citizens were higher than the price mentioned in the contract. *Held*, that the deposit so made was a pledge subject to the provisions of the sixteenth title of the Civil Code of Lower Canada and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor and the debtor was entitled to its restitution although the obligation for which the security had been given had not been executed.—On a cross-demand by the defendant for damages, to be set off in compensation against the plaintiff's claim; *Held*, that, as the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city; and that the breach of contract in respect to supplying the public did not give the corporation any right of action for damages suffered by the citizens individually. *Held*, further, that prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set-off in compensation of the claim for the return of the deposit.—The court also decided that, following its usual practice, it would not, on the appeal, interfere with the action of the courts below in matters of mere procedure where no injustice appeared to have been suffered in consequence although there might be irregularities in the issues as joined which brought before the trial court a *demande* almost different for the matter actually in controversy. *Finnie v. City of Montreal*, xxxiii., 335.

40. *Breach of covenant to issue debentures—Assessment of damages—Arts. 1065, 1070, 1073, 1077, 1840, 1841 C. C.*

See CONTRACT, 6.

41. *Rectification of contract—Breach of agreement.*

See RES JUDICATA, 16.

42. *Public work—Breach of contract—Appropriation of plant—Interest.*

See CONTRACT, 21.

43. *Contract—Shipping receipt—Carriers—Liability limited by special conditions—Negligence—Connecting lines of transportation—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.*

See CARRIERS, 2.

3. COMMON FAULT.

44. *Apportionment—"Collision in part"—Shipping.*

See NEGLIGENCE, 38.

45. *Contract for manufacture of machinery—Cause of delay in completion—Penal clause—Common fault.*

See CONTRACT, 192.

46. *Negligence—Common fault—Division of damages.*

See NEGLIGENCE, 47.

4. DAMNUM ABSQUE INJURIA.

47. *Right of action—Lawful use of land—Injury to adjoining property—Nonsuit.*—Damages and injury must both concur to give a right of action, and no action can lie in consequence of the ordinary and lawful use of land by its owner. (18 N. B. Rep. 523, affirmed). *St. John Young Men's Christian Association v. Hutchison*, Cass. Dig. (2 ed.) 210.

48. *Public work—Wharf property injuriously affected—Evidence.*

See PUBLIC WORK, 4.

5. DISCRETIONARY AWARD.

49. *Libel—Confidential report—Discretion of trial—Interference on appeal.*—In an action for libel the trial judge awarded plaintiff \$2,000. The Court of Appeal reduced the damages to \$500. *Held*, that the amount of damages awarded by the trial judge in his discretion, should not be interfered with on appeal unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the judge. *Levi v. Reed* (6 Can. S. C. R. 482), and *Gingras v. Desilets* (Cass. Dig. 2 ed. 212) followed. (See M. L. R. 3 S. C. 345.) *Cossette v. Dun*, xviii., 222.

50. *Personal injuries—Measure of damages—Findings of fact—Exemplary damages.*—In an action for damages for injuries to his feelings, reputation and health the Superior Court at Three Rivers assessed damages at \$3,000.—On appeal to the Queen's Bench, reduced the damages to \$600 condemning plaintiff to pay all the costs of appeal. *Held*, reversing the judgment appealed from (10 R. L. 275), *Taschereau, J.*, dissenting, that in view of very serious injuries sustained by plaintiff and of the misconduct of defendant (who appears to have abused his position of Justice of the Peace), the amount awarded by the trial judge was not so clearly excessive as to justify interference with his judgment.—*Per Fournier, J.* The abuse by plaintiff of his position of J. P. was an important element to be taken into consideration in fixing the amount of damages.—*Per Gwynne, J.* The sound rule to adopt is that in mere matters of fact, or in the estimation of damages not capable of precise calculation, nor ascertainable by the application of any rule prescribing a measure of damage, this court should sustain the judgment of first instance, unless satisfied that its conclusions are clearly erroneous.—Appeal allowed with costs in Queen's Bench and Supreme Court. *Levi v. Reed* (6 Can. S. C. R. 482) approved. — *Per Taschereau, J.*, dissenting. Though the amount awarded by the Queen's Bench was not sufficiently large, yet taking into consideration the position of the plaintiff and the nature of the in-

juries \$3,000 was excessive. *Gingras v. Desilets*, Cass. Dig. (2 ed.) 212.

51. *Finding of trial judge—Exemplary damages—Special damages—Interference on appeal.*

See APPEAL, 205.

52. *Public work—Award—Past and future damage—Review on appeal.*

See ARBITRATIONS, 10.

53. *Measure of damages—Estimating by guess.*

See No. 14, ante.

6. EXPROPRIATIONS.

54. *Expropriations for railway purposes—Farm crossings—Estimating compensation.*

See RAILWAYS, 26.

55. *Expropriation of land—Severancy by railway—Farm crossings—Estimating compensation.*

See RAILWAYS, 27.

56. *Expropriation for railway purposes—Estimation of damages—Prospective capabilities—Increased advantages—Severance of possession—Paper town site—Terminus—Set-off.*

See EXPROPRIATION, 22.

57. *Expropriation by railway—Assessment of compensation—Town plot sub-division—Valuation of lands—Crossings.*

See EXPROPRIATION, 1.

58. *Municipal corporation—Expropriation proceedings—Negligence—Interference with proprietary rights—Abandonment of proceedings—Damages—Servitudes established for public utility.*

See SERVITUDE, 6.

59. *Expropriation of land—Reducing damages—Valuation—Evidence.*

See EXPROPRIATION, 3.

7. INJURIA SINE DAMNUM.

60. *Injuria sine damnum—Counterclaim—Action of contract—Verdict for plaintiff—Technical breach by plaintiff—Defendant's nominal damages—New trial.*—In an action on a contract and also on the common counts to recover the balance of the contract price for work done for the defendant, the evidence shewed that there was a technical breach of the contract by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff and a new trial was refused.—*Held*, affirming the Court of Appeal for Ontario, that a verdict would not be set aside, merely to enter a verdict for nominal damages in favour of the other party. *Beatty v. Oille*, xii., 706.

8. JOINT TORT-FEASORS.

61. *Appeal—Practice—Judgment of court—Withdrawal of opinion—Master's report—*

Credibility of witnesses — Apportionment of damages — Irrelevant evidence — Severance of damages — Reasons for report — Equal division of judges in appeal — Final judgment.] — The Court of Appeal for Ontario, composed of four judges, pronounced judgment, two being in favour of dismissing an appeal, the other two pronouncing no judgment. In the Supreme Court it was objected that in the judgment appealed from no decision had been arrived at. *Held*, that the appellate court could not go behind the formal judgment which stated that the appeal had been dismissed; further that the proposition was the same as if the four judges had been equally divided in opinion, in which case the appeal would have been properly dismissed. — In an action against several mill-owners for obstructing the Ottawa River by throwing sawdust and refuse into it from their mills, a reference was made to the master to ascertain the amount of damages. *Held*, affirming the judgment appealed from, that the master rightly treated the defendants as joint tort-feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant, and that he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff. *Held*, further, that the master was the final judge of the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence. — On a reference to a master, the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons or enter into a detailed explanation of his report to the court. — (Compare, 11 O. R. 491; 14 Ont. App. R. 419; 15 App. Cas. 188.) *Booth v. Ratté*, xxi., 637.

62. *Breach of contract — Government railway — Joint misfeasance — Reduction of damages — Petition of right.*

See TORT, 1.

63. *Carriers — Partial loss of goods — Release to one of several joint tort-feasors.*

See ESTOPPEL, 64.

9. LIBEL.

64. *Libel by mercantile agency — Confidential report — False information — Negligence — Arts. 1053, 1054, 1727 C. C.*] — Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. (See M. L. R. 3 S. C. 345.) *Cossette v. Dun*, xviii., 222.

65. *Libel — Evidence — Special injury — Excessive verdict — New trial.*

See LIBEL, 1.

66. *Special damages — Loss of custom — Pleading.*

See LIBEL, 4.

67. *Newspaper libel — Additional libel in plea — Excessive damages.*

See No. 7, ante.

10. LICENSED FERRY.

68. *Monopoly — Highways and ferries — Tolls — Navigable streams — Disturbance of licensee — Companies and partnerships — Northwest.*

See CONSTITUTIONAL LAW, 27.

11. LIMITATION OF ACTIONS.

69. *Statute of Limitations — Criminal conversation — Ceasing of adulterous intercourse.*] — In an action for crim. con., it was questioned whether or not the Statute of Limitations commenced to run only when the adulterous intercourse ceased, and whether or not damages could be recovered only for intercourse within the six years preceding action. (See 27 Ont. App. R. 703.) *King v. Bailey*, xxxi., 338.

12. NEGLIGENCE; PROXIMATE CAUSE.

70. *Negligence — Work in mine — Entering shaft — Code of signals — Disregard of rules — Damages.*] — A miner was getting into the bucket by which he was to be lowered into the mine when owing to the chain not being checked his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine owners the jury found that the system for lowering the men was faulty; the man in charge of it negligent; and that the engine and brake by which the bucket was lowered were not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing among other things that signals should be given, by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual in descending to signal with the bells; and that the injured miner knew of the rules but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for plaintiff and ordering a new trial. — *Held*, reversing said judgment (8 B. C. Rep. 344) and restoring the judgment of the trial judge (7 B. C. Rep. 414), that there was ample evidence to support the findings of the jury that defendants were negligent; that there was no contributory negligence by non-use of the signals, the rules having, with consent of the employees and of the persons in charge of the men, been disregarded, which indicated their abrogation; the new trial should, therefore, not have been granted. — *Held*, further, that as the negligence causing the accident was not that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employees' Liability Act ([1897] R. S. B. C. c. 69). *Warmington v. Palmer*, xxxii., 126.

71. *Extra expenses — Probable cause — 41 Vict. c. 14, s. 4 (Que.).*

See INJUNCTION, 2.

72. *Libel by mercantile agency — False information — Confidential report.*

See No. 49, ante.

73. *Action for negligence — Excessive damages — New trial.*

See NEGLIGENCE, 15.

74. *Remote cause—Street railway—Ejection from car—Consequent illness.*

See NEGLIGENCE, 284.43

75. *Negligence—Personal injuries—Drains and sewers—Liability of municipality—Officers and employees of municipal corporation—59 Vict. c. 55, s. 26, s.s. 18 (Que.).*

See NEGLIGENCE, 124.

13. NUISANCE.

76. *Nuisance—Trespass—Continuing damage.*—In 1888 the Canada Atlantic Railway Company ran their line through Britannia Terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their foundry business. In 1900 they brought an action against the Canada Atlantic Railway Company alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work.—*Held*, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained. *Chaudière Machine & Foundry Co. v. Canada Atlantic Ry. Co.*, xxxiii, 11.

77. *Emphyteutic lease—Injuries to leased lands—Right of action—Domaine utile—Recovery by lessee.*—The right of action for damages to leased lands lies in the lessee of an emphyteutis who has the beneficial estate therein; and, where the owner of the legal estate has brought a petitory action to eject an adverse occupant and for damages, the lessee may be added as a party plaintiff in the action for the purpose of recovering any damages that may be shewn to have been sustained. *Mississippi Valley Ry. Co. v. Reed*, xxxiii, 457.

78. *Nuisance—Livery stable—Offensive odours—Noise of horses.*

See NUISANCE, 3.

14. PENAL CLAUSE.

79. *Contract for building engine—Construction of—Time for completion—Delay.*

See CONTRACT, 192.

15. WAIVER.

80. *Constructions on public property—Sufferance—Nuisance—Long possession—Trespass.*

See ESTOPPEL, 1.

81. *Promotion of joint stock company—Prospectus—Mortgage given subsequently for existing debts—Fraud—Action ex delicto—Waiver.*

See COMPANY, 11.

82. *New trial—Remittitur damnum—Practice.*

See EVIDENCE, 14.

16. WARRANTY.

83. *Sale of goods—Breach of warranty—Recovery of special damages—Action subsequently taken on contract—Evidence of inferiority of goods delivered—Consequential damages.*

See EVIDENCE, 2.

84. *Eviction—Knowledge of cause—Special agreement—Liquidated damages—Art. 1512 C. C.*

See TITLE TO LAND, 124.

DATION EN PAIEMENT.

1. *Gift inter vivos—Subsequent deed—Dation en paiement—Registration—Arts. 806, 1592 C. C.*—A gift *inter vivos* of real estate with warranty by the donor was not registered, but a subsequent deed, which was registered changed its nature from an apparently gratuitous donation to a *dation en paiement*. In an action by testamentary executors of the donor to set aside the donation for want of registration.—*Held*, affirming the judgment appealed from (*M. L. R. 6 Q. B. 316*), that the forfeiture under art. 806 C. C. resulting from neglect to register applies only to gratuitous donations, and as the deed in this case was in effect a *dation en paiement*, with warranty, which under art. 1592 C. C. is equivalent to sale, the testamentary executors had no right of action against the donee based on the absence of registration of the original deed of gift *inter vivos*. *Lacoste v. Wilson*, xx, 218.

2. *Sale—Donation in form of—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Arts. 762, 989 C. C.*—During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale, for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee, and the consideration acknowledged by the deed was never paid.—*Held*, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to shew that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid. *Valade v. Lalonde*, xxvii, 551.

DEATH OF PARTY.

Judgment reserved—Death after hearing—Entry of judgment nunc pro tunc.

See PRACTICE, 227.

DEBATS DE COMPTE.

See ACCOUNT.

DEBENTURES.

1. *Provincial bonds — Succession duties — Property exempt—Sale under will—Duty on proceeds — Costs — Proceedings by or against the Crown.*—Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General claimed succession duty on the whole estate. — *Held*, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills, J.J., dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were. Costs will be given for or against the Crown as in other cases. *Lovitt v. Atty.-Gen. of Nova Scotia*, xxxiii., 350.

2. *By-law—Conditions precedent to issue—Indorsement of future conditions*—Art. 982, *Municipal Code*.

See RAILWAYS, 88.

3. *Railway subsidy—Signature by de facto officer—Condition precedent to aid.*

See MUNICIPAL CORPORATION, 83.

DECEIT.

Bills and notes—Conditional indorsement—Principal and agent — Knowledge by agent—Constructive notice—Deceit by bank manager.

See BILLS AND NOTES, 26.

DEBTOR AND CREDITOR.

1. ATTACHMENT, 1.
2. CHATTEL MORTGAGE, 2-4.
3. COMPOSITION AND DISCHARGE, 5-7.
4. FRAUD AGAINST CREDITORS, 8-12.
5. LIMITATIONS OF ACTIONS, 13, 14.
6. PARTNERSHIP DEBTS, 15.
7. PAYMENT; INTEREST, 16-24.
8. PREFERENCES, 25-42.
9. PRESSURE, 43-45.
10. SALE OF GOODS, 46-48.
11. SECURITY FOR DEBT; SURETYSHIP, 49-53.
12. SEPARATE ESTATES, 54-56.
13. SHERIFF'S SALES, 56.

1. ATTACHMENT.

1. *Sale of goods on credit — Insolvency of consignee — Seizing goods in bond.*

See STOPPAGE IN TRANSIT.

2. CHATTEL MORTGAGE.

2. *Unregistered Mortgage — Assignment for benefit of creditors—Priority.*

See CHATTEL MORTGAGE, 15.

3. *Description of mortgaged goods — C. S. M. c. 49, s. 5.*

See CHATTEL MORTGAGE, 3.

4. *Chattel mortgage—Existing debt — Consideration—Purchase by creditor.*

See CHATTEL MORTGAGE, 1, 7.

3. COMPOSITION AND DISCHARGE.

5. *Deed of composition — Execution — Assignment in trust — Release — Authority to sign — Ratification — Estoppel.*—To an action by L. against A. the defence was release by deed. A. had executed an assignment for benefit of creditors and received authority by telegram to sign for L., the deed dated 8th October, 1881. Afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, wrote to A., "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get things adjusted I would like you to send me a cheque for \$800." . . . In April, 1885, A. wrote to L., "In one year more I will try again for myself and I hope to pay you in full." In November, 1886, the account sued upon was stated.—*Held*, reversing the judgment appealed from (21 N. S. Rep. 466), Taschereau and Patterson, J.J., dissenting, that the execution of the deed on his behalf being made without sufficient authority, L. was not bound by the release contained therein, and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it.—*Held*, per Taschereau and Patterson, J.J., that though A. had no sufficient authority to sign the deed, yet there was an agreement to compound which was binding on L., and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A., who could only receive the dividends realized by the estate. *Lawrence v. Anderson*, xvii., 349.

6. *Composition and discharge — Acquiescence in — New arrangement of terms of settlement — Waiver of time clause—Principal and agent — Deed of discharge—Notice of withdrawal from agreement — Fraudulent preferences.*—Upon default to carry out the terms of a deed of composition and discharge, a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the execution creditors appeared to have assented. *Held*, that a creditor who had benefited by the realization of the assets, and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it — The debtor's assent, to such repudiation and the grant of better terms to the one creditor would be a fraud upon the other creditors, and as such inoperative and of no effect. *Howland, Sons & Co. v. Grant*, xxvi., 372.

7. *Partnership—Insolvent firm — Assignment for benefit of creditors—Composition—Discharge of debt — Release of debtor.*—T. and C. doing business under the name of & Co., made an assignment for the benefit

creditors, and T. then induced the Dueber Co., a creditor, to pay off a chattel mortgage on the stock, and a composition of 25 cents on the dollar of unsecured claims, the company to receive its own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the Dueber Co., and the arrangement was carried out, the company eventually as provided in a contemporaneous deed executed by the parties interested re-conveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action by the company against T. & Co. on the original debt: *Held*, affirming the judgment appealed from (26 Ont. App. R. 295), that the original debt was extinguished and C. was released from all liability thereunder. *Dueber Watch Case Mfg. Co. v. Taggart*, xxx., 373.

4. FRAUD AGAINST CREDITORS.

8. *Fraudulent purchase by person in insolvent circumstances — Debts contracted out of Canada — Pleading — Confession and avoidance.*

See INSOLVENCY, 38.

9. *Pawning chattels — Insolvency — Judgment creditor.*

See PLEDGE, 2.

10. *Conveyance in name of a trustee — Fraudulent device — Parties in pari delicto.*

See TRUSTS, 20.

11. *Estoppel — Conveyance by married woman — Agreement — Recital.*

See FRAUDULENT CONVEYANCES, 5.

12. *Voluntary conveyance of land — 13 Eliz. c. 5 (Imp.) — Solvent vendor — Action by mortgagee.*

See FRAUDULENT CONVEYANCE, 6.

5. LIMITATIONS OF ACTIONS.

13. *Claims of a commercial nature — C. S. L. C. c. 67 — Art. 2260 C. C. — Limitation of action for debt — Loan by a non-trader to a trader — Interruption of prescription — Acknowledgement in writing — Entries in merchant's books — Evidence.*

See PRESCRIPTION, 26.

14. *Prescription — Unpaid note — Security for, by deed — Novation.*

See PRESCRIPTION, 6.

6. PARTNERSHIP DEBTS.

15. *Partnership debts — Division of assets — Art. 1898 C. C. — Mandate — Account.*

See PARTNERSHIP, 7.

7. PAYMENT; INTEREST.

16. *Appropriation of payments — Statements of account rendered — Rule in Clayton's case.] — In 1884 J. was unable to pay his liabilities as they matured, his principal cred-*

itors being appellants, (G. & Co.), for about \$2,000, and C. for over \$1,500.—Proposals were made for an arrangement, but before settlement each creditor issued writs against J. Pending the suits C. & P. offered to take 60 cents on the dollar or give the same for the claim of G. & Co. Appellants agreed to take 60 cents on the dollar, but both suits went to judgment. C. & P. signed judgment on 22nd January, 1885, for \$1,252.44, and appellants signed judgment on 27th February, 1885, for \$2,112.67. Appellants were paid by C. & P. indorsing J.'s note for \$1,164.67, dated 21st February, 1885, which note was paid by C. & P. on maturity and appellant's judgment was assigned to them 2nd April, 1885, at J.'s request; as security for the amount of the note which they were obliged to pay.—After this arrangement C. & P. continued to furnish J. with goods. J. paid moneys thereafter from time to time, but never at any time did he pay his new account in full.—In January, 1887, J. owed C. & P., on all accounts about \$8,000, and they then sued him and recovered a judgment against him for \$3,062.07, which with the amounts of the two judgments and with some unmatured notes of J.'s made up the total amount. On 10th January, 1887, *fi. fa.* against the goods of J. issued on the first judgment recovered by C. & P. against J. for \$1,252.42 and was placed in the sheriff's hands on the same date.—A writ of *fi. fa.* against the goods of J. also issued on the judgment by appellants against J. for \$2,112.67, on 10th January, 1887, and was on same date placed in the sheriff's hands, but only \$1,257.84 and interest was claimed thereon, being the amount actually paid by C. & P. to appellants for their claim.—On 7th February, 1887, *fi. fa.* against the goods of J. issued on the second judgment recovered by C. & P. for \$3,062.07 and was placed in the sheriff's hands same date.—Subsequently respondents each recovered a judgment against J. and placed a writ of *fi. fa.* against the goods of J. in the hands of the sheriff.—On 7th February, 1888, the sheriff seized the goods and stock-in-trade of J. and on 17th February sold the same to C. & P., at 78 cents on the dollar of the invoice price, the total purchase money amounting to \$6,101.16.—Immediately after the sale the sheriff received notice from respondents claiming that the two first above mentioned executions were paid and satisfied as against respondents, thereupon he paid to C. & P. the amount of the third above execution \$3,062.07, and retaining the balance took interpleader proceedings, and thereupon an issue was directed to try the validity of the appellant's execution, C. & P. being the real plaintiffs.—C. & P. in the course of their dealings with J. rendered four statements of account, as follows:—1. Rendered October 22nd, 1885. This statement is divided into "Old Acct." and "New Acct." "Old Acct." extends from September 22nd, 1884, to February 27th, 1885. Debits, \$2,952.75; credits, \$1,594.50; balance, \$1,358.25. J. Green & Co., note, \$1,164.67; interest on same, \$93.95; total, \$2,616.87.—"New Acct." extends from April 18th, 1885, to Oct. 23rd, 1885. Debits \$2,537.55; credits, \$1,704.90; balance, \$832.65.—2. Rendered October 21st, 1886, and marked "New Acct." To amt. acct. rendered, \$832.65; debits (goods), \$14,506.77; credits, \$9,740.58; balance, \$5,598.84.—3. Rendered October 23rd, 1886. This account is set out verbatim. 1885.—October 23rd, to amount old account, \$2,616.87; 1886.—February 24th, cash note Green & Co., \$88.22; February 24th, cash

note, Green & Co., \$41.19; by amount overcharged on interest, 78 cents; to amount old account, \$2,745.50; to amount new account, as per detailed statement, \$5,598.84; total, \$8,344.34.—4. Rendered December 31st, 1886. To amount account rendered, \$8,344.34; to debits (goods), \$2,421.67; credits, \$2,992.17; balance, \$7,783.84. The accounts are all blended into one account in No. 3 and the balance is then carried forward into one continuous account in No. 4, and all payments credited generally. These payments are more than sufficient to pay the old account, including the G. & Co. notes.—Taylor, C.J., gave judgment for respondents holding that whatever the original arrangement was for paying off G. & Co., C. & P. by the statements rendered and the receipts they gave, had so appropriated the payments made by J., that the old account was paid off. This judgment was affirmed by the Queen's Bench.—On appeal the Supreme Court affirmed the judgment, Gwynne and Patterson, J.J., dissenting, on the ground that in their view of the evidence it was agreed that all payments made by J. after the opening of the new account in April, 1885, should be applied to the new purchases until fully paid for, which agreement was continued to be acted upon until the closing of the account, and therefore the case did not come within the rule in *Clayton's Case*, but rather within the exception to the rule as laid down in *City Discount Co. v. McLean* (L. R. 9 C. P. 693), and *Heinmiker v. Wigg* (4 Q. B. 791). *Green v. Clark*, Cass. Dig. (2 ed.) 614.

17. *Payment to pretended agent—False representations as to authority—Ratification by creditor — Indictable offence.*—Where payment is obtained from a debtor by one who falsely represents that he is agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent.—The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence. (See 31 N. B. Rep. 21). *Scott v. Bank of New Brunswick*, xxiii., 277.

18. *Debtor and creditor—Security for debt—Security realized by creditor—Appropriation of proceeds—Res judicata.*—If a merchant obtains from a bank a line of credit on terms of depositing his customers' notes as collateral security, the bank is not obliged, so long as the paper so deposited remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once as payment of the merchant's debt, and must be credited to him.—Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded. Judgment appealed from (23 Ont. App. R. 146) reversed. *Cooper et al. v. The Molsons Bank*, xxvi., 611.

[Affirmed on appeal to Privy Council (26 Ont. App. R. 571).]

19. *Appropriation of payments—Error in appropriation — Arts. 1160, 1161 C. C.*—A bank borrowed from the Dominion Government two sums of \$100,000 each, giving deposit receipts therefor respectively numbered

323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made on O., one of the directors of the bank, becoming personally responsible for re-payment, and the receipt for such last loan was numbered 346. The Government having demanded payment of \$50,000 on account that sum was transferred in the bank books to the general account of the Government, and a letter from the president to the Finance Department stated that this had been done, enclosed another receipt numbered 358 for \$50,000 on special deposit, and concluded, "Please return deposit receipt No. 323—\$100,000, now in your possession." Subsequently \$50,000 more was paid and a return of receipt No. 358 requested. The bank having failed the Government took proceedings against O. on his guarantee for the last loan made to recover the balance after crediting said payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guaranteed loan and that the president had instructed the accountant so to apply the two sums of \$50,000 paid, but he had omitted to do so. The trial judge gave effect to this objection and dismissed the information of the Crown. *Held*, reversing the judgment appealed from (6 Ex. C. R. 21), Taschereau and Girouard, J.J., dissenting, that as the evidence showed that the president knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within art. 1160 C. C., no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant unless the Government could be restored to the position it would have been in if no imputation at all had been made, which was impossible as the Government would then have had an option which could not now be exercised. *The Queen v. Ogilvie*, xxix., 299.

20. *Interest—Debt certain and time certain —3 & 4 Wm. IV., c. 42, s. 28 (Imp.)*—To entitle a creditor to interest under 3 & 4 Wm. IV., c. 42, s. 28 (Imp.), the written instrument under which it is claimed must shew by its terms that there was a debt certain, payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. *Sinclair v. Preston*, xxxi., 408.

21. *Fire insurance—"Mortgage clause"—Payment to mortgagee—Liability of insurer to insured—Subrogation in rights of mortgagee—Release of mortgage.*

See INSURANCE. FIRE. 72.

22. *Creditors of company — Payment on shares — Appropriation by directors — Part treated as paid up.*

See COMPANY LAW, 40.

23. *Money paid—Voluntary payment—Insolvency of debtor.— Action by assignee — Status.*

See PAYMENT, 3.

24. *Payment — Accord and satisfaction—Mistake—Principal and agent.*

See MISTAKE, 7.

8. PREFERENCES.

25. *Insolvency—Knowledge of, by creditor—Fraudulent preference—Pledge—Warehouse receipt — Novation — Arts. 1035, 1036, 1169 C. C.]—W. E. E., connected with two business firms in Montreal, viz., the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and Elliott, Finlayson & Co., wine merchants, made a judicial abandonment on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The bank discounted for W. E. Elliott & Co., before his departure for England on the 30th June, a note of \$5,087.50 due 1st October, signed by John Elliott & Co., and indorsed by W. E. Elliott & Co., and Elliott, Finlayson & Co., and on the 5th July took, as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On and about the 9th July 146 barrels were sold, and the proceeds, viz., \$3,528.30, were subsequently, on the 9th August, credited to the note of \$5,087.50. On the 13th July, McDougall, Logie & Co. failed, and W. E. E. was involved in the failure to the extent of \$17,000, of which amount the bank held \$7,559.30, and on the 16th July, Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of \$7,559.30 on the paper of McDougall, Logie & Co., customers' notes to the amount of \$2,768.28, upon which the bank collected \$1,603.43, and still kept a note of J. P. & Co. unpaid of \$1,165.32. On the return of W. E. E., another note of John Elliott & Co., for \$1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms, on their joint paper, of \$2,660.53. The old note of \$5,087.50 due 1st October, and the one of \$1,101.33 were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co., and secured by 200 barrels of oil, 146 barrels remaining from the original number pledged, and an additional warehouse receipt of 54 barrels of oil, indorsed over by W. E. E. to Finlayson, Elliott & Co., and by them to the bank. The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August, and the giving of the notes on the 16th July to the bank, were fraudulent preferences. The Superior Court held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 13th of July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes, and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference. (Q. R. 1 Q. B. 371.)—On an appeal and cross-appeal to the Supreme Court:—*Held*, 1st. That the finding of the courts below of the fact that the bank's knowledge of W. E. Elliott's insolvency dated from the 13th July, was sustained by evidence in the case, and there had therefore*

been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' paper not yet due. Gwynne, J., dissenting.—2ndly, That the additional security given to the bank on the 10th August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co., was also a fraudulent preference. Gwynne, J., dissenting.—3rdly, Reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s substituted notes. Gwynne and Patterson, JJ., dissenting. *Stevenson v. Canadian Bank of Commerce*, xxiii., 530.

26. *Debtor and creditor—Payment by debtor—Appropriation — Preference — R. S. O. (1887) c. 124.]—A trader carrying on business in two establishments mortgaged both stocks-in-trade to B. as security for indorsements on a composition with his creditors, and for advances in cash, and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received out of the proceeds of the sale of the goods, under an order of the court, the balance remaining due on his mortgage. *Horsfall v. Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors.—*Held*, affirming the decision appealed from (23 Ont. App. R. 230), that there was no preference to B. within R. S. O. [1887] c. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue, and there had been one sale of both stocks of goods, realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens v. Boisseau*, xxvi., 437.*

27. *Assignment for the benefit of creditors—Preferred creditors—Moneys paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors.]—In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the Statute of*

Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox v. Worrall* (26 N. S. Rep. 366), questioned. (See 24 Can. S. C. R. 321). *Taylor v. Cummings*, xxvii., 589.

28. *Insolvency—Fraudulent preferences—Chattel mortgage—Advances of money—Solicitor's knowledge of circumstances—R. S. O. (1887) c. 124—54 Vict. c. 20 (Ont.)—58 Vict. c. 23 (Ont.)*—In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock-in-trade in favour of a money-lender, by whom a loan was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at one time paid over to the creditor who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the Acts respecting assignments and preferences, and to bring the case within the ruling in *Gibbons v. Wilson* (17 Ont. App. R. 1.) — *Held*, that all the circumstances, necessarily known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a *bonâ fide* payment of money within the meaning of the statutory exceptions. *Burns & Lewis v. Wilson*, xxviii., 207.

29. *Assignment for benefit of creditors—Preferred creditors—Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth.*—Where an assignment has been held void as against the statute, 13 Eliz. c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon by him under his execution, such creditor has no legal right and no equity to an account or to follow moneys received by the assignee or paid by him under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible. Judgment appealed from (29 N. S. Rep. 162), reversed. *Cummings & Sons v. Taylor*, xxviii., 337.

30. *Fraudulent preferences—Transfer of property—Delaying or defeating creditors—13 Eliz. c. 5.*—A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing

debt and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor. Judgment appealed from (30 N. S. Rep. 121) reversed. *Mulcahy v. Archibald*, xxviii., 523.

31. *Fraudulent preference—Collusion—Pressure—R. S. B. C. cc. 86, 87—The Bank Act, s. 30—Company law—Mortgage by directors—Ratification—B. C. Companies Act, 1890, 1892, 1894.*—The action was to set aside a mortgage by an incorporated company to the bank, an assignment of book debts and judgment by the bank against the company on grounds: (1) that the mortgage was voluntary, fraudulent, and void under the Statute of Elizabeth; (2) void as a fraudulent preference; (3) not executed in accordance with the Companies Act; (4) that the assignment was void for same reasons and contrary to the Bank Act; and (5) the judgment voluntary, fraudulent, and void under the Statute of Elizabeth. It was contended that moneys received by the bank were exigible under plaintiffs' executions and an order asked accordingly. The judgment appealed from (8 B. C. Rep. 314) affirmed the trial judgment and held that there was good consideration for the mortgage, that it was given under pressure and should not be set aside although comprising the whole of the debtor's property and given under insolvent circumstances to the knowledge of the mortgagee and deprived the other creditors of their remedy; also, that the mortgage given by the company's directors without proper authority had been legally ratified by subsequent resolution of the shareholders. The Supreme Court affirmed the judgment appealed from, Gwynne, J., taking no part in the decision, and subsequently the Privy Council refused leave for an appeal (8 B. C. Rep. 337). *Adams & Burns v. The Bank of Montreal*, xxxii., 719.

32. *Conveyance in fraud of creditors—Illegal preference—Arts: 993, 1033, 1035, 1040, 1981, 1982 C. C.—Insolvent Act of 1869 and 1875.*

See INSOLVENCY, 11.

33. *Winding-up insolvent bank—Priority of claims by the Crown—Waiver—45 Vict. c. 23 (D.)*

See CROWN, 73.

34. *Security obtained by simulated loan—Chattel mortgage—Bona fides—Pressure.*

See FRAUDULENT PREFERENCE, 2.

35. *Insolvency—Chattel mortgage—Suit by creditors—Parties.*

See FRAUDULENT PREFERENCE, 3.

36. *Assignment in trust—Unreasonable conditions—Preferences—Resulting trusts—Fraud on creditors—Statute of Elizabeth.*

See ASSIGNMENTS, 3.

37. *Insolvency—Conveyance in fraud of creditors generally—Simulated sale.*

See FRAUDULENT CONVEYANCES, 4.

38. *Fraudulent preference—Pledge of railway property—Advances to insolvent company—Priority.*

See LIEN, 7.

39. Assignment for benefit of creditors—Preference—Hindering and delaying—Statute of Elizabeth.

See CHATTEL MORTGAGE, 12.

40. Purchase of land by married woman—Re-sale—Garnishee of purchase money—Debt of husband—Statute of Elizabeth—Hindering or delaying creditors.

See PRACTICE, 61.

41. Insolvency—Assignment—Preference—Payment in money—Cheque of third party.

See INSOLVENCY, 23.

42. Assignment for the benefit of creditors—Affidavit of bona fides—Preferences—Distribution of assets—Arbitration—Conditions of deed—Statute of Elizabeth.

See FRAUDULENT PREFERENCES, 9.

9. PRESSURE.

43. Preferences—Pressure—Insolvency—49 Vict. c. 45 (Man.)

See FRAUDULENT CONVEYANCES, 2.

44. Mortgage by insolvent—Pressure—R. S. O. (1887) c. 124, s. 2.

See FRAUDULENT PREFERENCE, 6.

45. Conveyance—Unlawful pressure—Trust property.

See DURESS, 2.

10. SALE OF GOODS.

46. Goods sold—Person to whom credit was given—Assignment in trust—Power of attorney by trustee—Authority of attorney to use principal's name—Evidence.—A., doing business as J. A. & Sons assigned to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, etc., and to carry on the business if expedient. A. continued the business as before, and in the course of it purchased goods from F., to whom on some occasions he gave notes signed "J. A. & Sons—H. trustee per A." All the goods so purchased from F. were charged in his books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F., the latter brought an action against H. on notes signed as above, and for the price of goods so sold to A.—*Held*, reversing the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the evidence at the trial of the action clearly shewed that the credit for the goods sold was given to A. and not to H.; that A. did not carry on the business after the assignment at the instance or as the agent of H., nor for the benefit of his estate; that A. was not authorized to sign H.'s name to notes as he did; and that H. was not liable either as the person to whom credit was given or as an undisclosed principal.—*Held*, further, that if H. was guilty of a breach of trust in allowing A. full control over the estate, that would not make him liable to F. in this action. *Hechler v Forsyth* xxii. 489.

47. Open sale—Change of possession—R. S. O. (1877) c. 119, s. 5.

See SALE, 12.

48. Agreement to supply goods—Property in goods supplied—Execution—Seizure.

See CONTRACT, 215.

11. SECURITY FOR DEBT—SURETYSHIP.

49. Loan by savings bank—Pledge of securities for—Validity of—Insolvency of borrower—Right of curator to impugn transaction—R. S. C. c. 122, s. 20.—L. borrowed a sum of money from a savings bank which he agreed to re-pay with interest, transferring in pledge as collateral security letters of credit on the Government of Quebec. L. having become insolvent the bank filed its claim for the amount of the loan, with interest, with the curator of the estate, and on appeal the appellants, as creditors of L., contested on the ground that the said securities were not of the class mentioned in the Act relating to savings banks (R. S. C. c. 122, s. 20), and the bank's act in making said loan was *ultra vires* and illegal. (See Q. R. 3 Q. B. 315.)—*Held*, that L., having received good and valid consideration for his promise to re-pay the loan, could not, nor could the appellants, his creditors, who had no other rights than the debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities.—Assuming that the act of the bank in lending the money, on the pledge of such securities, was *ultra vires*, although this might affect the pledge as regards third parties interested in the securities, it was not, of itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank under arts. 989 and 990 C. C. from claiming back the money with interest. *Bank of Toronto v. Perkins* (8 Can. S. C. R. 903) distinguished. *Rolland v. Caisse d'Economie de Québec*, xxiv., 405.

50. Conditional license to take possession of goods—Creditor's opinion of debtor's incapacity—Bona fides—Replevin—Conversion.—F., a trader, having become insolvent, and being indebted among others to the firm of T. M. & Co., composed of T. and M., arranged to pay his other creditors 50 per cent. of their claims, T. M. & Co., indorsing his notes for securing such payment, they to be paid in full, but payment to be postponed until a future named day. T. M. & Co. were secured for indorsing by an agreement under seal, by which it was agreed that if F. should at any time, in the opinion of T. M. & Co., or either of them, become incapable of attending to his business, the debt due to T. M. & Co., should at once become due, and they could take possession of the stock-in-trade, book debts, and property of F., and sell the same for their claim, having first served on F. a notice in writing, signed by the firm name, stating that in their opinion F. was so incapable; and that on a change in the firm of T. M. & Co., the agreement should enure to the benefit of the firm as changed if it assumed the liabilities of, and took over T.'s indebtedness to the old firm. This arrangement was carried out, and some time after the date for payment to T. M. & Co., payment not having been made, a bank to which F. was indebted failed, and T. M. & Co. then consisting of T. and N. M.

having retired, persuaded F. to assign his book debts to them, and afterwards served on him a notice as required by the agreement, and took possession of his place of business and stock. F. then agreed to act for T. M. & Co., until a certain day after, and resumed possession, but when T. M. & Co. returned on said day he disputed their right, and ejected them from the premises. Two days after he assigned to the official assignee for the benefit of all his creditors, and T. M. & Co. issued a writ to replevy the goods from him and the assignee. *Held*, affirming the decision appealed from (10 Man. L. R. 340), Gwynne, J., dissenting, that F. and the assignee were guilty of a joint conversion of the property replevied.—Gwynne, J., held that there was no conversion by either.—*Held*, also, affirming said decision, Gwynne, J., dissenting, that if T. M. & Co. formed an honest opinion that F. was incapable such opinion must govern, though mistaken in point of law or fact, illogical or inconclusive; that they were justified in believing from his loose business methods, waste of time over small matters, financial embarrassments, and acting under the direction of his creditors, that F. was worn down by worry and generally unfit for business; that the fact that the notice would not have been given if certain demands of T. M. & Co. had been complied with did not necessarily shew *mala fides*; and that the change in the firm of T. M. & Co., did not vitiate the notice as one of the original members clearly formed the opinion, if one was formed, and conveyed it to F. *Francis v. Turner*, xxv., 110.

51. *Principal and surety—Giving time to principal — Reservation of rights against surety.*—Where a creditor gives his debtor an extension of time for payment, a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given. *Wyke v. Rogers* (1 DeG. M. & G. 408) followed. *Gorman v. Dixon*, xxvi., 87.

52. *Vendor and purchaser—Agreement for sale of lands—Assignment by vendee—Principal and surety — Deviation from terms of agreement—Giving time — Creditor depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.*

See PRINCIPAL AND SURETY, 4.

53. *Principal and surety—Guarantee bond —Default of principal — Non-disclosure by creditor.*

See PRINCIPAL AND SURETY, 5.

12. SEPARATE ESTATE.

54. *Married woman's property — Separate estate—Contract by married woman—Separate property exible—C. S. U. C. c. 73—35 Vict. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 Vict. c. 19 (O.)*—A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property, and in 1887, before the Married Woman's Property Act of that year (R. S. O. c. 132), came into force, she became liable on certain promissory notes made by her. *Held*, reversing the judgment appealed

from (19 Ont. App. R. 383), that the liability of her separate property to satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts of 1887 (R. S. O. cc. 125, 127), and the Married Woman's Property Act, 1884 (47 Vict. c. 19), read in the light furnished by certain clauses of C. S. U. C. c. 73; and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property. *Moore v. Jackson*, xxii., 210.

55. *Married woman — Separate property—Conveyance—Contracts—C. S. N. B. c. 72.*

See MARRIED WOMAN, 3.

13. SHERIFF'S SALES.

56. *Execution — Sales under execution —Equitable rights—Unregistered transfers—Registration—Real Property Act—R. S. C. c. 51; 51 Vict. (D.), c. 20.*

See REGISTRY LAWS, 31.

DEDICATION.

1. *Old trails in Rupert's Land — Crown grant—Squatter's plan of sub-division—Substitution of new way—Dedication—Highway—Adopting new street as a boundary.*—A squatter in possession of public lands near the old Hudson Bay Trading Post at Edmonton, who afterwards became patentee of the greater part of the lands he occupied, had made a plan of sub-division thereof into town lots, which shewed a new roadway or street laid down in the place of the old travelled trail across said lands leading to the trading post, and subsequently, the Crown, in making grants, described several parcels of the lands in the patents as being bounded and abutting upon the said new street, or roadway, so laid down on the plan. *Held*, affirming the judgment appealed from (1 N. W. T. Rep., pt. 4, p. 39), that the space so shewn upon the plan, as laid out for a street, had been adopted and dedicated by the Crown as and for a public street and highway, in substitution for the old travelled trail or roadway across said lands. *Brown et al. v. Town of Edmonton*, xxiii., 308; xxviii., 510.

2. *Constitutional law—Navigable waters—Title to bed of stream—Crown—Dedication of public lands — Presumption of dedication — User — Obstruction to navigation — Public nuisance—Balance of convenience.*

See NAVIGABLE WATERS, 2.

3. *Municipal corporation—Highways—Old trails in Rupert's Land—Substituted highway —Necessary way—R. S. C. c. 50, s. 108—Reservation in Crown grant—Dedication—User —Estoppel—Assessment of lands claimed as highway—Evidence—Presumption.*

See HIGHWAY, 3.

4. *Highway—User—Evidence.*

See HIGHWAY, 5.

DEED.

1. CHARGE UPON LANDS, 1-3.
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1. CHARGE UPON LANDS.

1. *Construction of deed—Partition—Charge upon lands.*—A deed for the partition of land held in common contained a conveyance of a portion thereof to M. W., for certain considerations therein recited of which one was the condition that she should procure from her minor children, upon their coming of age, the necessary quitclaim deeds for the release of their interests in another portion of the land in question apportioned and conveyed to her co-parceners, and the amount of certain payments of money then made for the purpose of effectuating the partition, was by the deed of partition declared to remain a lien on that portion of the land thereby conveyed to M. W. until such quitclaims should have been obtained and delivered to her said co-parceners. *Held*, that the said recital was sufficient to charge that portion of the said land so conveyed to M. W. with the amount of the said payments of money as a security for the due execution and delivery of the quitclaims in conformity with the condition stipulated in the deed of partition. *Green v. Ward*, xxix., 572.

2. *Agreement to charge lands—Statute of Frauds.*

See MORTGAGE, 25.

3. *Title to lands—Seigniorial tenure—Words of limitation—Covenant by grantee—Charges running with title—Servitude—Condition, si voluero—Prescriptive title—Edits and Ordonnances (L.C.)—Municipal regulation* — 23 Vict. (Can.) c. 85.

See SERVITUDE, 4.

2. CONDITIONS.

4. *Substitution—Bail-à-rente—Donation—Sale—Consideration—Rente foncière—Prohibition to alienate—Onerous title—Nullity*—Arts. 970, 1234 C. C.—18 Vict. c. 250—*Evidence.*—By 18 Vict. c. 250, W. F. and E. F. were authorized to sell lands *grévés de substitution*, in consideration of a non-redeemable rent representing the value of the property.

On 7 September, 1860, they assigned to A. F., part of the entailed property, in consideration of a *rente foncière* of £6 annually, payable by a deed stipulating that the assignee could not alienate the land, nor any part thereof, without express written consent of the assignors, under penalty of nullity. The property was subsequently seized by a judgment creditor of A. F., and W. F. opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate. *Held*, affirming the judgment appealed from, that the deed was in accord with the provisions of 18 Vict. c. 250; that it was a purely onerous title on its face, and consequently the prohibition to alienate was void. *Held*, also, that parol testimony ought not to have been admitted as evidence to vary the character of the deed as an onerous title.—*Quære*, Whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration. *Fraser v. Pouliot*, iv., 515.

5. *Contract—Subsequent deed—Inconsistent provisions.*—C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co., all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th a deed was executed and delivered to the company, transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Company, who immediately cut off from the works of C. the supply of gas, and an action was brought by C. to prevent such interference. *Held*, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained. *Carroll v. Provincial Natural Gas and Fuel Co.*, xxvi., 181.

6. *Construction of deed—Sale of phosphate mining rights—Option to purchase other minerals while working—Exercise of option.*

See CONTRACT, 237.

3. CONSTRUCTION.

7. *Terms of deed—Servitude—Roadway—User*—Art. 549 C. C.—In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed, to which they all were parties, they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards, the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which

did not lie between the road so purchased over the spur of the mountain, and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way.—In an action (*négotoire*) to prohibit further use of the way; *Held*, affirming the decision appealed from (Q. B. 5 Q. B. 572), that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain. *Riou v. Riou*, xxviii., 53.

8. *Construction of deed of lands—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Art. 5535 R. S. Q.*—A deed conveying a portion of the vendor's lands bordering on a stream granted the privilege of constructing dams, etc., therein, with the proviso that, in case of damages being caused through the construction of any such works, the vendor or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators and that the purchasers should pay the amount awarded. *Held*, that, under the deed, the purchasers were liable, not only for damages caused by the flooding of lands, but also for all other damages occasioned by the building of dams and other works in the stream by them; and, that the provisions of art. 5535 R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused. *Hamlin v. Bannerman*, xxxi., 334.

9. *Railways—Construction of deed—Location of permanent way—Laying out boundaries—Fencing—Riparian rights—Notice of prior title—Registry laws—Possession—Acquisitive prescription.*—In the conveyance of lands for the permanent way the deed described lands sold to the railway company as bounded by an unnavigable stream, as "selected and laid out" for the railway. Stakes were planted to shew the side lines, but the railway fences were placed inside the stakes above the water's edge, and the vendor was allowed to remain in possession of the strip of land between the fence and the middle of the bed of the stream. The deed was duly registered and, subsequently, the vendor sold the rest of his property including water rights, mills, and dams constructed in the stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, etc." *Held*, 1. that the description in the deed included, *ex jure nature*, the river *ad medium filum aquæ* and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them; 2. That the failure of the vendor to deliver the full quantity of land sold by him to the company and their abstention from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms, or as limiting the area of the property conveyed so as to exclude the

strip outside the fences or the bed of the stream *ad medium filum*, and 3, that such possession by the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

10. *Construction of deed—Sale of patent—Future improvements.*

See PATENT OF INVENTION, 11.

11. *Construction of deed—Deceased partner—Continuation—Purchase of share—Discount—Good will.*

See PARTNERSHIP, 27.

12. *Construction of warranty clause—Sheriff's deed—Sale of rights in land—Claimant under prior title—Eviction.*

See TITLE TO LAND, 126.

4. CONVEYANCE AS SECURITY.

13. *Banking—Bond to secure advances—Construction—Estoppel—Misrepresentation—Literatæ obligæe.*—M., a man of education, well acquainted with commercial business, executed a bond to pay money, in certain events, to the bank. By an agreement, bearing even date it was recited that, in consideration of a certain mortgage, the bank had agreed to make further advances to joint obligors with M., parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss; that if the firm should pay, then the bond and agreement should become wholly void. In a suit brought upon the agreement against M., alleging a deficiency in the assets of the firm and indebtedness to the bank, M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against loss arising by reason of non-registration of the mortgage, or by reason of over-valuation of property in the mortgage, and not otherwise. The bank, made no representations whatever to the defendants. *Held*, affirming the judgment appealed from (5 O. R. 112), (Gwynne, J., dissenting), that M. was bound by the execution of the documents, and liable upon them according to their tenor and effect. *Moffatt v. Merchants Bank of Canada*, xi., 46.
[The Privy Council refused leave to appeal.]

14. *Absolute conveyance—Operation as mortgage—Evidence.*—Evidence of the most conclusive character must be adduced in order to have a deed absolute in character declared to operate as a mortgage only. *McMicken v. Ontario Bank*, xx., 548.

15. *Absolute sale of mortgaged lands—Purchase of equity of redemption—Consideration mentioned.*

See SALE, 106.

16. *Absolute in form—Conveyance to third party—Security for loan—Undisclosed trust—Parol testimony—Statute of Frauds.*

See SPECIFIC PERFORMANCE, 2.

17. *Sale of land—Absolute in form—Effect as mortgage—Parol testimony.*

See EVIDENCE, 225.

18. *Obligation—Constitution d'hypothèque—Security for unpaid note—Novation—Prescription.*

See PRESCRIPTION, 6.

19. *Conveyance in absolute form—Mortgage—Resulting trust—Notice—Estoppel.*

See TITLE TO LAND, 7.

5. COVENANTS.

20. *Covenant for title—Escrow—Estoppel.*—To an action for breach of covenant for title in a mortgage to the plaintiffs, executed by T., the defendants' grantee, R., one of the defendants, pleaded that T. did not, after the making of that deed, convey the lands to the plaintiffs. The deed from defendants to T. was dated 22nd June, 1855, and the mortgage from T. to the plaintiff was dated 10th April, 1855. Both were registered on the 28th July, 1855—the deed first. It appeared that there were two mortgages from T. to the plaintiffs on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendants to him was necessary to give the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August, 1855. *Held*, (Henry, J., dissenting), reversing the judgment appealed from (1 Ont. App. R. 26), and affirming 32 U. C. Q. B. 222, that the whole transactions shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiff, therefore, could recover. Also, *per* Richards, C.J., and Strong, J., that assuming the deed of the 10th of April, 1855, to have been a completed instrument from its date, the usual covenant contained in it that the grantor was seized in fee at the date of the deed created an estoppel, and that the estoppel was fed by the estate T. acquired by deed of 22nd June, 1855. *Trust and Loan Co. v. Ruttan*, i., 564.

21. *Landlord and tenant—Conditions of lease—Construction of deed—Practice.*—Where a written lease of lands provides for the payment of indemnity to the lessees in case they should be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned. *The Queen v. Poirier*, xxx., 36.

22. *Construction of lease—Provision for termination—Sale of premises—Parol agreement—Misrepresentation—Quiet enjoyment.*—A lease of premises used as a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises, if necessary, on six months' notice." *Held*, reversing the judgment appealed from (26 Ont. App. R. 78), and (29 O. R. 75), that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision en-

titling the lessor to give the notice to vacate. *Held*, further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment. *Lumbers v. Gold Medal Furniture Mfg. Co.*, xxx., 55.

6. DELIVERY.

23. *Delivery—Retention by grantor—Presumption—Rebuttal.*—The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument.—The evidence in favour of the due execution of such a deed is not rebutted by the facts that it compromised all the grantor's property, and that while it professed to dispose of such property immediately the grantor retained the possession and enjoyment of it until his death. Judgment appealed from (31 N. S. Rep. 333) reversed. *Zwicker v. Zwicker*, xxix., 527.

7. DESCRIPTION OF LANDS.

24. *Description of land—Extent—Terminal point—Number of rods—Railway company.*—A specific lot of land was conveyed by deed, and also: "A strip of land 25 links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about twelve rods unto the western end of the railway station ground, the said lot and strip together containing one acre, more or less." *Held*, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the strip conveyed was not limited to twelve rods in length, but extended to the western end of the station, which was more than twelve rods from the starting point. *Doyle v. McPhee*, xxiv., 65.

25. *Construction of deed—Conveyance of land—Uncertain description—Evidence of intention—Verba fortius accipiuntur contra proferentem—Maxim applied—Patent ambiguity.*—A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend *ad medium filum* as in the case of a non-navigable river.—If in a conveyance of land the description is not certain enough to identify the locus it is to be construed according to the language of the instrument, though it may result in the grantor assuming to convey more than his title warranted.—The intention of the parties to a deed is paramount and must govern regardless of consequences. *Res magis valeat quam percat* is only a rule to aid in arriving at the intention, and does not authorize the court to override it.—A general description of land as being part of a specified lot must give way to a particular description by boundaries, and, if necessary, the general description will be rejected as *falsa demonstratio*.—Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favour of either

party.—Where a description is such that the point of commencement cannot be ascertained it cannot be determined at the election of the grantee.—Judgment appealed from (21 Ont. App. R. 569) reversed. *Barthel v. Scotton*, xxiv., 367.

26. *Mortgage of trust estate—Equity running with estate—Equitable recourse—Construction of deed—Description of lands—Falsa demonstratio—Water lots—Accretion to lands—After acquired title—Contribution to redeem—Discharge of mortgage—Parol evidence to explain deed—Estoppel by deed.*—On the dissolution of the firm of A. & Co. by the retirement of C. D. A. the business was carried on by the remaining partners T. A. and B. A., on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay, and the property was sold by the sheriff under a foreclosure decree, when they purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description, adding a further or alternative description, and, at the end, the following words:—"also all and singular the water lots and docks in front of the said lots,"—although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property, and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage, and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying \$8,000, and obtained their discharge. Upon proceedings being taken by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due, and the foreclosure proceedings were continued for their benefit. *Held*, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding encumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands.—*Per Gwynne, J.* The mortgagors were only entitled to foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond. *Held*, further, that as the construction of the mortgage depended upon the state of the property at the time it was made, parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected; that as there were no specified descriptions or recitals tending to shew that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "stone ballast heap," the after acquired water lots would not be charged or liable to contribute ratably towards redemption of the mort-

gage; that even admitting that the description was sufficient to include the after acquired property, such property was not liable to contribute towards payment of the mortgage debt. *Imrie v. Archibald et al.*, xxv., 368.

27. *Construction of deed—Title to lands—Ambiguous description—Evidence to vary or explain deed—Possession—Conduct of parties—Presumptions from occupation of premises—Arts. 1019, 1238, 1242, 1473, 1599 C. C.—47 Vict. c. 87, s. 3 (D.); 48 & 49 Vict. c. 58, s. 3 (D.)—45 Vict. c. 20 (Q.)*—By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immoveable described as part of lot No. 1937, in St. Peter's Ward in the City of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the River St. Charles, with the wharves and buildings thereon erected. The respondents entered into possession of the lands by virtue of said deeds and remained in possession for twelve years, without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882. *Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada, the Chief Justice and King, J., dissenting, that the words "Henderson street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shewn to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusions at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors. *City of Quebec v. North Shore Ry. Co.*, xxvii., 102.

28. *Construction of deed—Reference to plan—Description of lands—Courses and distances—Computed area—Evidence of boundaries.*

See BOUNDARY, 1.

29. *Sale of land—Representation as to boundaries—Description—Executed contract—Rescission—Deficiency—Fraud—Compensation.*

See VENDOR AND PURCHASER, 21.

30. *Agreement for sale of timber limits—Description of lands—New contract by conveyance.*

See SALE, 108.

31. *Sale of land—Building restrictions—Street boundaries—Construction of covenant.*

See CONTRACT, 15.

32. *Land in adjoining counties—Possession—Title by prescription.*

See TITLE TO LAND, 85.

33. *Construction of deed—Description of lands—Metes and bounds—Cadastral plans and descriptions—Possession—Registry laws—Notice—Bona fides—Prescription.*

See TITLE TO LAND, 87.

34. *Conveyance to railway—Description of land—Staking boundaries—Fencing—Riparian rights.*

See No. 9, ante.

8. DURESS.

35. *Conveyance—Duress—Undue pressure—Trust property.*—The owner of land having died intestate leaving several children, one of them, W. R., received from the others a deed conveying to him the entire title in the land in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently W. R. borrowed money from his sister and gave her a deed of the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a re-conveyance of the land to him and then gave a mortgage to B. The re-conveyance not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land. *Held*, affirming the judgment appealed from (30 N. S. Rep. 405), that the sister of W. R. was entitled to a first lien on the land for the money lent to her brother; that the deed of re-conveyance to W. R. had been obtained by undue influence and pressure and should be set aside, and B. should not be allowed to set it up.—B. claiming to be a creditor of the father and deceased brother of the defendants wished to enforce the provision in the deed to W. R. by his brothers and sister for payment of the debts of the father and brother. *Held*, that this relief was not asked in the action, and if it had been the said provision was a mere contract between the parties to the deed of which a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother. *Burris v. Rhind*, xxix., 498.

9. ESTOPPEL.

36. *Missing deed—Evidence of execution and delivery—Certified copy—Affidavit of search—Estoppel.*—Action of ejectment. The action was twice tried. Plaintiffs, executors of original plaintiff, claimed title under a deed dated 18th June, 1856, by H. McM., deceased, the former owner, conveying the land to his son, R. McM., who, on 19th April, 1869, mortgaged to the original plaintiff. This mortgage having been foreclosed, the land was purchased by the mortgagee at sheriff's sale.—At the trial plaintiff's counsel tendered a copy of the deed of 18th June, 1856, certified to be a true copy by the registrar of deeds, and accom-

panied by an affidavit of one of the plaintiffs.—“That the original deed of which the paper writing hereunto annexed, marked A., is a copy certified under the hand of the late registrar of deeds, in and for the said County of Inverness, is not in my or my co-plaintiff's possession, or under our control; and I further say that we have inquired for, and been unable to procure the same.”—D. McM., a son of the original owner, and one of the witnesses to the deed, gave evidence.—“I went to the registry of deeds office, and proved the deed from my father, H. McM., to R. McM., his son. It was registered 17th June, 1856. I took the deed to the registry office and left it there. . . . I am not aware of R.'s knowledge of the deed from my father.” R. McM. swore that he never saw the deed and never heard of it until a few years before the first trial in October, 1880.—It was agreed that plaintiff should become nonsuited with leave to move to set the nonsuit aside, and in case the court should think the nonsuit wrong, the court to enter a verdict for plaintiff.—The Supreme Court of Nova Scotia (Macdonald, C.J., and Rigby, Smith, and Weatherbe, J.J.), were divided, Rigby and Weatherbe, J.J., being of opinion that the presumption was that H. McM., the original owner, having signed the deed, delivered it to D., to take to the registry office to be proved and registered; that by this registration he gave notice to all the world that he had conveyed the land to R., and that there was evidence for a jury; that by his conduct in relation to the conveyance to R. he had induced the original plaintiff to accept the mortgage from R., believing the title to be vested in R. by virtue of the deed. Therefore the defendant, who also claimed through his father, was estopped from denying the due execution of the deed. Macdonald, C.J., and Smith, J., were of opinion there was not sufficient evidence of the execution of the deed.—The Supreme Court of Canada, *Held*, that there was sufficient evidence to establish the due execution and delivery of the deed to R. The copy having been received in evidence without objection, it was too late to object to its admissibility. Strong, J. *dubitante*.—Judgment appealed from (17 N. S. R. 438) reversed, and a verdict directed to be entered for plaintiffs. *McDonnell v. McMaster*, 22nd June, 1885, Cass. Dig. (2 ed.) 246.

37. *Translatory title—Bona fides—Prescription—Estoppel.*

See TITLE TO LAND, 76.

38. *Construction of deed—Estoppel—Purchase by fiduciary agent of Crown—Vesting of lands in Crown—Reversion of ordnance lands.*

See RIDEAU CANAL LANDS, 2.

39. *Collateral notes—Suit by trustee—Estoppel—Prescription.*

See TRUSTS, 5.

10. FIXTURES.

40. *Trade fixtures—Chattels—Tools and machinery of a “going concern”—Constructive annexation—Mortgagor and mortgagee.*—The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of moveable articles in permanent structures,

with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed, but in a manner appropriate to their use, and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises, or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty. *Haggart v. Town of Brampton*, xxviii., 174.

11. FORM.

41. *Words of grant—Conveyance—Creation of easement.*]—*Per Strong, J.* Where the intention of the parties is evident from the instrument, a covenant under seal may enure as a grant for the purpose of creating an easement, even although the technical word "grant" is not used as a word of conveyance. *Ross v. Hunter*, vii., 289.

42. *Defect in form—Commencement of proof in writing.*]—*Writings under private seal* which have been signed by the parties, but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence. (See *Q. R. 12 S. C. 350*). *Powell v. Watters*, xxviii., 133.

43. *Conveyancing in Quebec—Notarial profession—Prevention of fraud—Illiteracy—Arts. 646, 650 C. C.*

See *NOTARY*, 1.

44. *Locus regit actum—Lex domicilii—Lex rei sitæ—Form of instruments executed abroad.*

See *WILL*, 46.

12. MARRIED WOMAN.

45. *Mortgage—Married woman—Implied covenant—Disclaimer.*]—Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon, and a covenant to the same effect with the vendor, his executors, administrators and assigns, and she took possession of the lands and enjoyed the same, and the benefits thereunder, without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that, in assenting to take under the deed, she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, and an assignee of the covenant could enforce it against her separate estate. *Small v. Thompson*, xxviii., 219.

13. NULLITY.

46. *Nullified deed—Compromise—Transaction—Estoppel—Admission—Evidence.*]—A deed was entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation, but failed to attain its end, and was annulled and set aside

by order of the court, as being in contravention of art. 311 C. C.—*Held*, affirming the judgment appealed from (*Q. R. 5 Q. B. 458*), *Girouard, J.*, dissenting, that upon the nullification of the deed no allegation contained in it could subsist even as an admission. *Durocher v. Durocher*, xxvii., 363.

47. *Second conveyance—Nullity—Former grantee in possession.*]—The conveyance by an heir at law of real estate which had been already granted by his father during his lifetime is an absolute nullity, and cannot avail for any purposes whatever against the father's grantee, who is in possession of the lands, and whose title is registered. (See *Q. R. 12 S. C. 350*). *Powell v. Watters*, xxviii., 133.

48. *Substitution—Bail-à-rente—Donation—Prohibition—Onerous title—Void condition.*

See *No. 4, ante*.

49. *Conveyance in fraud of creditors generally—Insolvency—Simulated sale.*

See *FRAUDULENT CONVEYANCES*, 4.

50. *Undue influence—Valuable consideration—Setting aside deed.*

See *EVIDENCE*, 226.

51. *Sale by sheriff—Folle enchere—Registration—Nullity.*

See *APPEAL*, 394.

52. *Building society—Assessments on loans—Administrators and trustees—Nullity—Art. 1484 C. C.*

See *BUILDING SOCIETY*, 3.

53. *Sale—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Consideration—Dation en paiement—Arts. 762, 989 C. C.*

See *SALE*, 86.

54. *Assignment for the benefit of creditors—Preferred creditors—Money paid under voidable assignment—Liability of assignee—Statute of Elizabeth—Hindering and delaying creditors.*

See *ASSIGNMENTS*, 6.

14. PAROL EVIDENCE.

55. *Erroneous statement of price—Oral contradiction—Evidence to vary statement in deed—False consideration—Admissions—Art. 1243 C. C.—Art. 231 C. C. P. (old text).*

See *EVIDENCE*, 219.

56. *Conveyance to third party—Absolute form of deed to avail as security—Undisclosed trust—Statute of Frauds—Parol testimony.*

See *SPECIFIC PERFORMANCE*, 2.

57. *Sale to take effect as mortgage—Parol testimony.*

See *EVIDENCE*, 225.

58. *Lost grant—Statute of Frauds—Parol evidence.*

See *TITLE TO LAND*, 28.

15. POSTPONEMENT.

59. *Registry laws—Registered deed—Priority over earlier grantee—Postponement—Notice.*—To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable. (See 33 N. B. Rep. 310.) *New Brunswick Ry. Co. v. Kelly*, xxvi., 341.

16. RATIFICATION.

60. *Second conveyance by vendor to third party—Ratification by implication—Consent of first grantee.*—Where the owner of lands was present, but took no part in a deed subsequently executed by the representative of his vendor granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof. (See Q. R. 12 S. C. 350.) *Powell v. Watters*, xxviii., 133.

61. *Execution—Ratification—Discharge—Estoppel.*

See DEBTOR AND CREDITOR, 5.

17. REVOCATION.

62. *Title to land—Substitution—Acceptance by institute—Rights of children not yet born—Revocation of deed—Prescription—Bonafides—Recital in deed—Presumption.*—A substitution created by a donation *inter vivos* in avour of the children of the institute, even before they are born, is irrevocable after acceptance by their parent; and the law of Quebec on the subject, as declared by the Civil Code, is the same as the old law of that province in existence before the promulgation of the Code.—Where an institute has accepted a donation creating a substitution in favour of his children, his acceptance as institute constitutes valid acceptance of the substitution on behalf of his children thereafter born to him during marriage.—Where the title deed of a purchaser of lands bears upon its face recitals which would have led upon inquiry to evidence of the defeasibility of his vendor's title, he must be presumed to have been aware of the precarious nature of the title he was purchasing, and prescriptive title cannot afterwards be invoked either by him or those in possession under him as holders in good faith under transitory title. Judgment appealed from (Q. R. 5 Q. B. 490) reversed. *Meloche Simpson*, xxix., 375.

[Leave to appeal to Privy Council refused.]

63. *Title to land—Sheriff's sale—Vacating lease—Refund of price paid—Exposure to eviction—Actio conductio indebiti—Substitution—Entail—Substitution non ouverte—Prior imbrance—Discharge by sheriff's sale—Procedure—Petition to vacate sheriff's sale.*

See TITLE TO LAND, 67.

18. TAX SALES.

64. *Land tax sale—Evidence of compliance with statute—Halifax Assessment Act, 1883—Waiving clauses.*

See ASSESSMENT AND TAXES, 59.

DELAISSEMENT.

See ABANDONMENT—SURRENDER.

DELIVERY.

1. *Donatio mortis causa—Delivery to third person—Delivery of key.*—To effect a *donatio mortis causa* delivery to a third person for the use of the donee is sufficient provided that such third person is not a mere trustee, agent or servant of the donor. The assent of the donee or even his knowledge of the delivery is not requisite. Delivery of the keys of the desk containing the property to be donated constitutes an actual delivery of such property and transfers the possession of the dominion over the same. *Walker v. Foster*, xxx., 299.

2. *Contract—Sale of goods—"At" shed—"Into" shed or grounds adjacent.*—A tender by H. to supply coal to the Town of Goderich pursuant to advertisement thereof contained an offer to deliver it "into the coal shed, at pumping station or grounds adjacent thereto where directed by you," (that is by a committee of the council). The tender was accepted and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from the vessel on to the dock, about 80 feet from the shed and separated from it by a road.—*Held*, reversing the judgment of the Court of Appeal, that the coal was not delivered "at the coal shed" as agreed by the contract signed by the parties which was the binding document.—*Held*, also, that if the contract was to be decided by the terms of the tender the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto." *Town of Goderich v. Holmes*, xxxii., 211.

3. *Carriage of goods—Forwarding by connecting lines—Custody—Negligence—Bill of lading.*

See CARRIERS, 6.

4. *Goods sold by weight—Damage in possession of vendor—Contract.*

See SALE, 15.

5. *Mortgage—Mining machinery—Registration—Fixtures—Interpretation of terms—Bill of sale—Personal chattels—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of Sale)—55 Vict. (N. S.) c. 1, s. 143 (The Mines Act)—41 & 42 Vict. (N. S.) c. 31, s. 4.*

See MORTGAGE, 43.

6. *Life insurance—Condition of policy—Payment of first premium—Delivery of policy—Art. 1233 C. C.*

See INSURANCE, LIFE, 32.

7. *Contract by correspondence—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Condition precedent—Right of action.*

See CONTRACT, 217.

8. *Donatio mortis causa—Deposit receipt—Cheques and orders—Delivery for beneficiaries—Corroboration—Construction of statute.*

See GIFT, 2.

9. Commencement of insurance contract — Delivery of policy — Incontestability — Operation of conditions.

See INSURANCE, LIFE, 12.

DELICTUM.

See NEGLIGENCE—TORT.

DEMOLITION.

1. *Trespass — Overhanging roof—Waiver—Servitude.*]—In an action for demolition of an overhanging roof and to close up windows: *Held*, per Girouard, J., following *Delorme v. Cusson* (23 S. C. R. 66) that, as the plaintiff and his *auteurs* had waived objection to the manner in which the toll-house had been constructed and permitted the roof and windows to remain there, the demolition could not be required at least so long as the building continued to exist in the condition in which it had been so constructed. *Parent v. Quebec Turnpike Road Trustees*, xxxi., 556.

2. *Encroachment—Constructions under mistake of title—Good faith—Common error—Demolition of works—Accession—Indemnity.*

See TITLE TO LAND, 136.

3. *Overhanging roof — Trespass — Right of view—Boundary—Waiver.*

See TITLE TO LAND, 41.

4. *Construction of sidewalk — Trespass — Abandonment of expropriation proceedings—Damages—Removal of works constructed.*

See EXPROPRIATION, 11.

5. *Construction of sidewalk — Trespass — Damages—Removal of works constructed.*

See ACTION, 171.

6. *Riparian rights — Injury through construction of dams—Removal of obstructions.*

See TITLE TO LAND, 8.

DEMURRER.

1. *Appeal—Final judgment — Judgment on demurrer to replication to plea.*]—A judgment allowing a demurrer to replication to one of several pleas (5 Man. L. R. 334), which does not put an end to the whole or any part of the action or defence, is not a final judgment from which an appeal will lie to the Supreme Court of Canada. *Shaw v. Canadian Pacific Ry. Co.*, xvi., 703.

2. *Judgment in appeal — Superior Court affirmed on allowance of demurrer—Final judgment — Appeal to Supreme Court — Jurisdiction.*

See APPEAL, 161.

3. *Plaintiff's demurrer to plea — Decision sustaining demurrer—Entry of final judgment — Issue on appeal.*

See APPEAL, 164.

DENONCIATION DE NOUVEL OEUVRE.

See ACTION, 118, 126, 171.

DEPOSIT.

1. *Sale of goods by weight — Delivery — Damage in possession of vendor.*

See SALE, 15.

2. *Pledge—Deposit with tender—Forfeiture — Breach of contract—Municipal corporation — Right of action — Restitution of thing pledged.*

See PLEDGE, 9.

3. *Donatio mortis causa—Deposit receipt—Cheques and orders—Delivery for beneficiaries — Corroboration—Construction of statute.*

See GIFT, 2.

AND see BAILMENT—PLEDGE—TRUSTS.

DESAVEU.

See DISAVOWAL.

DESCRIPTION OF LANDS.

See DEED—TITLE TO LAND.

DEVISE.

1. *Forfeiture—Death of testator caused by devisee—Felonious act.*

See CRIMINAL LAW, 15.

2. *Will — Construction of—Executory devise over — Contingencies — “Dying without issue” — Revert — Dower—Annuity—Conditions in restraint of marriage.*

See WILL, 15.

3. *Will—Devise to two sons—Devise over of one's share—Condition—Context—Codicil.*

See WILL, 16.

DISAVOWAL.

1. *Attorney — Institutions—Co-defendants — Authority to enter appearance — Ratification.*]—In an action brought in 1866 for \$800 and interest at 12½ per cent. against S. D. and W. D., amount of a promissory note signed by them, one copy of the summons was served at the domicile of S. D., at Three Rivers, the other defendant, W. D., then residing in New York. On the return of the writ, respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken, and in December, 1880, upon the issue of an *alias* writ of execution, appellant, having failed in an opposition to judgment, filed a petition in disavowal of respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by S. D., saying: “Be so good as to

le an appearance in the case to which the enclosed has reference, etc.," and also pleaded rescission, ratification and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed—*Held*, reversing the Court of Queen's Bench (Que.), that there was no evidence of authority given to respondent or of ratification by appeal of respondent's act, and therefore the petition in disavowal should be maintained. *Dawson v. Dumont*, xx., 709.

2. *Appearance by attorney—Want of authority—Opposition à fin d'annuler—Arts. 83, 484, 505 C. C. P.—Waiver—Estoppel.*

See OPPOSITION, 3.

DISCLAIMER.

Mortgage—Married woman—Implied covenant.

See MARRIED WOMAN, 4.

DISCRETION.

1. *Appointment of liquidator—Insolvent bank.*

See WINDING-UP ACT, 8.

2. *Appeal—Jurisdiction order—Default to plead—R. S. C. c. 135, ss. 24 (a) and 27—R. S. O. c. 44, s. 65—Ontario Judicature Act, rule 796.*

See APPEAL, 196.

DISSEISIN.

Crown grant—Disseisin of grantee—Tortious possession—Statute of Maintenance—32 Hen. VIII. c. 9—Estoppel.

See TITLE TO LAND, 83.

DISTILLERIES.

See LIQUOR LAWS.

DISTRESS.

1. *Landlord and tenant—R. S. O. (1887) c. 143, s. 28—Construction of statute—Distress—Goods of person holding "under" tenant—Estoppel.*—The Ontario Landlord and Tenant Act (R. S. O. 1887, c. 143, s. 28), exempts from distress for rent the property of all persons except the tenant or persons liable. The word "tenant" includes a subtenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant.—*Held*, reversing the judgment of the Court of Appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress. *Farewell v. Jameson*, xxvi., 588

2. *Statute of Anne—Attornment by mortgagor—Demise not signed—Colourable process—Tenant at will—Security for debt.*

See LANDLORD AND TENANT, 1.

3. *Assessment and taxes—Ontario Assessment Act—R. S. O. (1887) c. 193—Construction of statute—Arrears of taxes—Distress.*

See ASSESSMENT AND TAXES, 21.

See JUDGMENT—PARTITION—SHERIFF—STATUTE OF DISTRIBUTIONS.

DITCHES AND WATERCOURSES.

See DRAINAGE—WATERCOURSES.

DIVORCE.

*Lex loci—Lex domicilii—Foreign judgment—Decree in State of New York—Force in Quebec—Submitting to jurisdiction—Domicile—Authorization to sue—Art. 14, C. C. P.—Arts. 176, 178, C. C.]—Appeal from a judgment rendered by the Court of Queen's Bench (appeal side) in Montreal, on the 19th day of September, 1883, reversing a judgment of the Superior Court rendered on the 25th of February, 1882.—The facts of the case may be summed up as follows: On the 7th of May, 1871, the appellant and respondent, both being domiciled in New York, were married there without ante-nuptial contract. By the law of New York no community of property is created between persons married there without ante-nuptial contract, and the wife holds and acquires property in her own name, entirely free from marital control, as if she were a *feme sole*.—Before and at the time of her marriage with respondent, appellant had a fortune in her own right, amounting to \$220,775.74, inherited from her father, and consisting of cash, bonds, and other moveable property. On the 8th Jan., 1872, appellant received this fortune from her trustees, and placed it in the hands of respondent, who administered and controlled it until 25th Sept., 1876. The respondent kept his domicile in New York for about eighteen months after the marriage, when he suddenly removed to Montreal, where he established himself in business, and has resided ever since. The appellant accompanied her husband to Canada in 1872, but does not appear to have actually resided there for much more than a year, and has since lived alternately in Paris and New York. In 1876 she demanded the return of her securities, and obtained a small portion of them, and in February, being then resident in the State of New York, instituted proceedings for divorce before the Supreme Court of New York, on the ground of her husband's adultery. The respondent was personally served with process in Montreal, and appeared in the suit by attorneys, who were present at every step in the procedure, but filed no plea. In Dec., 1880, appellant obtained a decree of divorce absolute in her favour. The effect, according to the laws of New York, being to dissolve the marriage and to place appellant in the same position as if she had never been married.—On 29th Aug., 1881, appellant took the present action in the Superior Court at Montreal for an account.—The chief grounds of defence were: 1st. That*

appellant was still his wife, and, 2nd, that she was not authorized to institute the action.—The Superior Court overruled the pleas, and held that the divorce alleged in the declaration was good and valid in the Province of Quebec (5 Leg. News, 79); but the Court of Queen's Bench (by a majority of a single judge) reversed this judgment, on the ground that the alleged divorce had no force in the Province of Quebec, and that, consequently, the plaintiff, being still the wife of appellant, could not institute her proceedings without marital or judicial authorization (6 Leg. News, 329).—On appeal, *Held*, Strong, J., dissenting, 1. *Per* Ritchie, C.J., and Henry and Gwynne, JJ., that under the circumstances the decree obtained by the appellant from the Supreme Court of New York should have been recognized as valid by the courts of the Province of Quebec.—2. *Per* Fournier, Henry and Gwynne, JJ., that it was not necessary for the appellant, a foreigner, to obtain the authorization required by arts. 176 or 178, C. C. in order to sue as, in her own country, such authorization was not necessary: art. 14 C. C. P.—*Per* Ritchie, C.J. The evidence established that the plaintiff had a sufficient residence in New York to enable her to obtain under the law of New York a valid divorce there, and that she did in accordance with that law without fraud or collusion, obtain such divorce from a court competent to pronounce it; that if the question of jurisdiction turns on the question of the husband's domicile, the burthen was on the husband of shewing that he had actually changed his domicile *animo et de facto*. Having been cited before the court of New York, appeared in the suit and submitted to and not disputed the jurisdiction of the court, the legitimate presumption against him was that he had not changed his domicile *animo et de facto*. That independent of any question of domicile, having appeared, submitted to and not questioned the jurisdiction, he was bound by the decree and should not be allowed to affirm that the court had no jurisdiction to pronounce it, and to claim that the marriage dissolved in New York in a proceeding to which he was an unobjecting party, and which he had never before questioned, was subsisting in Quebec.

Strong, J., dissenting. Was of opinion that as regards the question as to the validity of the divorce, the Court of Queen's Bench was perfectly right.—As regards the other question, one peculiar to French law, that as to the plaintiff's right to institute and maintain the action without the authorization of justice, from the best consideration he had been able to give the point he was of opinion the court below was right in that also. Appeal allowed with costs. *Stevens v. Fisk*, Cass. Dig. (2 ed.) 235.

[For judgments of Fournier, Gwynne, and Henry, JJ., see 8 Legal News, pp. 42, 53.]

DOMESTIC TRIBUNAL.

1. *Discipline — Advocate — Jurisdiction — Procedure — Powers.*

See BAR, 1.

2. *Decision of domestic tribunal — Conference of Methodist Church — Church discipline.*

See APPEAL, 138.

AND see CHURCH—NOTARY.

DOMICILE.

1. *Marriage laws—Act of marriage—Civil status—Arts. 63, 65, 79, 80, 81, 83, C. C.—Legal community.*—About 1822, W. came to Canada and was employed as a shantyman on the Bonnechère, in Upper Canada. In 1827 he got out timber for himself, and in 1828, while in Quebec, where he was in the habit of going every summer with rafts of timber, he was married in September to Q. widow of McM., in his lifetime of Upper Canada, and shortly after his marriage returned to the Bonnechère to carry on lumbering operations there as formerly, and on his way up left his wife and her daughter in the neighbourhood of Aylmer, in Lower Canada. In the winter he came down for her and brought her to his home on the Bonnechère and lived there for ten or twelve years and acquired considerable wealth. W. declared in the presence of the priest who performed the ceremony that he was a *journalier de la Ville de Québec*, and he was so described in the certificate of marriage. Q. having died without a will, W. married again, and by his will left his property to his second wife, the appellant. The respondents claimed there was community of property between Q., their grandmother, and W. according to the laws of Lower Canada, and demanded their share of it in right of heirship. The appellant disputed this claim, contending there was no community.—*Held*, reversing the judgment appealed from (M. L. R. 2 Q. B. 113), Fournier and Taschereau, JJ., dissenting, that the facts of the present case were not sufficient to prove that W. had acquired a domicile in the Province of Quebec at the time of his marriage; that the certificate (*acte de mariage*) has only relation to residence in connection with matrimonial domicile, and therefore has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties. *Wadsworth v. McCord*, xii., 466.

[The Privy Council affirmed this judgment, 14 App. Cas. 631.]

2. *Municipal assessment — Domicile — Change of domicile — Intention*—59 Vict. c. 61 (N.B.)—By the St. John City Assessment Act (59 Vict. c. 61) s. 2 "for the purposes of assessment any person having his home or domicile, or carrying on business, or having any office or place of business or any occupation, employment or profession, within the city of Saint John, shall be deemed . . . an inhabitant and resident of the said city." J. carried on business in St. John as a brewer up to 1893 when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York where he carried on the business of buying and selling stocks and securities having offices for such business and living at a hotel paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John visiting his children and taking recreation. He had no business interests there but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John he appealed against the assessment unsuccessfully and then applied for a writ of certiorari with a view to having it quashed. *Held*, reversing

the judgment of the Supreme Court of New Brunswick, that as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment, he had avowed his *bonâ fide* intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicile and that in St. John had been abandoned within the meaning of the Act. *Jones v. City of St. John*, xxx., 122.

3. *Election of domicile—Contract by correspondence—Acceptance—Mailing—Indication of place of payment—Delivery of goods sold—Cause of action—Jurisdiction—Art. 85, l. C.—Post Office Act.*—Art. 85, l. C., as amended by 52 Vict. c. 48 (Que), providing that indication of a place of payment in any note or writing should be equivalent to election of domicile at the place so indicated, requires that such place should be actually designated in the contract.—An offer was made by letter dated and mailed at Quebec, defendant's acceptance being by letter dated and mailed at Toronto. In a suit upon the contract in the Superior Court at Quebec, defendant (served substitutionally), opposed a judgment against him by default by petition in revocation of judgment, first by preliminary exception to the jurisdiction of the court over the cause of action and then, as incidental plaintiff, making a cross-demand for damages to be set off against plaintiffs' claim.—*Held*, that in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but the mailing in the general post office of such letter completes the contract, subject, however, to revocation of the offer by the party making it before receipt by him of such letter of acceptance. *Underwood v. Maguire* (Q. R. 6 l. B. 237) overruled. (Q. R. 16 S. C. 22, reversed). *Magann v. Auger*, xxxi., 186.

4. *Inhabitant of St. John, N.B.—Taxes on wife's property—Income tax—Imprisonment—Damages.*

See ASSESSMENT AND TAXES, 29.

5. *Establishment of domicile—Change of domicile—Foreign divorce—Decree in New York—Force in Quebec—Jurisdiction of foreign court—Lex loci—Lex domicilii—Authorization to sue.*

See DIVORCE.

DOMAINE DIRECT.

See TITLE TO LAND

DOMAINE UTILE.

See TITLE TO LAND.

DOMINION ARBITRATORS.

Accounts of the Province of Canada—Common school funds and lands—Administration, Ontario—Remitting price of lands sold—

Default in collections—Withholding lands from sale—Uncollected balances—Jurisdiction of Dominion arbitrators.—By the submission of 10th April, 1890, amongst other matters submitted to the Dominion arbitrators were the following: "(h) The ascertainment and determination of the principal of the common school fund, the rate of interest which would be allowed on such fund, and the method of computing such interest. (i) In the ascertainment of the amount of the principal of the said common school fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold." The Province of Quebec claimed that Ontario was liable (1) for the purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold, and (4) for all uncollected balances of purchase money. *Held*, Gwynne, J., dissenting, that the Dominion arbitrators have jurisdiction, under the submission, to hear and adjudicate upon the claims so made by the Province of Quebec. *The Province of Quebec v. The Province of Ontario and the Dominion of Canada. In re Common School Fund and Lands*, xxxi., 516.

DOMINION LANDS.

See CROWN.

DONATION.

1. *Revocation—Fraud—Arts. 803, 1034 C. C.—Marriage contract—Insolvency of donor—Evidence.*—T. purchased lands in 1876 from L. for \$12,350, of which \$3,789 was paid in cash, the balance being secured by hypothec on the lands. In June, 1879, a daughter of T. was married to J. K., and on the contract of marriage T. made a donation to her of property of considerable value, and remained with no other than the mortgaged property.—In July, 1881, L. brought an action to set aside the gift claiming that the property sold had so depreciated in value as to be insufficient to cover the balance secured only by the property so sold, that the gift had reduced T. to a state of insolvency, and had been made in fraud of L., and that at the time of the gift T. was notoriously insolvent.—The only evidence of the value of the property still held by T. at the date of the donation, was that of an auctioneer as to value in November, 1881, and that of a real estate agent, who did not know the condition of the property two years before, but stated that it was not worth more than \$6,000 in November, 1881, adding that he considered property better than it was two years before, although very little changed in price. *Held*, reversing the judgment appealed from (3 Dor. Q. B. 247), that in order to obtain the revocation of the gift, it was incumbent on the plaintiffs to prove the insolvency or *déconfiture* of the

donor at the time of the donation, and that there was no proof in this case sufficient to shew that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged. *Treacey v. Liggett*, ix., 441.

2. *Donatio mortis causâ* — *Delivery to third person*—*Delivery of key*.]—To effect a *donatio mortis causâ* delivery to a third person for the use of the donee is sufficient provided that such third person is not a mere trustee, agent, or servant of the donor. The assent of the donee or even his knowledge of the delivery is not requisite.—*Delivery of the keys of the desk containing the property to be donated constitutes an actual delivery of such property and transfers the possession of and dominion over the same. Walker v. Foster*, xxx., 299.

3. *Donatio mortis causâ*—*Ratification by will*—*Seisin*—*Payment of legacy*—*Sale of land*—*Charges*—*Action hypothécaire*.]—On appeal the Supreme Court affirmed the judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 511), in an hypothecary action by which it was also asked that a discharge by executors should be set aside. C. sold land to A. W. M. and C. B. M. for \$150,000 secured by privilege of *baillieur de fonds*, of which \$50,000 was payable to respondent after vendor's death. C. afterwards by his will ratified the donation and delegation of payment, A. W. M. and C. B. M. being named as testamentary executors. The C. C. Co. acquired the land assuming the obligation of paying this \$50,000. The executors discharged the debt and the hypothec by which it was secured. It was held by the court below, that, even if the delegation were null on account of the *donatio mortis causâ* by *acte entre vifs*, the will validated it and the credit passed to the respondent with all its accessories including the hypothec and special privilege of *baillieur de fonds*, and further, as the executors were seised only for the execution of the will, and there was no necessity to use this credit to pay debts of the succession, they had no power to grant the discharge. *Consumers Cordage Co. v. Converse*, xxx., 618.

4. *Interdiction* — *Donation by interdiction*—*Sheriff's sale* — *Warranty*—*Arts. 1467, 2116 C.C.*]—*Per Taschereau, J.* Neither the vendor nor his heirs, who have renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which the vendor has given warranty. *Rousseau v. Burland*, xxxii., 541.

5. *Registration* — *Subsequent deed*—*Arts. 806, 1592 C. C.*

See *DATION EN PAIEMENT*, 1.

6. *Sale*—*Gifts in contemplation of death*—*Mortal illness of donor*—*Presumption of nullity*—*Validating circumstances* — *Dation en paiement*—*Arts. 762, 989 C. C.*

See *SALE*, 86.

7. *Railways* — *Expropriation* — *Title to lands*—*Propriétaires par indivis*—*Plans, surveys, books of reference*—*Estoppel*—*Satisfaction of condition as to the indemnity*—*Appli-*

cation of statute—*Registry laws*—*Construction of agreement*.

See *RAILWAYS*, 32.

8. *Title to land*—*Substitution*—*Revocation of deed* — *Unborn children*—*Recitals*—*Presumption*.

See *DEED*, 62.

9. *Marriage contract*—*Property excluded*—*Subsequent acquisition* — *Don mutuel*—*Resiliation for value*—*Death of husband*—*Right of widow to possession*.

* See *MARRIED WOMAN*, 2.

10. *Marriage covenant* — *Universal community*—*Registry laws*.

See *MARRIAGE LAWS*, 2.

AND see *GIFT*.

DOWER.

1. *Interdiction* — *Authorization by interdicted husband*—*Sheriff's sale*—*Registry laws* — *Warranty* — *Succession* — *Renunciation*—*Donation by interdiction*.]—The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed and must also contain a description sufficient to identify the lands sought to be affected.—A sale by the sheriff against a debtor in possession of an immoveable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of art. 2116 of the Civil Code.—*Semble*, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization. *Rousseau v. Burland*, xxii., 541.

2. *Construction of will*—*Executory devise over*—*Contingencies*—*"Dying without issue"* — *"Revert"*—*Annuity*—*Election by widow*—*Devolution of Estates Act, 49 Vict. (O.) c. 22*—*Conditions in restraint of marriage*—*"The Wills Act of Ontario," R. S. O. (1887) c. 109, s. 30.*

See *WILL*, 15.

AND see *MARRIAGE LAWS*.

DRAINAGE.

1. *Defective award*—*Petition for works*—*Initiating municipality*—*Adjoining municipality*—*Report*—*Termini not defined*—*Lands benefited*—*Assessments in adjoining municipality*.]—Under the drainage clauses of the Municipal Act a by-law was passed by the Township of Chatham founded on the report, plans, and specifications of a surveyor, made with a view of drainage of lands in that township. The by-law set out that the petition had been signed by a majority of the ratepayers of the township to be benefited by the work and recited the report, by which it appeared that to obtain sufficient fall it

was necessary to continue the drain into the adjoining Township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost as for benefit. The Township of Dover appealed from this report under 46 Vict. c. 18, s. 582, on the grounds that a majority of the owners of property to be benefited had not petitioned for the works as required by the statute; that no proper reports, plans, specifications, assessments, and estimates had been made and served; that neither the Council of Chatham nor the surveyor had power to assess or charge the lands in Dover for the purposes stated in the report and by-law; that the report did not specify any facts to shew that the Council of Chatham or their surveyor had authority to assess the lots or roads in Dover for any part of the cost of the proposed work; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived; that no assessment whatever should be made on lands or roads in Dover as the works would, in fact, be an injury thereto; and that the report did not sufficiently specify the beginning and end of the work, nor the manner in which Dover was to be benefited.—Three arbitrators were appointed under the Act who all agreed that Dover would be benefited by the work, but R. F., one of the arbitrators, thought \$500 should be taken off the town line, and W. D. another arbitrator, held that, while the bulk sum assessed was not too great, the assessment on the respective lands and roads and parts thereof should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award "if in accordance with the above memoranda." W. D. and A. E. met and signed an award confirming the assessment on the lands and roads in Dover, and on the town line made by the surveyor, and dismissing the appeal for the reason that the grounds mentioned had not been sustained.—The Queen's Bench Division set aside this award for want of concurring minds in the arbitrators, and defect in the report not specifying the beginning and end of the works (5 O. R. 325). This judgment was sustained on appeal (11 Ont. App. R. 248.) On appeal to the Supreme Court of Canada:—*Held*, Ritchie, C.J., dissenting, that the award should have been set aside upon the ground that it was not shewn that the petition was signed by a majority of the owners of the property to be benefited, so as to give the corporation of Chatham jurisdiction to enter Dover and do work therein.—That the arbitrators should have adjudicated upon the merits of the appeal against the several assessments on the lots and roads assessed, as their award was, by ss. 400 & 404 of 46 Vict. c. 18, made final, subject to appeal only to the High Court of Judicature, and it was not a matter for the Court of Revision to deal with;—also that the award was bad because it professed to be a final adjudication against Dover upon all the grounds of appeal stated in the notice, and charged every lot and road so assessed with the precise amount assessed upon them respectively, although, by a minute of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to submit to the Court of Re-

vision.—Further, that the arbitrators should have allowed the appeal against the assessment, and their award should have been set aside on the merits, because the evidence failed to shew any benefit to the lots or roads in Dover which were assessed, but actually shewed that the surveyor did not assess them for benefit from the works, but for reasons which were not sufficient under the statute, and did not warrant the assessment. *Township of Chatham and North Gore v. Township of Dover East and West*, xii., 321.

2. *Negligence—Injuring liability—Arbitration—Right of action—Notice of action—Mandamus—Discretion of council—Maintenance and repair.*—By s. 483 of R. S. O. (1887) c. 184, owners of private lands injured by drainage works are to be indemnified, contested claims to be determined by arbitration. *Held*, that it is only when the act causing the injury can be justified as the exercise of a statutory power, that the party injured must seek his redress in the mode provided by the statute; the right of action at common law in other cases has not been taken away by the statute.—*Held*, also, that under s. 569 of the same Act, the municipal council, on a petition for drainage, has a discretion to exercise in regard to the adoption, rejection, or modification of any scheme proposed by the engineer or surveyor; and, if adopted, it is not relieved from liability for injuries caused by any defect therein or in the construction of the work or from the necessity to provide a proper outlet for the drain when made thereunder.—In pursuance of a petition and surveyor's report, a municipality constructed drains which flowed into others formerly in use and, which not having the capacity to carry off the additional volume of water, became overcharged and flooded the lands adjoining. *Held*, that the municipality was guilty of neglect of the duty imposed by the Act to preserve, maintain, and keep the drains in repair, and were liable in an action for damages so caused to the lands. *Held*, per Strong and Gwynne, JJ. (Ritchie and Patterson, JJ., *contra*), that the drains causing the injury being wholly within the limits of the initiating municipality, and not benefiting the lands in an adjoining municipality, did not come under the provisions of s. 583 of the Act, and an owner of injured lands was not entitled to a *mandamus* under that section.—Per Ritchie, C.J., and Patterson, J., s. 583 applied to said drains, but a *mandamus* could not issue for want of the notice required thereby.—Per Strong and Gwynne, JJ., that though the owner was not entitled to the statutory *mandamus* it could be granted under the Ontario Judicature Act. *Williams v. Township of Raleigh*, xxi., 103.

NOTE.—The judgment appealed from was reversed and set aside, the judgment of the Chancery Division of the High Court of Justice varied by striking out directions that defendants should repair and maintain the embankment of "Drain No. 1." remove the embankment of the "Bell Drain," stop the overcharging of "Drain No. 1." make a sufficient outlet for waters brought into it by subsequently constructed drains to avoid the overflowing of plaintiff's lands and postponing the issue of *mandamus* till defendants could make the necessary improvements. As so varied the Divisional Court judgment was restored.

3. *Ontario Municipal Act—R. S. O. (1887) c. 184, s. 583—Non-completion—Mandamus—*

Maintenance and repair — Flooding lands—Damages — Restoring roads.] — Under the drainage provisions of the Municipal Act, R. S. O. (1887) c. 184, respondent undertook the construction of a drain along the town line between Chatham and Sombra, but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the adjoining lands of M. who joined in an action against the township, alleging that the effect of the work on the drain was to stop up the outlets to other drains in Sombra, back the waters thereof and flood roads and lands in the township, and they asked an injunction to restrain Chatham from so interfering with existing drains and *mandamus* to compel the completion of the drain so undertaken as well as damages for the injury to M.'s land and other land in Sombra. *Held*, affirming the judgment appealed from (18 Ont. App. R. 252), that M. was entitled to damages, and reversing it, Taschereau, J., dissenting, and Patterson, J., hesitating, that the Township of Sombra was entitled to a *mandamus*, but the original decree should be varied by striking out the direction that the work should be done at the cost of the Township of Chatham, it not being proved that the original assessment was sufficient. *Held*, per Ritchie, C.J., Strong and Gwynne, JJ., that s. 583 of the Municipal Act providing for *mandamus* to compel the making of repairs to preserve and maintain a drain does not apply to this case in which the drain was never fully made and completed, but that the Township of Sombra was entitled to a *mandamus* under Ont. Jud. Act, R. S. O. (1887) c. 44. *Held*, further, that the flooding of lands was not an injury for which the Township of Sombra could obtain damages, even though a general nuisance was occasioned. The only pecuniary compensation to which Sombra was entitled was the cost of repairing and restoring roads washed away.—*Per* Patterson, J. It might be preferable to leave the judgment appealed from undisturbed and allow the appellant to work out its remedy under s. 583 of the Municipal Act. *Township of Sombra v. Township of Chatham*, xxi., 305.

4. *By-laws—Drainage Act — Petition for drain—Withdrawal of name from—Improper construction.*]—The action was brought by Gibson to have a by-law of the corporation quashed, or, in the alternative, for damages for injury to his property, resulting from improper construction and want of repair of a drain made under said by-law. The ground upon which said by-law was attacked was that the plaintiff had withdrawn from the petition and there were not sufficient names on it without him.—The trial judge held that plaintiff had not withdrawn from the petition, and refused to quash the by-law. He also held that plaintiff had failed to prove his allegations in the statement of claim on which his right to damages was founded. The Divisional Court reversed this decision on the first ground, and held the by-law invalid. The Court of Appeal for Ontario (21 Ont. App. R. 504) restored the original judgment.—The Supreme Court of Canada affirmed the judgment appealed from and dismissed the appeal with costs. *Gibson v. Township of North Easthope*, xxiv., 707.

5. *Assessment—Intermunicipal obligations—Initiation and contributions—By-law—On-*

tario Drainage Act, 1873—36 Vict. c. 38 (O.)—36 Vict. c. 39 (O.)—R. S. O. (1887) c. 184—Ont. Mun. Act, 1892—55 Vict. c. 42 (O.)—The provisions of the Ontario Municipal Act (55 Vict. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet, or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged. — If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law. *Broughton v. Grey and Elma*, xxvii., 495.

6. *Ditches and Watercourses Act, 1894 (Ont.)—Owner of land—Declaration of ownership—Award—Defects — Validating award—57 Vict. c. 55—58 Vict. c. 54 (Ont.)*—A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under The Ditches and Watercourses Act, 1894, of Ontario. *Township of Osgoode v. York* (24 Can. S. C. R. 282) followed.—If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction.—Section 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings where the party initiating the latter is not an owner. *Township of McKillop v. Township of Logan*, xxix., 702.

7. *Improvement of natural watercourses — Artificial watercourses — Embankments — Dykes—“The Drainage Act, 1894”—57 Vict. c. 56 (Ont.)—“The Ontario Drainage Act, 1873”—“The Municipal Drainage Aid Act”—36 Vict. c. 39 — 36 Vict. c. 48 (Ont.)—“Benefit” assessment—“Injuring liability”—“Outlet liability” — Assessment of wild lands—Construction of statute.*] — The Ontario Act, 57 Vict. c. 56, has not abrogated the fundamental principle underlying the provisions of the previous Acts of the legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners which rests on the maxim *qui sentit commodum sentire debet et onus*—Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated cannot be assessed for “outlet liability” under said Act.—Where a drainage work initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for “outlet liability” therein is limited to the cost of the work at such outlet.—Every assessment, whether for “injuring liability” or for “outlet liability” must be made upon consideration of the special circumstances of each

particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands to their injury, which water is to be carried off by the proposed drainage work.—Assessment for “benefit” under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work, and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work and other like circumstances.—Section 75 of that Act only authorizes an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under said s. 75, but must constitute a charge upon the general funds of the municipality.—In the present case, the scheme proposed was mainly for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality, and such works are not drainage works within the meaning of said s. 75 for which assessments can be levied thereunder, nor are they works by which the lands in the higher township are to be said to have been benefited. *Sutherland-Innes Co. v. Township of Romney*, xxx., 95.

8. *Contract — Drainage — Intermunicipal works—Damages — Guarantee — Continuing liability.*—The City of Montreal, having a sewer sufficient for all its purposes within its limits and through lands lying on a lower level than those of the adjoining municipalities of Ste. Cunégonde, St. Henri, and Westmount, entered into an agreement in writing with Ste. Cunégonde by which the last named city was permitted to connect its sewers with the Montreal sewer in question for drainage purposes, and by the same agreement, the City of Montreal consented that the City of Ste. Cunégonde should allow the two other municipalities to make connections with its sewers, so connected, in such a manner that waters coming from such three higher municipalities should be drained through the Montreal sewer. The privilege was granted on condition that the connection with the Montreal sewer should be made by Ste. Cunégonde at its own cost and to the entire satisfaction of the Montreal engineers; that Ste. Cunégonde should guarantee Montreal against all damages which might result whether from the connection of said sewers or works necessary in connection therewith, as well to the City of Montreal as to other persons or corporations, and Ste. Cunégonde bound itself to pay and reimburse to the said City of Montreal all sums of money that the latter might be “called upon and condemned to pay in account of such damages and the costs resulting therefrom.” In case of the Montreal sewer becoming insufficient, and its capacity equiring to be increased, or a new sewer constructed, it was provided that Ste. Cunégonde should contribute proportionately to the cost of constructing the new works. The Ste. Cunégonde sewer was accordingly connected, and the other municipalities, upon entering into similar agreements with the city of Ste. Cunégonde, were permitted by Ste. Cunégonde to make connections with its sewers whereby their lands were also drained through

the Montreal sewer. the agreements of the two last municipalities binding them as the *arrière-garants*, respectively, of the City of Ste. Cunégonde. In an action by the City of Montreal to recover from Ste. Cunégonde damages which it had been compelled to pay for the flooding of cellars by waters from the sewer in question, the *arrière-garants* were made parties by the principal defendant on demands in warranty:—*Held*, that the guarantee in question bound the several higher municipalities for all damages resulting not only from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from time to time on account of the user by them of the Montreal sewer for drainage purposes. *Held*, also, that, as the City of Montreal had not obliged itself to construct additional or new works within any fixed time in case of insufficiency, the adjoining municipalities were not relieved from any of their liabilities on account of postponement of construction of such works by the City of Montreal. *Held*, further, that the judgment awarding damages against the City of Montreal being a matter between third parties and not *res judicata* against the other municipal corporations interested, the said City of Montreal was only entitled to recover by its suit against Ste. Cunégonde, such damages as might be shewn to have resulted from the connection and user of the sewers under the agreement; that the City of Montreal, when sued, was not obliged to summon its warrantor into the action for damages, but could, after condemnation, recover such damages by separate action under the contract; that it was not, by the terms of the contract, a condition precedent to action by the City of Montreal, that it should first submit to a judicial condemnation in liquidation of such damages; and that, as between the City of Ste. Cunégonde and the *arrière-garants*, their contracts bound them, respectively, to pay such damages, with interest and costs in proportion to the areas drained by them respectively into the Montreal sewer. *City of Montreal v. City of Ste. Cunégonde; City of Ste. Cunégonde v. City of St. Henri; City of Ste. Cunégonde v. Town of Westmount*, xxxii., 135.

9. *Intermunicipal works—Removal of obstruction—Municipal Act, 1883, s. 570 (Ont.) Municipal Amendment Act, 1886, s. 22—Report of engineer.*—In 1884 a petition was presented to the council of Elizabethtown asking for the removal of a dam and other obstructions to Mud Creek into which the drainage of the township and of Augusta adjoining emptied. The council had the creek examined by an engineer who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each township. The council then passed a by-law authorizing the work to be done which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, s. 570 of the Municipal Act, 1883. In 1886 the Act was amended and a fresh petition was presented to the council of Elizabethtown which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval) but presented to the council his former report, plans, specifications and assessments, and another

by-law was passed by which the work was done. In an action to recover from Augusta its proportion of the assessment:—*Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 4) Strong, C.J., dissenting, that the amendment in 1886 to s. 570 of the Municipal Act, 1883, authorized the council of Elizabethtown to cause the work to be done and claim from Augusta its proportion of the cost.—*Held*, further, reversing said judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment. *Township of Elizabethtown v. Township of Augusta*, xxxii., 295.

10. *Municipal work — Improper construction—Action by ratepayer.*

See ESTOPPEL, 3.

11. *Adjoining municipalities — Defective scheme — Tort-feasors — Drainage Trials Act, 54 Vict. c. 51 — Powers of referee — Negligence.*

See MUNICIPAL CORPORATION, 86.

12. *Award by drainage referee — Appeal—Jurisdiction—54 Vict. c. 51 (Ont.)*

See APPEAL, 354.

13. *R. S. O. (1887) c. 220—Requisition for drain — Owner of land — Meaning of term "owner."*

See MUNICIPAL CORPORATION, 87.

14. *Municipal by-law — Special assessments — Powers of councils as to additional necessary works — Ultra vires resolutions — Executed contract.*

See MUNICIPAL CORPORATION, 90.

15. *Aggravation of natural servitude — Flow of water — Sewage — Lands on lower level—Damages—Art. 501 C. C.*

See EASEMENT, 1.

16. *Assessment — Extra cost of intermunicipal works—R. S. O. (1877) c. 174—46 Vict. c. 18 (Ont.)—By-law—Repairs — Misapplication of funds—Negligence—Damages.*

See WATERCOURSES, 2.

17. *Easement — Adjoining properties of land — Injury by surface water — Different levels.*

See WATERCOURSES, 3.

18. *Municipal drains — Continuing trespass—Limitation of actions—Actions ex delictu—58 Vict. c. 4, s. 295 (N. S.)*

See MUNICIPAL CORPORATION, 94.

19. *Qualification of petitioner — "Last revised assessment roll"—R. S. O. (1897) c. 225—Costs of non-appealing party.*

See COSTS, 75.

DRIVING LOGS.

See RIVERS AND STREAMS—WATERCOURSES.

DRUGGISTS.

See PHARMACY.

DRUGS.

Unlicensed sale—"Quebec Pharmacy Act,"
See STATUTE, 36.

DURESS.

1. *Assignment for benefit of creditors — Pressure—Criminal process—Stifling criminal charge — Extortion.]*—S., a trader in Yarmouth, N.S., had a number of creditors in Montreal. J., one of such creditors, preferred a criminal charge against S., sent a detective to Yarmouth with a warrant, caused such warrant to be indorsed by a local magistrate and had S. brought to Montreal, when the other creditors there issued writs of *caapias* for their respective claims. The father of S. came to Montreal, and in consideration of the release of S. on both the civil and criminal charges, transferred all his property for the benefit of the Montreal creditors, and S. was released from gaol, having given his own recognizance to appear on the criminal charge. In the settlement, to the claims of the creditors was added the costs of both the civil and criminal suits. In a suit to set aside the transfer as being obtained by duress and to stifle the criminal prosecution, the evidence shewed that the creditors, in taking the proceedings they did, expected to obtain the security of the friends of S.—*Held*, affirming the judgment appealed from (20 N. S. Rep. 378), that the nature of the proceedings and the evidence clearly shewed that the criminal process was only used for the purpose of getting S. to Montreal to enable the creditors to put pressure on him, in order to get their claims paid or secured, and the transfer made by the father under such circumstances was void. *Shorey v. Jones*, xv., 398.

2. *Conveyance—Duress—Undue pressure—Trust property.]*—The owner of land having died intestate leaving several children, W. R. received from the others a deed conveying to him the entire title in the land in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently W. R. borrowed money from his sister and gave her a deed of the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a re-conveyance of the land to him and then give a mortgage to B. The re-conveyance not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land. *Held*, affirming the judgment of the Supreme Court of Nova Scotia (30 N. S. Rep. 405), that the sister of W. R. was entitled to a first lien on the land for the money lent to her brother; that the deed of re-conveyance to W. R. had been obtained by undue influence and pressure and should be set aside, and B. should not be allowed to set it up. *Burris v. Rhind*, xxix., 498.

3. *Will—Capacity of testator—Undue influence.]*—A codicil to a will executed shortly before the testator's death, increasing the provision made by a former codicil for a niece

of his wife who had lived with him for nearly thirty years, for a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick, JJ., dissenting, that as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece even if it had been proved that she urged him to make better provision for her than he had previously done such would not have amounted to undue influence. *Held*, also, following *Perera v. Perera* [1901] A. C. 354, that even if there was room for saying that the testator was not at the time of execution capable of making a will, he were when he gave the instructions the codicil would still have been valid. *Kaulbach v. Archbold; In re Archbold*, xxxi., 387.

4. *Promissory note—Duress—Verdict of jury.*—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager. *Held*, that the jury having believed the defendant's account and given him a verdict which the evidence justified, such verdict ought to stand. *Western Bank of Canada v. McGill*, xxii., 581.

5. *Fraud—False inventory—Compromise of action to annul.*

See PARTITION, 1.

6. *Payment under threat of criminal prosecution—Répétition de l'indu—Ratification—Error as to fact.*

See MISTAKE, 3.

AND see FORCE—PRESSURE.

DUTIES.

1. *Provincial bonds—Succession duties—Property exempt—Sale under will—Duty on proceeds—Costs—Proceedings by or against the Crown.*—Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included one of these debentures, should be converted into money to be invested by the executors and sold on certain specified trusts. This direction was carried out after his death, and the attorney-general claimed succession duty on the whole estate. *Held*, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills, JJ., dissenting, that although the debentures themselves were not due to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were—trusts will be given for or against the Crown in other cases. *Lovitt v. Attorney-General Nova Scotia*, xxxiii., 350.

2. *Illegal distilleries—Penalties—Vice-Admiralty Courts—Jurisdiction.*

See CONSTITUTIONAL LAW, 18.

3. *Customs duties—Duties on goods—Foreign built ship—Customs Tariff Act, 1897, s. 4.*

See CUSTOMS, 4.

4. *Duties on export of lumber—Improper levy—Payments of interest—Liability of Crown for further interest.*

See INTEREST, 10.

AND see CUSTOMS—EXCISE—INLAND REVENUE.

DUTY.

Master and servant—Negligence—"Quebec Factories Act"—R. S. O. arts. 3019 to 3058—C. C. art. 1053—Civil responsibility—Accident, cause of—Conjecture—Evidence—Onus of proof—Statutable duty, breach of—Police regulations.

See MASTER AND SERVANT, 12.

AND see NEGLIGENCE.

"DYING WITHOUT ISSUE."

1. *Will, construction of—Executory devise over—Conditional fee—Life estate—Estate tail.*—A testator died in 1856, having previously made his last will, divided into numbered paragraphs by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of 21 years—"giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years, and by a subsequent clause be provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue. *Held*, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance, or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to all the property devised to the testator's sons and daughters by the preceding clauses of the will. *Held*, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee, who thus took an estate in fee subject to the executory devise over. *Crawford v. Broddy*, xxvi., 345.

2. *Construction of will—Executory devise over—Contingencies—"Revert"—Dower—Annuity—Election by widow—Devolution of Estates Act—48 Vict. (O.) c. 28—Conditions in restraint of marriage—"The Wills Act of Ontario," R. S. O. (1887) c. 109, s. 30.*

See WILL, 15.

3. Will—Devise to two sons—Devise over of one share—Condition—Context—Codicil.

See WILL, 16.

4. Statute, construction of—Estates tail, Acts abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—23 Vict. c. 2 (N. S.)—Will—Construction of—Executory devise over—"Dying without issue"—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S. (2 ser.) c. 114 ss. 23 and 24—Title by will—Conveyance by tenant in tail.

See WILL, 18.

5. Will—Construction of—Words of future—Life estate—Joint lives—Time for ascertainment of class—Survivor dying without issue—"Lawful heirs."

See WILL, 34.

EASEMENT.

1. DRAINAGE, 1-3.
2. LIGHT AND AIR, 4, 5.
3. MERGER, 6.
4. PARTY WALL, 7.
5. PLAN OF SUB-DIVISION, 8.
6. RAILWAY CROSSING, 9, 10.
7. RIGHT OF WAY, 11-15.
8. RIPARIAN RIGHTS, 16-18.
9. USER, 19, 20.

1. DRAINAGE.

1. Aggravation of natural servitude—Damages—Drainage—Art. 501 C. C.]—The proprietor of a superior tenement, who has increased and aggravated the servitude appurtenant thereto, over adjoining lands of a lower level, remains liable for damages resulting therefrom, notwithstanding that he has complied with the directions of the judgment declaring the aggravation by the re-construction in a proper manner of the drain by which the natural servitude had been increased. (See 15 R. L. 391; 19 R. L. 620; 21 R. L. 59.) *Vineberg et vir v. Hampson*, 27th February, 1896.

2. Adjoining proprietors of land—Different levels—Injury by surface water—Watercourse.]—O. and S. were adjoining proprietors of land in the Village of Frankford, Ont., that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887, S. erected a building on his land and cut off the wall of the culvert, which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby. *Held*, affirming the judgment appealed from (24 Ont. App. R. 526), that S. having a right to cut off the part of the culvert which projected over his land was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain. *Ostrom v. Sills*, xxviii., 485.

3. Trespass—Damages—Equitable interest—Municipal by-law—Registration—Notice—R. S. O. (1877) c. 114.

See MUNICIPAL CORPORATION, 89.

AND SEE DRAINAGE — RIPARIAN RIGHTS—RIVERS AND STREAMS—WATERCOURSES.

2. LIGHT AND AIR.

4. Light and air—Twenty years' use—Prescription—Misdirection—Measure of damages—New trial.]—Action on the case for obstructing plaintiff's lights. Plaintiff and defendant were owners of contiguous houses. Defendant's house was built prior to 1853 for B., who in that year conveyed it to S., who deeded to H., from whom plaintiff purchased under registered deed. In 1853, whilst defendant's house was occupied by R. a tenant of S., the house owned by plaintiff was built for A. from whom, through several mesne conveyances, plaintiff derived title. Whilst plaintiff's house was in course of erection, two windows were placed in the gable end of it to afford light and air to attic bedrooms. These windows overlooked the house which B. had erected. A. began to live in the house about December, 1854. The windows remained unobstructed until August, 1874, when defendant, by raising his house and putting a mansard roof upon it, caused the obstruction complained of, by closing up the lower half of the windows.—There was no evidence of express grant of an easement, plaintiff relying upon 20 years' uninterrupted enjoyment. For defendant it was shewn by S. that he never gave A. permission to place the windows, and that he did not notice them till after he had sold in 1857. S. saw A.'s house built. Defendant had examined the records, and there was no grant of an easement in the lights in question; he was ignorant of the windows when he bought, in 1874, and did not know of them till the obstruction was made. The evidence was not certain as to when R.'s tenancy terminated. No question appears to have been raised at the trial as to the time her lease terminated, nor was this point left to the jury, the contention of plaintiff's counsel being that time began to run from the period when the windows were put in, and that the tenancy had nothing to do with the question. The trial judge directed the jury that "if S., the owner of the land, did not occupy the land himself, but it was occupied by his tenants, then he would not be bound by the user, unless he knew of the windows being there; if he knew of the windows being there, and did not obstruct them within twenty years, he would be bound, and the tenancy had nothing to do with the question;" and as to measure of damages: "The fair measure would be what it would cost the plaintiff to make such alterations in his house as would admit the same quantity of light and air as he had before the defendant raised his roof."—The jury found for plaintiff for \$400.—A rule nisi for a new trial was discharged. *Held*, reversing the judgment appealed from (2 Pugs. & Bur. 503), 1. that the duration of R.'s tenancy was a proper question for the jury, and it should have been left to them without the qualification that it made no difference if S. had knowledge of the existence of the windows; for if the tenancy continued after August, 1854, there was manifestly no user for 20 years with the consent or acquiescence of defendant and those through whom he claimed, for

S., then owner of the fee, would have had no right to enter upon the possession of his tenant for the purpose of obstructing the lights. *Angus v. Dalton* (6 App. Cas. 740) referred to. 2. There was misdirection as to measure of damages; the plaintiff should have been limited to recovery in respect of loss and inconvenience caused by darkening his windows up to the time action was brought, and for future damages he could bring successive actions from time to time as long as the nuisance continued. *Pugsley v. Ring*, Cass. Dig. (2 ed.) 241.

5. Windows—Overhanging roof—Right of view.

See TITLE TO LAND, 41.

3. MERGER.

6. Unity of ownership—Easements apparent and non-apparent—Quasi-easement—Subsequent grants—Implied reservation—Implied grant.]—One piece of land cannot be said to be burdened by an easement in favour of another when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parcels comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact—*quasi* easements.—If the *quasi* servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent.—If the dominant tenement is first granted, all *quasi* easements which have been enjoyed as appendant to it over a *quasi* servient tenement retained by the grantor pass by implication. *Attrill v. Platt*, x., 425.

4. PARTY WALL.

7. Party wall—Visible incumbrance—Notice—Conveyance—Registration—Trespass.

See DEED, 41.

5. PLAN OF SUB-DIVISION.

8. Alteration of sale plan—Lease according to new plan—Acceptance by purchaser—Estoppel.]—The lane shewn on a sale plan as running in rear of a lot purchased was closed before registration of the plan, and the purchaser subsequently accepted a lease describing the lot according to a plan shewing the lane in rear as closed. *Held*, (affirming 11 Ont. App. 416), that the purchaser was, by such acceptance, estopped from claiming a right of way over the land shewn as a lane in the sale plan.—*Per* Gwynne, J. Though the advertisement of the public sale stated "lanes run in rear of the several lots," the contract

evidenced thereby and by the public sale gave the purchaser no right to use the lane afterwards closed. *Carey v. City of Toronto*, xiv., 172.

6. RAILWAY CROSSING.

9. Farm crossing—Cattle-pass—Trestle bridge—Embankment.

See RAILWAYS, 42.

10. Right of way—Farm crossing—Prescription.

See RAILWAY, 44.

7. RIGHT OF WAY.

11. User—Adjoining lands—Way of necessity—License—Prescription—Agreement for right of way.]—In an action for obstructing a right of way plaintiff claimed use both by prescription and agreement, and also that by the agreement the way was wholly over defendant's land. Plaintiff acquired the land from his father who retained the adjoining land which was eventually conveyed to defendant, and after so acquiring it continued to use a track over the adjoining land, mostly through bush land, to reach the concession line, and his claim to the use of the way by prescription depended on whether or not his user was of a well-defined road, or merely of an irregular track and by license and courtesy of the adjoining owner. Finally an agreement was entered into between the plaintiff and his brother, who had acquired the adjoining lot which he afterwards conveyed to defendant, by which, in consideration of privileges granted to him, the brother covenanted to permit plaintiff to have a right of way along a lane to which the way formerly used led, and extending forty rods east from the centre of the lot, so as to allow plaintiff free communication from defendant's lot along said lane to the concession line. The issue raised on the construction of this agreement was, whether the right of way granted thereby should be wholly or in part on plaintiff's land, or wholly on that of the defendant. *Held*, reversing the judgment appealed from (16 Ont. App. R. 3, and restoring 15 O. R. 699), Ritchie, C.J., dissenting, that plaintiff had no title to the right of way by prescription, the evidence clearly shewing that the user was not of a well-defined road but only of a path through bush land and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death: but,—affirming the judgment appealed from, that under the agreement the right of way granted to plaintiff was wholly over defendant's land, the agreement not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor. *Rogers v. Duncan*, xviii., 710.

12. Necessary way—Implied grant—User—Obstruction of way—Interruption of prescription—Acquiescence—Limitation of actions—*R. S. N. S. (5 ser.) c. 112—R. S. N. S. (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.), c. 71, ss. 2 and 4.*]—K. owned lands in the County of Lunenburg, N. S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner

of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed, and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R. S. N. S. 5 ser. c. 112) provides a limitation of twenty years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same. *Held*, reversing the judgment appealed from (29 N. S. Rep. 267), that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. *Held*, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements. *Knock v. Knock*, xxvii., 664.

13. *Construction of deed—Servitude—Roadway—User—Art. 549 C. C.*—In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain, and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way. In an action (*négoce*) to prohibit further use of way: *Held*, affirming the decision appealed from (Q. R. 5 Q. B. 572), that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far

as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain. *Riou v. Riou*, xviii., 53.

14. *Right of way—Easement—User.*—A right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purposes in respect to any other property. Judgment appealed from (26 Ont. App. R. 95) affirmed. *Purdom v. Robinson*, xxx., 64.

15. *Appurtenant right—Accretion—Access to lands redeemed—Statutory interference with right of way—Public works—Indemnity.*

See TITLE TO LAND, 32.

8. RIPARIAN RIGHTS.

16. *Interference with navigation—Water lots—Crown grant—Trespass—Public waters—Prescription.*—W. was lessee of water lots held under patent granted in 1840, the lease being given by authority of the patent and public statutes respecting the construction of the Esplanade in Toronto, which formed the boundary of said water lots.—*Held*, affirming the judgment appealed from (12 Ont. App. R. 327), that such lease gave to W. a right to build as he chose on the lots, subject to any regulations which the city had power to impose, and in doing so to interfere with the right of the public to navigate the water. *Held*, also, that the waters being navigable parts of the Bay of Toronto, no private easement by prescription could be acquired therein while they remained open for navigation. *London and Canadian Loan and Agency Co. v. Warin*, xiv., 232.

17. *Access to navigable river—Railway—Obstruction—Damages.*

See RIPARIAN RIGHTS, 1.

18. *Ice harvesting—Navigable waters—Trespass on water lots.*

See RIVERS AND STREAMS, 5.

9. USER.

19. *Sale of land—Unity of possession—Severance—Continuous user.*—When two properties belonging to the same owner are sold at the same time, and each purchaser has notice of sale to the other, the right to any continuous easement passes with the sale as an absolute legal right. But the easement must have been enjoyed by the former owner at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale. Judgment appealed from (32 N. S. Rep. 340) affirmed. *Hart v. McMullen*, xxx., 245.

20. *Right of way—Common use—Title to land—Prescription.*

See USER, 2.

AND see SERVITUDE.

EDUCATION.

1. *Denominational schools—Manitoba Act—Rights acquired by practice—Legislative jurisdiction.*

See CONSTITUTIONAL LAW, 69.

2. *Powers of Provincial Legislatures—Manitoba constitution—Rights prejudicially affected—33 Vict. c. 3, s. 22, s.-s. 2—B. N. A. Act, s. 93, s.-s. 3.*

See CONSTITUTIONAL LAW, 2.

3. *School corporation—Decision of superintendent of public instruction—Appeal—Final judgment—Mandamus—Practice.*

See MANDAMUS, 3.

4. *Will—Condition of legacy—Religious liberty—Restriction as to marriage—Exclusion from succession—Public policy.*

See PUBLIC POLICY, 1.

EJECTMENT.

1. *Recovery of land—Fraudulent conveyance by husband to wife—Pleadings—Possession in wife—Sale by sheriff—Trial after demurrer.*—Action of ejectment against K., and her husband, J. K., to recover possession of land. Ferguson, J., gave judgment in favour of the plaintiff against the defendants (14 O. R. 226), and Court of Appeal affirmed the judgment for reasons stated by Burton, J., who held that K. having been treated as having possession, had the same right to defend the possession thus attributed to her as if a stranger to the plaintiff and not his wife. Rule 144 made it sufficient for her to state by way of defence that she was in possession, and dispensed with a plea of title on her part, unless her defence depended upon an equitable estate or right, or unless she claimed relief upon any equitable ground. Her defence was partly of the character which had to be specially set out, alleging irregularities, or faults of omission and commission by the sheriff, in the conduct of the sale under *fi. fa.* against K.; but without doubting the correctness of the view taken of the alleged acts and omissions, K. could not be heard to criticise those proceedings; as far as she was concerned the plaintiff owned the interest professed to be conveyed by the sheriff, and that included whatever right her husband had to possession of the property. The contest, therefore, turned on the sufficiency of evidence concerning the title of J. K. There was no direct evidence, but sufficient was shewn to enable plaintiff to recover, in the absence of any title in K., in the proceedings and adjudication in the former action between plaintiff and K., in which the conveyance from J. K. to his wife was declared fraudulent and void under 13 Eliz. c. 5. The plaintiff's position at the trial after production of these proceedings was the same as if he had put in evidence the patent from the Crown to J. K. and then proved, as he did, his acquisition of J. K.'s interest in the land. Plaintiff did not, on the evidence, require to resort to the judgment on the demurrer, but Mr. Justice Burton did not wish to be understood as intimating any doubt of the correctness of that judgment. The gravamen of the demurrer was that the statement did not allege title in J. K. It did allege the former action and judgment, but their bearing on the admission of title in J. K. was

not so apparent as it might have been. An application such as that in *Phillips v. Phillips* (4 Q. B. D. 127), might have led, as in that case, to a better statement being ordered, but that is a very different thing from holding the pleading bad on demurrer.—In his view of the evidence, it became unnecessary to express any opinion on the application of decisions like *Johnsson v. Bonhote* (2 Ch. D. 298).—The Supreme Court, *Held*, that although K. might set up the irregularities and defects in the sheriff's sale her allegations were such that she could not do so without making the sheriff a party; but the findings of the trial judge on the question of irregularity and of value were correct. The proof of title also was sufficient; and the appeal should therefore be dismissed. *Kane v. Magee*, 4th Dec., 1889; Cass. Dig. (2 ed.) 247.

2. *Parties—Non-joinder of tenants in common—Action for use and occupation—Mesne profits—Trespas.*—C. H. and J. H. were tenants in common of lands under will of T. H. and each occupied a portion. On 30th Dec., 1868, L. purchased the interest of C. H. at sheriff's sale. C. H. died 7th March, 1870, and his widow, the defendant, with the assent of J. H., remained in possession of the portion of which C. H. had been in possession. In proceedings for partition against the heirs of T. H., to which defendant was no party, the portion she occupied was, on 12th Aug., 1873, allotted to L. as sole owner. He thereupon brought action for use and occupation, adding a count in trespass for the mesne profits since the death of C. H.—A rule *nisi* to enter a nonsuit was made absolute (2 Russ. & Ches. 229), and it was held that no action would lie for use and occupation, the widow occupying adversely; that no action would lie for mesne profits as there had been no previous recovery in ejectment by plaintiff, and that even if a contract had been proved to sustain use and occupation, the non-joinder of J. H. as a plaintiff, was fatal. On appeal, *Held*, 1. An action of trespass for mesne profits is consequential to recovery in ejectment.—2. Even if such action would lie under some circumstances without ejectment brought, plaintiff could not recover without entry and possession.—3. After entry there is a relation back to the actual title as against a wrong-doer, and an action may be maintained for trespass prior to such entry. But besides deficient evidence of entry, there was evidence that defendant remained in possession subsequent to 12th Aug., 1873, when plaintiff's title accrued, with his assent. Strong, J., *dubitante*.—4. In any event the action for mesne profits would not lie, defendant having been, previous to the 12th Aug., 1873, in possession with the consent of J. H., the co-tenant in common, and being, therefore, entitled to notice to quit, or demand of possession, before her possession could be considered tortious. *Lecain v. Hosterman*, 28th Jan., 1878; Cass. Dig. (2 ed.) 827.

3. *Illegal possession—Landlord's title—Evidence—Estoppel—Account for waste—Jurisdiction of Court of Chancery—R. S. O. (1877) c. 40, s. 87—33 Vict. c. 23 (Ont.).*

See TITLE TO LAND, 99.

4. *Action by devisee—Land mortgaged by testator—Sale under decree for payment of debts—Assignment of mortgage—Title by statute.*

See TITLE TO LAND, 56.

ELECTRICITY.

See ELECTRIC LIGHTING — MASTER AND SERVANT—NEGLIGENCE—TRAMWAY.

ELECTRIC LIGHTING.

1. *Contract — Duration—Right to cancel—Repugnant clauses.*—A contract for supplying light to a hotel contained the following provisions. "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled in writing by one of the parties hereto. . . . Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer. *Held*, reversing the judgment of the Court of Appeal (1 Ont. L. R. 73), that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term. *Ottawa Electric Co. v. St. Jacques*, xxxi., 636.

2. *Negligence—Operations of a dangerous nature—Supplying electric light—Insulation of electric wires.*—The defendants are a company engaged in supplying electric light to consumers in the City of Montreal under special charter for that purpose. They placed a secondary wire, by which electric light was supplied to G.'s premises in close proximity to a guy-wire used to brace primary wires of another electric company which, although ordinarily a dead wire, might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy-wire. While attempting to turn on the light of an incandescent electric lamp on his premises, on a wet and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury, *Held*, affirming the judgment appealed from, that the defendants were liable for actionable negligence as they had failed to exercise the high degree of skill, care and foresight, required of persons engaging in operations of a dangerous nature. *Royal Electric Co. v. Hévé*, xxxii., 462.

ELECTRIC RAILWAY.

See RAILWAY—TRAMWAY.

ELECTION LAW.

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1. AGENCY.

1. *Limited powers of agent — Acts beyond scope of his authority.*—An agent who is not a general agent, but one with powers expressly limited, cannot bind the candidate by acts done beyond the scope of his authority. Judgment appealed from affirmed. *Berthier Election Case; Genereux v. Cuthbert*, ix., 102.

2. *Implied agency — Surrounding circumstances — Corrupt practices — Treating — Bribery.*—H., a Conservative, prior to the election, canvassed B., in company with the respondent. On election day H. was selected by the assistant-secretary of the association (an acknowledged agent of the respondent) to represent respondent at Burnley poll, and obtained a certificate under s. 42 of the Act, entitling him to vote at that poll. H. there met B. and treated him by giving him a glass of whiskey and after B. had voted he gave him \$2, and subsequently sent him \$50. The treating, according to B.'s evidence, was nothing more than an act of good fellowship; and according to H.'s account, B. was not feeling well, and the whiskey was given in consequence. B. negatived that the \$2 were paid him for his vote, and H. said that he supposed it was a dollar bill and told B. to go and treat the boys with it, and that it was not given on account of any previous promise, or for his having voted. The court below held that none of these acts constituted corrupt acts so as to avoid the election.—*Held*, per Ritchie, C.J., and Henry and Taschereau, J.J. — There was sufficient evidence of H.'s agency, but it was not necessary to decide this point.—*Per Strong, J.* There was no proof of H.'s agency. Agency is not to be presumed from the fact that the respondent permitted H. to canvass B. in his presence, and there is an entire absence of proof of any sufficient authority to H. to bind the respondent by his acts at the polling place in the matters of treating and the payment of the \$2.—*Per Fournier, J.* The treating of B.

on polling day, both before and after he had voted, by H., an agent, and the giving of the sum of \$2 immediately after he had voted, were corrupt acts sufficient to avoid the election. *West Northumberland Election Case; Henderson v. Guillet*, x., 635.

3. *Organization of political party—Inferences from combined elements—Proof of agency.*—There was no formal organization of the party supporting appellant; the county reform association had been disbanded and the minutes, regularly kept since 1882, destroyed, as were the rough minutes of every meeting of a convention of the party held since that date. In lieu of local committees vice-presidents were appointed for the respective townships, and on the approach of a contest the vice-presidents called a meeting of the county association, composed of all reformers in the riding, to go over the lists and do all the necessary work of the election. The evidence of H.'s agency relied on was, that he had always been a reformer, had been active for two elections, had attended one important committee meeting and been recognized by the vice-president of his township as an active supporter of the appellant, and that he acted as scrutineer at the polls in the election in question. The trial judge held that all these elements combined, in view of the state of affairs regarding organization, were sufficient to constitute H. an agent of the appellant.—*Held*, affirming the judgment appealed from, Ritchie, C.J., dissenting, and Taschereau, J., hesitating, that the circumstances justified the trial judge in holding the agency of H. established. *Haldimand Election Case; Colter v. Glenn*, xvii., 170.

4. *Political association—Agency of members.*—If a political association is formed for a place within the electoral district, and it is not shewn that there was any restriction on the members to work for their candidate within the limits of that place only, they are his agents throughout the whole district. *West Prince Election Case*, xxvii., 241.

5. *Scrutineer under written authority—Illegal acts at his polling place—Corrupt practices.*

See No. 28, *infra*.

2. APPEAL.

6. *Supreme Court Act, 1879, s. 10—38 Vict. c. 11, s. 48—Appeal—Election petition—Preliminary objections—Procedure.*—On 21st April, 1877, an election petition was deposited against the respondent, who filed preliminary objections that the petition, notice of presentation and copy of receipt of the deposit had been served upon him. Judgment maintained the preliminary objections and dismissed the petition with costs. On appeal to the Supreme Court under 38 Vict. c. 11, s. 48—*Held*, (Taschereau and Fournier, JJ., dissenting), that there was no appeal, and that, under that section, an appeal lay only from the decision of a judge who tried the merits of an election petition.—*Per* Richards, C.J., and Strong, J., that the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure. *Charlevoix Election Case; Brassard v. Langevin*, ii., 319.

(NOTE.—The statute has been amended.)

7. *Appeal—Notice—Setting down for hearing—Extension of time—Supreme Court Rules, 56, 69—Jurisdiction—Discretion of judge.*—On motion to quash appeal where appellant had not, within three days after setting down the petition for hearing, given notice thereof in writing, nor obtained from the judge who tried the petition further time for giving such notice.—*Held*, that the provision in s. 48 of the Sup. & Ex. Courts Act was imperative; that such notice was a condition precedent to jurisdiction to hear the appeal; that as the appellant had failed to comply with the statute, the court could not grant relief under rules 56 or 69; and that therefore the appeal could not be then heard, but must be struck off the list of appeals, with costs of the motion.—*Held*, also, that the judge who tried the petition had exclusive power to extend the time for giving such notice to be exercised according to sound discretion, and that judge having subsequently made such an order, the appeal was heard as having come properly before the court. Taschereau, J., dissented. *North Ontario Election Case; Wheeler v. Gibbs*, iii., 374.

8. *Reversal of question as to jurisdiction of trial court—Re-hearing on merits—Sending back record for further adjudication—Second appeal.*—The original petition was tried on the merits, subject to objection to jurisdiction. The objection was maintained and in consequence the petition was dismissed. This judgment was appealed from by the present respondent under s. 48, Sup. Court Act, who limited his appeal to the question of jurisdiction, and it was held that McCord, J., had jurisdiction, and ordered that the cause should be proceeded with. The record was accordingly sent to the court below, and McCord, J., after suggesting a re-hearing rendered his judgment on the merits declaring the election void. On appeal it was contended that McCord, J., had no jurisdiction so to proceed with and finally decide on the merits of the case a second time.—*Held*, that the Supreme Court, on the first appeal, even if the appeal had not been limited to the question of jurisdiction, could not have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court below to be proceeded with according to law, gave jurisdiction to McCord, J., to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment was properly appealable under section 48, Supreme Court Act. (Fournier and Henry, JJ., dissenting.) (See 6 Q. L. R. 100.) *Bellechasse Election Case; Larue v. Deslauriers*, v., 91.

9. *Controverted election—Service of petition—Preliminary objection—Rule extending time for service—42 Vict. c. 39, s. 10.*—The petitioner, on *ex parte* application to a judge, obtained extension of time for service of petition, but subsequently, on cause shewn, the judge rescinded the order as made improvidently. On a second *ex parte* application, supported by affidavits, the judge made another order extending the time. Respondent then obtained a rule nisi to set aside the second order, and the rule was made absolute by the full court, on the ground that all the facts on which the second application was based were in the knowledge of the petitioner when the first application was made.—*Held*, Fournier and Henry, JJ., dissenting, that the matter at issue was not in the nature of a preliminary

objection, and that the rule was not a judgment, order or decision on a preliminary objection from which an appeal would lie to the Supreme Court. *Kings Election Case; Dickie v. Woodworth*, viii., 192.

[Approved of and followed in the *Gloucester Election Case*, 8 Can. S. C. R. 204.]

10. *Appeal*—42 Vict. c. 39, s. 10—*Rule absolute in banc to rescind order of a judge—Preliminary objection.*—A petition was filed by appellant under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections were filed, and before hearing by consent of the attorney of the appellant, respondent obtained an order for withdrawal of the deposit and removal of petition off the files. The money was withdrawn, but not the petition, and shortly afterwards, the appellant, alleging that the proceedings by his attorney were without his knowledge or consent, a second order rescinding the order so made, and directing that, upon re-payment of the security, the petition be restored, and the appellant should be at liberty to proceed. On appeal from an order of the Supreme Court (N.B.), rescinding the order for restoration, *Held*, that the judgment appealed from is not a judgment on preliminary objections within the meaning of 42 Vict. c. 39, s. 10, and therefore not appealable. *Kings Election Case* (8 Can. S. C. R. 192) followed. *Gloucester Election Case; Commeau v. Burns*, viii., 204.

11. *Dominion Controverted Elections Act*—R. S. C. c. 9, ss. 32, 33 & 50—*Petition—Extension of time—Appeal—Jurisdiction.*—An order in a controverted election case made by the court below or a judge thereof not sitting at the time for the trial of the petition, and granting or rejecting an application to dismiss the petition on the ground that the trial had not been commenced within six months from the time of its presentation, is not an order from which an appeal will lie to the Supreme Court of Canada under s. 50 of the Dominion Controverted Elections Act. Fournier and Henry, J.J., dissenting. *L'Assomption Case; Gauthier v. Normandeau; Quebec County Case; O'Brien v. Caron*, xiv., 429.

12. *Order dismissing objection to jurisdiction—Proceeding with trial after lapse of time limit—Appeal.*—An order, at the trial of an election petition, overruling an objection to the jurisdiction to proceed with trial as more than six months had elapsed from the presentation of the petition, is appealable to the Supreme Court of Canada. (Gwynne, J. dissented.) *Glengarry Election Case; Purcell v. Kennedy*, xiv., 453.

13. *Controverted election—Discontinuance—Dismissing appeal.*—A motion to dismiss an appeal by either party ought properly to be made to the court. *Soulanges Election Case*, Cass. S. C. Prac. (2 ed.) 120; Cass. Dig. (2 ed.) 682.

14. *Practice in election cases—Quashing appeal—Motion in chambers.*—A motion to quash an election appeal was directed to stand over till hearing of the appeal, as too important a matter to be disposed of on summary application. *Charlevoix Election Case*, Cass. Dig. (2 ed.) 695.

15. *Appeal from ruling on preliminary objection at trial—Jurisdiction.*—Before proceeding with the trial of an election petition the judges overruled an objection that they could not then proceed with the trial of one of two petitions against the appellant because the petitions had not been bracketed as directed by R. S. C. c. 9, s. 30, was not a judgment or decision appealable to the Supreme Court of Canada. *Vaudreuil Election Case*, xxii., 1.

16. *Appeal—Election petition—Preliminary objection—Delay in filing—Objections struck out—Order in chambers—R. S. C. c. 8, s. 50.*—The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Election Act, and if it were, no judgment on the motion could put an end to the petition. *West Assiniboia Case*, xxvii., 215.

17. *Appeal—Preliminary objections—R. S. C. c. 9, ss. 12 and 50—Order dismissing petition—Affidavit of petitioner.*—The appeal given to the Supreme Court of Canada by the Controverted Elections Act (R. S. C. c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under s. 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. *Marquette Election Case*, xxvii., 219.

18. *Controverted election—Lost record—Substituted copy—Judgment on preliminary objections—Discretion of court below—Jurisdiction.*—The record in the case of a controverted election was produced in the Supreme Court of Canada on appeal against the judgment on preliminary objections and, in retransmission to the court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in substitution of the lost record, and upon verification as to its correctness, the court below ordered the substituted record to be filed. Thereupon, the respondent in the court below raised preliminary objections traversing the correctness of a clause in the substituted petition which was dismissed by the judgment appealed from.—*Held*, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the court below in ordering the substituted record to be filed. *Two Mountains Election Case*, xxxiii., 55.

19. *Controverted election—Trial of petition—Extension of time—Appeal—Jurisdiction.*—On 25th May, 1901, an order was made by Mr. Justice Belanger for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois thirty days after judgment should be given by the Supreme Court on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on 29th October and on 19th November,

on application of the petitioner for instructions, another order was made by the said judge which decided that juridical days only should be counted in computing the said thirty days, stating that such was the meaning of the order of 25th May, and that 6th December would be the date of trial. On the petition coming on for trial on 6th December appellant moved for peremption on the ground that the six months' limit for hearing had expired. The motion was refused and on the merits the election was declared void. On appeal to the Supreme Court.—*Held*, Davies, J., dissenting, that an appeal would not lie from the order of 19th November; that the judge had power to make such order and its effect was to extend the time for trial to 6th December, and the order for peremption was, therefore, rightly refused. *Beauharnois Election Case*, xxxii., 111.

20. *Appeal — Controverted election—Judgment dismissing petition.*] — An appeal does not lie to the Supreme Court of Canada from a judgment dismissing an election petition for want of prosecution within the six months prescribed by s. 32 of the Dominion Controverted Elections Act (R. S. C. c. 9). *Richelieu Election Case*, xxxii., 118.

21. *Matter in controversy—Fee of office—Collateral issue—Future rights—Quebec Election Act—Disqualification—R. S. Q. art. 429.*

See APPEAL, 29.

22. *Discontinuance of election appeal — Practice—Certificate to speaker.*

See No. 66, *infra*.

23. *Controverted cases not appealed—Disallowance of costs.*

See PRACTICE OF SUPREME COURT, 107.

24. *Setting down for hearing—Expediting proceedings.*

See PRACTICE OF SUPREME COURT, 106.

25. *Appeal—Election petition—Preliminary objections—Delay in filing—Objections struck out—Order in chambers—R. S. C. c. 8, s. 50.*

See No. 16, *ante*.

3. BALLOTS.

26. *Dominion controverted election — Scrutiny—Recount—Rejected ballots—37 Vict. c. 9 ss. 43, 45, 55, 80—41 Vict. c. 6, ss. 5, 6, 10—Neglect by deputy returning officer — Initials on ballots — Objections by county judge.*] — In ballot papers containing the names of four candidates, the following ballots were held valid: 1. Ballots containing two crosses, one on the line above the first name, and one on the line above the second name, valid for the two first named candidates; 2. Ballots containing two crosses, one on the line above the first name and one on the line dividing the second and third compartments, valid for the first named candidate; 3. Ballots containing properly made crosses in two of the compartments of the ballot paper, with a slight lead pencil stroke in another compartment; 4. Ballots marked in the proper compartments thus X. The following ballots were held invalid: 1. Ballots with a cross in the right place on the back of the

ballot paper, instead of on the printed side; 2. Ballots marked with an x instead of a cross. —On a recount, the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, all the ballots cast at three polling districts, in which the appellant had polled only 331 votes and the respondent 345, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the backs of the ballots.—On appeal to the Supreme Court (P. E. I.), it was proved that the deputy returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Peters, J., held that the ballots of the three polls ought to be counted, and did count them.—On appeal to the Supreme Court of Canada, *Held*, affirming the judgment of Peters, J., that in the present case, the deputy returning officers having had the means of identifying the ballot papers as those supplied to the voters the neglect to put their initials on the backs of these ballot papers not having affected the result of the election, or caused substantial injustice, did not invalidate the election. *Monk Election Case* [Hodgins' Elec. Cas. 725] approved. *Quere*, Whether the county judge can object to the validity of a ballot paper when no objection has been made to it by the candidate or his agent, or an elector, in accordance with the provisions of 37 Vict. c. 10, s. 56, at the time of the counting of the votes by the deputy returning officer. *Queen's (P. E. I.) Election Case; Jenkins v. Brecken*, vii., 247.

27. *Voting—Marking of ballots—Scrutiny—Irregularities—Numbering and initialing ballots—Dominion Election Act, 1874, c. 80—Saving clause.*] — In a polling division, no statement of votes either signed or unsigned was in the ballot box, and the deputy returning officer had indorsed on each ballot paper the number of the voter on the voter's list. These votes were not included either in the count before the returning officer, the recount by the county judge nor before the judge who tried the election petition. *Held*, affirming the court below, that the ballots were properly rejected.—Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper and a line drawn dividing the paper in the middle. *Held*, affirming the ruling at the trial that these ballots were valid.—*Per* Ritchie, C.J. Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as, for instance, by making a straight line or round O, then such non-compliance with the law renders the ballot null. *The Stepney Case*, remarks by Denman, J. (4 O. M. & H. 37) referred to.—During the voting,

at the request of one of the agents, who thought the ballot papers were not being properly marked, a deputy returning officer, who had been putting his initials and the numbers on the counterfoil, not on the ballot papers, initialled and numbered about twelve of the ballot papers, but finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took these ballots out of the box and obliterated the marks he had put upon them. *Held*, Gwynne and Henry, JJ., dissenting, that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, these ballots should be held good, and that said irregularities came within the saving provisions of s. 80 of the Dominion Elections Act, 1874.—*Per* Henry, J. Although the ballots should be considered bad, the present appellant having acted upon the return and taken his seat, was not in a position to claim that the election was void. *Bothwell Election Case; Hawkins v. Smith*, viii., 676.

28. *Marking ballots—Secrecy of balloting—Public policy—Findings of fact.*—Secrecy of the ballot is an absolute rule of public policy, and it cannot be waived.—It will require a clear case to reverse the decision of the trial judge who has found as a question of fact whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter.—Also, that where the X is not unmistakably above or below the line separating the names of the candidates the ballot is bad. *Haldimand Election Case; Walsh v. Montague*, xv., 495.

4. CORRUPT PRACTICES.

- (a) *Betting*, 29.
- (b) *Bribery*, 30-47.
- (c) *Conspiracy*, 48.
- (d) *Conveyance to polls*, 49-51.
- (e) *Intimidation*, 52-54.
- (f) *Subornation*, 55.
- (g) *Treating*, 56-58.
- (h) *Trivial Acts*, 59.

(a) *Betting.*

29. *The Dominion Elections Act, 1874—Wager by agent with voter—Bribery—Corrupt practice.*—An agent of the respondent, (the president of the Conservative Association), made a bet of \$5 with one Parker, a Liberal, that he would vote against the Conservative party, and deposited the \$5 with a stakeholder, which, after the election, was paid over to Parker. At the trial, the agent denied that he was actuated by any intention to influence the voter, and alleged that the bet was made as a sporting bet on the spur of the moment, and with the expectation that, as he said, Parker would warm up and vote; he admitted that it passed through his mind that some one on the voter's side would make the money good if he voted. Parker said he

had formed the resolution not to vote before he made his bet, but the evidence shewed that he did not think lightly of the sum which he was to receive for not voting, his answer being: "Oh! I don't know that \$5 would be an insult to any one not to vote." *Held*, reversing the judgment appealed from (4 Ont. Elec. Cas. 32), that the bet in question was colourable bribery within the enactments of s.s. 1 of s. 92 of the Dominion Elections Act, 1874, and a corrupt practice which avoided the election. *West Northumberland Election Case; Henderson v. Guillet*, x., 635.

(b) *Bribery.*

30. *Undue influence—Agency—Treating—Statement in speech—Corrupt practices—Promising appointments—Bribery.*—Drinking on nomination or polling day is not a corrupt practice sufficient to avoid an election, unless the drink is given by an agent on account of the voter having voted or being about to vote: [39 Vict. c. 9, s. 94 (D.), compared with 17 & 18 Vict. c. 102, ss. 4, 23 & 36 (Imp.)]—A candidate, charged by his opponent with having no influence, is not guilty of a corrupt practice, if, in a public speech, in reply to the attack, he states "that he had had influence to procure more appointments for the electors of the county than any member."—Long before the election, R. with members of his family (the P. family), strongly desired to obtain employment for O., his brother-in-law. R., being a political supporter, client and personal friend of L., asked him on different occasions to procure O. a place. The first time he spoke to him with reference to it was about a year previous to the election; but he said nothing on that occasion about his father-in-law (P.). R.'s evidence then went on as follows: "Q. On what occasion did you speak to him (L.) about it? A. It was when the question of an election arose that I spoke to him about it. Q. Last fall? A. Yes. Q. What was the date at which you spoke to him regarding the P. family? A. I cannot positively say, but it was 4 or 5 weeks before there was question of the election. It was then spoken of in the county and out of the county. Q. That was during the election? A. Yes. Q. At all events, it was at the time the election was spoken of? A. Yes. Q. What did you say to him regarding your brother-in-law and your father-in-law? A. I went to see Mr. L. on different occasions, when I had some accounts to give him to collect, and I said to him: 'It would greatly please the P. family if you could procure a place for my brother-in-law.' Q. Did you say to Mr. L. in what way it would please the P. family? A. I said this to him: 'It might, perhaps, prevent them from voting at the coming election.' Q. When you told Mr. L. that the P. family could be useful to him by not voting, what did Mr. L. say? A. He simply told me 'that he would think of me, and that if a vacancy occurred, he would do his best for me.' Mr. L., on the other hand, states: 'He (R.) had asked me, not during the election but many months before, I believe, so far as my memory goes, a year before there was any talk of an election, to try and secure some office or occupation, with a slight remuneration, for his brother-in-law. I told him that I would consider his claims; that he was one of my best supporters; and, if I saw

any occasion where it would be possible for me to support his claim, I would do so. The thing remained in that way; and previous to the election particularly, there was never one word said or breathed on that subject between R. and myself. I never asked him to use this promise, and never intended to do so; it was merely because he was a personal friend of mine and a man of respectability and importance that I promised to consider his claim, as I was justified as the representative of the county in doing." R. attended 3 or 4 meetings of respondent's committee, checked lists and reported his acts to members of the committee. Before the election, R. repeated to the P. family what had taken place between him and L. At the time of the election, R., while conversing in the family circle, was informed by one of them "they would vote for the defeated candidate, but would not use their influence." He said "Do as you please; they will use your votes as an objection to giving O. a place." This conversation was not reported by R. to respondent's committee. *Held*, 1. that the respondent, having a perfectly legitimate motive in promising R. to try and get an office for his brother-in-law—his desire to please a political friend and supporter—was not guilty of a corrupt act in making such promise; and further, that the act of R., in relation to the votes of the P. family, even if a corrupt one, was not committed with the knowledge and consent of the respondent.—2. That whether R. was respondent's agent or not, the conversations which took place between him and the P. family do not sufficiently shew a corrupt intent on his part to influence their vote, and that he is not guilty of bribery or undue influence within the meaning of the statute.—*Per* Richards, C.J., and Strong, J. (dissenting). There was sufficient evidence to declare R. respondent's agent. *Jacques-Cartier Election Case; Somerville v. Laflamme*, ii., 216.

31. *Controverted Elections Act, 1874 — Gifts for charitable purposes—Payment of debt — Bribery.*—Gifts and subscriptions for charitable purposes made by a candidate, in the habit of subscribing liberally to charitable purposes, not proved to have been offered or made as an inducement to, or on any condition that, any body of men, or any individual, should vote or act in any way at an election, or on any express or implied promise or undertaking that such body of men, or individual would, in consequence of such gift or subscription, vote or act in respect to any future election, are not corrupt practices within the meaning of that expression as defined by the Election and Controverted Elections Acts, 1874.—2. That the settlement by payment of a just debt by a candidate to an elector without any reference to the election, is not a corrupt act of bribery, and especially so when the candidate did not ask the elector's support, and the elector neither promised nor gave it. *Taschereau and Gwynne, J.J.*, doubted whether or not the transactions were within the prohibitory provisions of the Act. (See *Hodg. Elec. Cas. 751.*) *South Ontario Election Case; McKay v. Glen*, iii., 641.

32. *Professional speakers — Voter acting as canvasser — Legal expenses.*—*Per* Fournier, J. Candidates may lawfully employ and pay for the services and expenses of speakers and canvassers, although they may

be voters, provided there be no colourable device in the engagement in order to evade the bribery clauses of the Dominion Elections Act, 1874. *Per* Taschereau and Gwynne, J.J. such payments would be illegal. *North Ontario Election Case; Wheeler v. Gibbs*, iv., 430.

(NOTE.—See *Hodg. Elec. Cas. 785.*)

33. *The Dominion Elections Act, 1874, ss. 96 & 98—Hiring team — Corrupt practice—“Wilful” offence—Advance of money when not corrupt—Bribery—Constitution of statute.*—A charge was that S. bribed G. by payment of a note. The evidence shewed G. had been canvassing for S. a long time before the note fell due, and had always supported him. He was on his way to retire his note when S. asked him to canvass that day, and promised to have the note arranged for. At the same time G. was negotiating with S. for a loan on mortgage, and it was at first stipulated that the amount of this note should be taken out of the mortgage money. S.'s agent, after the election, at the request of G., paid the mortgage money in full and allowed the matter of the note to stand until G. could see S. G. stated that neither the note nor the mortgage transaction influenced him in any way, and that he had to pay the note and did not expect respondent to make him a present of it.—*Held*, that the evidence did not shew that the advance of money was made in order to induce G. to procure, or to endeavour to procure, the return of the respondent, and was not, therefore, bribery within the meaning of s-s. 3 of s. 62 of the Dominion Elections Act, 1874. *Selkirk Election Case; Young v. Smith*, iv., 494.

34. *Bribery — Clandestine payment—Personal expenses.*—Evidence that the candidate clandestinely slipped \$5 into a voter's pocket for a pretended service not mentioned to the voter nor included in the statement of personal expenses is sufficient to warrant a finding of personal bribery. Judgment appealed from (6 Q. L. K. 100) affirmed. *Bellechasse Election Case; Larue v. Deslauriers*, v., 91.

35. *The Dominion Elections Act, 1874, ss. 82, 83 & 84—Unauthorized employment of policemen—Colourable device — Liability for acts of sub-agent—Bribery.*—On a charge of bribery against T. and A., the trial judge found that A. had been directed by T., an agent of P. to employ persons to act as policemen at a polling place on polling day, and that with money given to him for this purpose A. had bribed four voters, previously supporters of C., but held that A. was not an agent of P., and therefore his acts could not void the election. On appeal, *Held*, reversing the judgment appealed from (10 R. L. 651), that as there was no excuse or justification for employing the voters as policemen; that their employment was merely colourable, and, having changed their votes in consequence of the moneys so paid to them, and P., the sitting member, being responsible alike for the acts of A., the sub-agent, as for the acts of T., the agent, and they having been guilty of corrupt practices, the election was void. *Taschereau and Gwynne, J.J.*, held that A., the sub-agent alone, had been guilty of bribery. *Charlevoix Election Case; Cimon v. Perrault*, v., 133.

36. *Corrupt practices—Gift towards building town hall — Charity or liberality —*

Bribery — Candidate's knowledge.]—Before setting out on a canvassing tour F. placed in the hands of B., who was not his financial agent, \$100 to be used for the purpose of the election. While visiting a part of the county with which he was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to K., a leading man in that locality, who indicated to B. his dissatisfaction with F. and stated that, although he would vote for the Liberal party, he would not exert himself as much as in former elections. F. then went out, and B. asked his host, "Do you want any money for your church?" received a negative reply, and added, "Do you want any money for anything?" K. then answered, "If you have any money to spare there are plenty of things we want it for. We are building a town hall and we are scarce of money." B. said, "Will \$25 do?" K. answered, "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant and B. good-bye, K. said, "Gentlemen, remember that this money has no influence as far as I am concerned with regard to the election." F. did not repudiate the act of B.. This \$25 was not included in any account by F. or his financial agent, and large sums were corruptly expended in the election by the agent of F. *Held*, affirming the judgment appealed from, that the giving of the \$25 by B. to K. was not an act of liberality or charity, but a gift out of F.'s money, with a view to influence a voter favourably to his candidature, and that, although the money was not given in F.'s presence, yet it was given with his knowledge, and therefore that he had been personally guilty of a corrupt practice. *Megantic Election Case; Frechette v. Goulet*, ix., 279.

37. *Election expenses — Corrupt practice — Promise to pay bills of previous election.*]—The payment by an agent of \$147 to a voter claiming the same to be due for expenses at a previous election and refusing to vote until the amount was paid, is a corrupt practice. Judgment appealed from (10 Q. L. R. 247) affirmed. *Selkirk Election Case* (4 Can. S. C. R. 494) followed. *Levis Election Case; Belleau v. Dessault*, xi., 133.

38. *Bribery — Inducing elector to abstain from voting—Corrupt loan by agent.*]—Petitioner charged that H., an agent of the candidate elected, corruptly offered and paid \$5 to induce a voter to refrain from voting. H. was in the habit of assisting this voter, and being told by him that he contemplated going on a visit a few days before the election, and being away on election day, H. promised him \$5 towards his expenses. Shortly after the voter went to H.'s house to borrow a coat for his journey, and H.'s brother gave him \$5. He went away and was absent on election day. *Held*, that the offer and payment of the \$5 formed one transaction and constituted a corrupt practice under the Election Act. *Haldimand Election Case; Colter v. Glenn*, xvii., 170.

39. *Corrupt practices — Provincial election fund—Promissory note—Nullity.*]—In an action on a promissory note the evidence shewed that its proceeds were given to an election agent to be used as a portion of an election fund controlled by the maker. *Held*, affirming the judgment appealed from (M. L. R. 5 Q. B. 332), that the transaction was illegal

under 38 Vict. c. 7 (now R. S. Q., art 425), which makes void any contract, promise or understanding in any way relating to an election under that Act, and the plaintiff could not recover. *Dansereau v. St. Louis* xviii., 587.

40. *Treating on election day—Undue influence — Election speech — Promising appointments — Bribery and corrupt practices.*
See No. 72, *infra*.

41. *Gifts for charities — Payment of a debt — Controverted Elections Act, 1874.*
See No. 31, *ante*.

42. *Canvassers — Professional speakers— Payment of expenses.*
See No. 32, *ante*.

43. *Unauthorized policemen — Employment by agent — Bribery.*
See No. 35, *ante*.

44. *Counter petition — 37 Vict. c. 10, s. 66 — Recriminating charges.*
See No. 133, *infra*.

45. *Wager by agent—Treating on polling day—Payment of money after voting—Corrupt practices.*
See Nos. 2, 29, *ante*.

46. *Bribery by agent—Loan to pay travelling expenses.*
See No. 87, *infra*.

47. *Promise of employment—Findings by trial judges.*
See No. 88, *infra*.

(c) Conspiracy.

48. *Undue influence — Conspiracy respecting marking ballots—Interference with franchise.*
See No. 53, *infra*.

(d) Conveyance to Polls.

49. *Hiring teams — Construction of Dominion Elections Act, 1874, s. 98.*]—Evidence shewed that a team was hired some days before the opening of the poll by an agent of S. for the purpose of bringing voters to the polls. It went for the voters, but returned the day before polling day without the voters and was paid for. *Held*, that the term "six preceding sections" in s. 98 "Dominion Elections Act, 1874," means the six sections immediately preceding the 98th, and, therefore, the hiring of a team to convey voters to the polls, prohibited by s. 96, was a corrupt practice within the meaning of s. 98. (Henry, J., dissenting.) (Followed in *Levis Election Case*, xi., 133.) *Selkirk Election Case; Young v. Smith*, iv., 494.

50. *Conveying voters to poll—Railway pass—37 Vict. c. 9, ss. 92, 96, 98 & 100—Powers of limited agent.*]—Four charges of bribery were relied upon, three of which were dismissed for insufficient evidence as to

agency. As to the fourth, the facts were: L., agent of C., gave electors employed on steamboats free transportation tickets over the N. S. Railway from Montreal to vote at the election, without any promise exacted from or given by them. The tickets shewed on their face that they had been paid for, but L. had received them gratuitously. The trial judge found that the tickets had not been paid for, and were given unconditionally, and therefore held it was not a corrupt act.—*Held*, affirming the judgment appealed from, Fournier and Henry, JJ., dissenting, that taking unconditionally and gratuitously of a voter to the poll by a railway company, or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that might affect the voter's action in reference to the vote to be given, is not prohibited by 37 Vict. c. 9 (D.).—2. That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under s. 96, and by virtue of s. 98 a corrupt practice, and would avoid the election.—3. That an agent who is not a general agent, but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority. *Berthier Election Case; Genereux v. Cuthbert*, ix., 102.

51. *Dominion Elections Act, 1874, ss. 96, 98*—*Promise to pay debts for a previous election*—*Hiring carters*—*Conveying voters to poll*—*Corrupt practices*.]—Hiring and paying of carters by an agent to convey to polls voters who are known to be supporters of the agent's candidate is a corrupt practice. *Selkirk Election Case; Young v. Smith* (4 Can. S. C. R. 494) followed.—Judgment appealed from (10 Q. L. R. 247) affirmed. *Levis Election Case; Belleau v. Dussault*, xi., 133.

(e) *Intimidation.*

52. *Dominion Elections Act, 1874, s. 95*—*Acts of agents*—*Clergymen using threats*—*Undue influence*.]—When clergymen, agents for a candidate, have been guilty of undue influence the election is void.—Sermons and threats by parish priests may constitute acts of undue influence, and a contravention of the *Dominion Elections Act, 1874, s. 95*.—*Per Ritchie, J.* A clergyman has no right, in the pulpit or out of it, by threatening any damage, temporal or spiritual, to restrain the liberty of a voter so as to compel him into voting or abstaining from voting otherwise than as he freely wills. *Charlevoix Election Case; Brassard v. Langevin*, i., 145.

53. *Dominion Elections Act, 1874, s. 95*—*Intimidation*—*Undue influence*—*Conspiracy*—*Corrupt practices*—*Marking ballots*—*Identification*.]—It was charged that the respondent personally, as well as acting by his agents, did undertake and conspire to impede, prevent, and otherwise interfere with the free exercise of the franchise by voters, and that, in furtherance of a scheme which they knew to be illegal, they did, in fact, so impede, prevent, and interfere with the franchise of certain voters, by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters s. c. d.—17.

was unjustifiably interfered with.—At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested was set aside, and certain voters were reported by the judge as having been guilty of corrupt practices, under s. 104 of the *Dominion Elections Act*. At a public meeting before the election C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters. On the polling day P., who had been appointed deputy returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with C., and on his advice and in collusion with him marked the ballots of certain of these voters.—*Held*, reversing the judgment appealed from (7 Legal News, 220) that the election was void by reason of the attempted intimidation practiced by C., the respondent's agent; and by reason also of the conspiracy between the said agent and the deputy returning officer to interfere with the free exercise of the franchise of voters, violations of s. 98 of the *Dominion Elections Act, 1874*, and corrupt practices under s. 98 of the said Act. *Soulanges Election Case; Cholette v. Bain*, x., 652.

54. *Libel*—*Slander*—*Public interests*—*Charge of corruption*—*Privileged statements*—*Challenge to sue*.

See No. 90, *infra*.

(f) *Subornation.*

55. *Agent*—*Authority of scrutineer*—*Wilfully inducing voter to take false oath*—*Corrupt practice*—*Farmers' sons*—*Oath T*.]—A scrutineer appointed for a polling place at an election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable.—The insisting by such scrutineer of the taking of the farmers' sons' oath T by a hesitating voter whose vote is objected to and who is registered on the list as a farmer's son and not as an owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list leaving the son owner of the property, is a wilful inducing or endeavouring to induce the voter to take a false oath, so as to amount to a corrupt practice within R. S. C. c. 8, ss. 90, 91, and such corrupt practice will avoid the election under s. 93. Strong and Gwynne, JJ., dissenting.—*Per Strong, J.* That reading s. 41 in conjunction with s. 45, s.-s. 2, and the oath T in schedule A. of R. S. C. c. 8, an inquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shewn that a number of unqualified farmers' sons' votes larger than the majority were admitted the election will be void. (*Taschereau, J. contra.*) *Haldimand Election Case; Walsh v. Montague*, xv., 495.

(g) *Treating.*

56. *Corrupt treating*—*Trivial act*.]—During an election liquor was given to an elector,

who at the same time was asked to vote for a particular candidate.—*Held*, that this was corrupt treating under R. S. C. c. 8, s. 86. *West Prince Election Case*, xxvii., 241.

57. *Giving drinks on election day—Agency—Undue influence.*

See No. 72, *infra*.

58. *Giving liquor to voter — Act of good-fellowship — Corrupt practices.*

See Nos. 2, 29, *ante*.

(h) Trivial Acts.

59. *Corrupt practices — Trivial or unimportant acts — Benefit of statute.*—Though the only corrupt act proved against a sitting member was of a trivial and unimportant character, and he had at public meetings warned his supporters against the commission of illegal acts, yet as such act was committed by an agent whom he had taken with him to canvass a certain locality, and there were circumstances which should have aroused his suspicion, he should have given a like warning to this agent, and not having done so he was not entitled to the benefit of the amendment to The Controverted Elections Act in 54 & 55 Vict. c. 20, s. 19. *West Prince Election Case*, xxvii., 241.

5. DEPOSIT.

60. *Controverted election — Appeal — Dissolution of Parliament—Petition lapsing—Return of deposit.*—Between the appeal from a decision on 8th November, 1890, in a controverted election case and the sittings of the court Parliament was dissolved, and by effect of dissolution the petition dropped. Respondent, in order to have costs out of the deposit in court moved before a judge of the Supreme Court in chambers (on reference from the full court) to dismiss the appeal for want of prosecution, or to have the record remitted to the court below. The petitioner claimed the deposit should be returned to him.—Patterson, J., held that the final determination of the right to costs being kept in suspense by the appeal, the motion should be refused; but inasmuch as the deposit in the court below ought to be disposed of by an order of that court, the registrar of the Supreme Court should certify to the court below that the appeal was not heard, and that the petition dropped by reason of dissolution of Parliament on 2nd February, 1891. [NOTE.—The court below refused to pay out the deposit, and on motion by petitioner the Supreme Court (being shewn that the order by Patterson, J., had not been appealed from) ordered on 15th March, 1893, (see No. 63, *infra*), a certificate to issue reciting the proceedings that took place and declaring that petitioner was entitled to the repayment to him of the deposit, both as security for costs of petition and as security for costs of appeal.] *Halton Election Case; Lush v. Waldie*, xix., 557.

61. *Preliminary objections — Service—Security — Receipt — R. S. C. c. 9, ss. 8 &*

9, s.-ss. e & g and s. 10.—Two members are returned for an electoral district in P. E. Island. With a petition against the return of the two sitting members, petitioner deposited \$2,000 with the deputy prothonotary, and in the notice of presentation of petition and deposit of security stated that he had given security of \$1,000 for each respondent "in all \$2,000" duly deposited with the prothonotary as required by statute. The receipt was signed by the deputy prothonotary appointed by the judges, and acknowledged receipt of \$2,000, without stating that \$1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa.—*Held*, 1. That personal service of the petition at Ottawa, without an order of the court, is a good service under s. 10 of the Controverted Elections Act.—2. That there being at the time of the presentation of the petition security of \$1,000 for the costs of each respondent the security given was sufficient.—3. That payment to the deputy prothonotary was a valid payment. *Queen's and Prince (P. E. I.) Election Cases*, xx., 26.

62. *Controverted election — Preliminary objections — Deposit of security — Legal tender — R. S. C. c. 9, s. 9 (f.).*—The preliminary objection was that the security and deposit receipt were illegal, null and void, the receipt being:—"The security required by law had been given on behalf of the petitioners by a sum of \$1,000 in a Dominion note, to wit, a bank note of \$1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was in fact a Dominion note of \$1,000. *Held*, affirming the judgment appealed from, that the deposit and receipt complied sufficiently with s. 9 (f) of the Dominion Controverted Elections Act. *Argenteuil Election Case—Christie v. Morrison*, xx., 194.

63. *Dissolution of Parliament—Abatement of proceedings — Return of deposits — Payment out of court below—Practice.*—In the interval between the taking of an appeal from the decision in the matter of a controverted election, and the sittings of the Supreme Court of Canada, when the appeal was to have been heard, Parliament was dissolved, and the petition was dropped and declared to have abated in consequence, by the judgment of His Lordship Mr. Justice Patterson, sitting as a judge of the Supreme Court of Canada in chambers (19 Can. S. C. R. 557). During a subsequent session of the Supreme Court, a motion was made on behalf of the petitioner for an order directing payment out of the court below of the deposit made in that court as security for the costs of the petition, and also of the further deposit made in said court below as security for the costs of the appeal to the Supreme Court. *Held*, that the petitioner was entitled to a special order declaring and ordering that the moneys so deposited should be paid to the petitioner out of the said court below. *Halton Election Case; Lush v. Waldie*, 15th March, 1893.

64. *Deposit of security—Payment to acting officer.*

See No. 116, *infra*.

6. DISCRETIONARY ORDER.

65. *Service of petition—Extension of time—Discretion of judge—R. S. C. c. 9, s. 10—Practice—Preliminary objections.*—An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that the respondent was at Ottawa, is a proper order for the judge to make in the exercise of his discretion under s. 10 of c. 9, R. S. C.—*Semble, per Ritchie, C.J., and Henry, J.*, that the court below had power to make rules for the service of an election petition out of the jurisdiction.—*Per Strong, J.* An extremely strong case should be shewn to induce the court to allow an appeal from the judgment of the court below on preliminary objections. *Shelburne Election Case; Robertson v. Laurie*, xiv., 258.

7. DISCONTINUANCE.

66. *Election appeal — Discontinuance — Practice — Certificate of registrar — New writ.*—Appellant was unseated for corrupt practices by agents, and upon appeal the case was inscribed for the May session, 1892. When the appeal was called, no one appearing for appellant, counsel for respondent stated that he had been served by appellant's solicitor when a notice of discontinuance, and the appeal was struck off the list.—The notice of discontinuance having been filed in the registrar's office, he certified to the Speaker of the House of Commons that by reason of such discontinuance, the decision of the trial judges and their report, were left unaffected by proceedings taken in the Supreme Court. The Speaker subsequently issued a new writ. *L'Assomption Election Case; Gauthier v. Brien*, xxi., 29.

67. *Controverted election—Change of solicitors—Payment of costs—Abandonment of appeal—Stay of proceedings on appeal—Peremptory order for hearing.*—While an appeal was pending, on 1st October, 1901, motion was made for change of solicitors of record and was granted on deposit being made of \$400 to secure former solicitor's costs. Thereupon counsel for appellant stated that an agreement for postponement of the hearing had been come to and the order for postponement was made accordingly. Beaudin, K.C., then asked leave to present a petition to have a new petitioner appointed on the ground that the postponement was the result of fraudulent collusion between the new solicitors and the former petitioner who have been paid to abandon proceedings. Leave for the application was granted after notice in order that, if collusion was proved, the order to postpone might be rescinded. On 22nd November, another motion to change solicitors was made and granted, on consent of parties, the hearing being ordered to be peremptorily fixed for the term then in session and not later than 29th November. This date for hearing was fixed by the court *suo motu*. On 29th November appellant's counsel applied to stay proceedings till costs of the solicitor on the record from 1st October to 22nd November had been paid. The order was refused and the hearing ordered to proceed forthwith. Upon appellant's counsel stating that the case could not be distinguished from the *Two Mountains Election Case* (31 Can. S. C. R. 437), the appeal was

dismissed with costs. *Terrebonne Election Case*, 29th November, 1901.

68. *Recriminatory charges — Procedure—Withdrawal of claim to seat—Order avoiding election.*

See No. 126, *infra*.

69. *Discontinuance — Appeal dismissed by consent.*

See PRACTICE OF SUPREME COURT, 104, 105.

8. DISQUALIFICATION.

70. *House of Commons—Eligible candidate—Legislative assembly — Disqualification — Contract with the Crown—39 Vict. c. 3, ss. 4 & 8 (P. E. I.).*—By instrument under the hand and seal of the Lieutenant-Governor of P. E. I., C. was appointed ferryman for the term of 3 years, pursuant to the Acts relating to ferries, and the commission provided that C. should be paid a subsidy of \$95 for each year of said term. C. had given to the Government a bond with two sureties for the performance of his contract. C. assigned to P. one-fourth interest in the ferry contract, and it was agreed that one-fourth of the profits should be paid over by C. to P. At the time of the agreement P. was a member of the House of Assembly of P. E. I. Subsequently P. was returned as a member elect for the House of Commons for Prince County, P. E. I., and upon his return being contested, *Held*, affirming the judgment appealed from, Taschereau, J., dissenting, that, by the agreement with C., P. became a person holding and enjoying a contract or agreement with Her Majesty within the meaning of 39 Vict. c. 3, s. 4 (P. E. I.), which disqualified him and rendered him ineligible for election to the House of Assembly or to sit or vote in the same, by s. 8, to be read with s. 4, his seat in the Assembly became vacated, and he was therefore eligible for election as a member of the House of Commons. *Prince Election Case; Hackett v. Perry*, xiv., 265.

71. *Corrupt practices — Conviction of respondent — Equal division of opinion on appeal.*

See No. 128, *infra*.

9. EVIDENCE.

72. *Candidate's evidence — Multiplicity of charges—Weight of evidence.*—The petition in the usual form, charged bribery and corruption on behalf of respondent and his agents; and treating by agents on nomination and polling days. The bill of particulars formulated 98 charges, but, in appeal, they only insisted upon 17, of which 7 attached personally to the respondent, and 10 to his agents. Respondent was examined on his own behalf, and, in all, 280 witnesses were heard.—The petition was dismissed on all the charges and on appeal to the Supreme Court against this judgment it was unanimously affirmed, except as to the charge of bribery and undue influence by one Robert, and — *Held*, 1. That the evidence of a candidate on his own behalf, is admissible in the Province of Quebec. — 2. That when there are a multiplicity of charges each charge

should be treated as a separate charge, and, if proved by one witness only, and rebutted by another, the united weight of the testimony, without accompanying or collateral circumstances to aid the court in its appreciation of the contradictory statements, cannot overcome the effect of the evidence in rebuttal, and that, in such a case, the candidate is entitled to the presumption of innocence to turn the scale in his favour. *Jacques-Cartier Election Case; Somerville v. Laflamme*, ii., 216.

73. *Dominion controverted election—Preliminary objections—Onus probandi—Costs.*—The petition complained of the return of G. for the House of Commons and was met by preliminary objections, that the petitioners were not electors, nor qualified to vote at the election. A day was fixed for hearing preliminary objections, no evidence was given upon them, and they were dismissed, following *Duval v. Casgrain* (19 L. C. Jur. 16), on the ground that the *onus probandi* was on the respondent to support such objections.—On appeal, Fournier, Henry, and Gwynne, JJ., were of opinion that the *onus probandi* was on the appellant, who by his preliminary objections had affirmed the disqualification of the petitioner. *Contra*, Ritchie, C.J., and Strong and Taschereau, JJ. The court being equally divided, the judgment of the court below stood affirmed without costs. *Megantic Election Case; Frechette v. Goulet*, viii., 169.

74. *Shorthand notes of evidence—Extension of stenographic notes.*—The shorthand notes of the stenographer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him. *Held*, that the notes of evidence could not be objected to. *Megantic Election Case; Frechette v. Goulet*, ix., 279.

75. *Election expenses—Accounting for expenditure—Presumption.*—When an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to. Judgment appealed from (10 Q. L. R. 247) affirmed. *Levis Election Case; Belleau v. Dessault*, xi., 133.

76. *Proof of agency—Inferences from combined elements.*

See No. 38, *ante*.

77. *Proof of status of petitioner—Onus probandi—Reservation in decision on preliminary objections—Failure to appeal—Res judicata.*

See No. 95, *infra*.

78. *Inferences by trial judges—Reverse on appeal.*

See No. 87, *infra*.

79. *Evidences of corrupt practices—Findings of trial judges—Interference on appeal.*

See No. 88, *infra*.

80. *Status of petitioner—Copy of voter's list—Certificate.*

See No. 97, *infra*.

10. EXPENSES.

81. *Canvassers—Promise to pay legal expenses—Voter acting as professional speaker—Dominion Elections Act, 1874, s. 3 s. 92.*—A promise by a candidate to pay the travelling expenses of a voter who acted as professional speaker on his behalf provided it were legal to do so, is not a breach of s. 3 s. 92 of The Dominion Elections Act 1874. Taschereau and Gwynne, JJ., dissenting.—*Per* Fournier, J. Candidates may legally employ and pay for the expenses and services of canvassers and speakers, although they may be voters, provided the agreement be not a colourable one intended to evade the bribery clauses of the Dominion Elections Act, 1874.—*Per* Taschereau and Gwynne, JJ. Such a payment would be illegal. (See *Hodg. Elec. Case*, 785.) *North Ontario Election Case; Wheeler v. Gibbs*, iv., 430.

82. *Personal expenses of candidate—Statement under 37 Vict. c. 9, s. 123.*—*Per* Taschereau, J. The personal expenses of candidates should be included in the statement of election expenses required to be furnished to the returning officer under 37 Vict. c. 9, s. 123. (Fournier and Henry, JJ., expressed no opinion on the merits. Judgment appealed from (6 O. L. R. 100) affirmed.)—*Bellechase Election Case; Larue v. Deslauriers*, v., 91.

11. FINDINGS IN TRIAL COURT.

83. *Bribery—Personal expenses—Clandestine payment to voter.*—The main charge was bribery of one A., and the trial judge found that the appellant had underhandedly slipped into a voter's pocket \$5 for a pretended purpose, not mentioned to the recipient; that this amount was not included in the published return of expenses required by the Election Act, and was bribery. *Held*, that an appellate court ought not to reverse the findings of fact of the trial judge unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding that appellant had been guilty of personal bribery. Judgment appealed from (6 Q. L. R. 100) affirmed. *Bellechase Election Case; Larue v. Deslauriers*, v., 91.

84. *Appeal on matters of fact—Bribery—Corrupt intent.*—Among charges of bribery and treating decided was the following:—One M., a blacksmith, who was a neighbour of D., had in his possession for two years several pieces of broken saws which D. had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination D. went into M.'s shop, and for sharpening a scraper told M. to keep the old pieces of saws which he might still have. M. in his evidence answered: "Q. He did not speak of your vote? A. No. Q. What has he said? A. He said that Magnan was coming like mustard after dinner. Q. Dugas did not ask you for whom you were? A. No. Q. Do you swear on the oath D. left with you these two pieces of saws in question with the intent to buy (bribe) you? A. I think so, I cannot say that it is sure, I don't know his mind (*son idée*). It is all I can swear. Q. It has not changed your opinion? A. No. Q. For whom were you in the last election?"

A. For Magnan." The scrapers were worth about \$2, and of no use to D., and no other conversation took place afterwards between the parties. The trial judge found no intention to corrupt M. *Held*, that the Supreme Court on appeal will not, on mere matters of fact, reverse the findings of the judge who tries an election petition, unless the evidence is of a nature to convey an irresistible conviction that the judgment is not only wrong, but erroneous; that the evidence in support of the charge of bribing M., as well as of the other charges of bribery and treating, was not such as would justify an appellate court in drawing inferences that D. intended to corrupt the voters. *Montcalm Election Case; Magnan v. Dugas*, ix., 93.

85. *Appeal — Findings of fact.*] — As to three charges, the court was of opinion that on the facts the judgment of the court below was not clearly wrong and should therefore not be reversed. *Berthier Election Case; Genereux v. Cuthbert*, ix., 102.

86. *Secrecy of ballot — Marking ballot — Reversal on questions of fact—Findings of trial judge.*]—A case must be clear in order to obtain reversal of findings of the trial judge on facts as to marks on ballots. *Hal-dimand Election Case*, xv., 495.

87. *Controverted election. — Reviewing inferences on appeal — Evidence — Loan for travelling expenses—Corrupt intent—R. S. C. c. 8, ss. 88, 91; s. 84 (a) (c)—Free railway tickets—Bribery.*]—G., a voter and supporter of respondent, holding a free railway ticket to go to Listowel to vote and wanting \$2 for his expenses while away from home, asked for the loan of the money from W., a bartender and friend. W. not having the money at the time applied to S., an agent of respondent, who was present in the room, for the money, telling him he wanted it to lend to G., to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G. W. returned the \$2 to S. the day before the trial. The judges at the trial held it a *bona fide* loan by S. to W. *Held*, Strong and Patterson, JJ., dissenting, reversing the judgment appealed from, that as the decision of the trial judges depended on the inference drawn from the evidence their decision could be reviewed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. within the provisions of s. 88 of The Dominion Elections Act and a corrupt practice sufficient to avoid the election under s. 91 of the Act.—Strong, J., dissenting, was of opinion that there was no evidence that the loan was made to G. with the corrupt intent of inducing him to vote for respondent.—Patterson, J., dissenting on the ground that as the decision of the court below depended on the credibility of the witnesses it ought not to be interfered with.—*Per* Strong and Patterson, JJ., affirming the judgment appealed from, that upon the evidence, which is reviewed in the judgments, the G. T. R. tickets issued at Toronto and Stratford for transportation of voters by rail to the polls in this case were free tickets, and that as the free tickets had been given to voters who were well known supporters of respondent, prepared to vote for him and for

him alone, if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of s. 88 of The Dominion Elections Act. *Berthier Election Case* (9 Can. S. C. R. 102) followed. *North Perth Election Case; Campbell v. Grieve*, xx., 331.

88. *Bribery — Promise to procure employment by candidate—Corrupt practice—Finding of the trial judges—Interference on appeal—R. S. C. c. 8, s. 94 (b).*]—On a charge that appellant had been guilty personally of a corrupt practice by promising to W. to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved. The promise was charged as having been made in Thorold on 28th February, 1891. It was proved that W. some time before the trial made a declaration upon which the charge was based, at the instance of the solicitor for petitioner, and had got for such declaration employment in Montreal from the C. P. R. Co. until the trial took place, and W. swore that the promise had been made on 17th February. G. (appellant), although denying the charge, admitted in his examination that he intimated to W. that he would assist him, and there was evidence that after the election G. wrote to W. and did endeavour to procure him the situation, but the letters were not put in evidence, having been destroyed by W. at the request of appellant. *Held*, affirming the judgment appealed from, that as the evidence of W. was in part corroborated by the evidence of appellant, the conclusion by the trial judges was not wrong, still less so entirely erroneous as to justify the court as an appellate tribunal in reversing the decision of the court below on the questions of fact involved. *Welland Election Case; German v. Rothery*, xx., 376.

89. *Findings in judgment appealed from—Vague general terms.*] — The judgment appealed from did not contain any special findings of fact nor any statement that any of the charges mentioned in the particulars were found proved, but stated generally that corrupt acts had been committed by respondent's agents without his knowledge, and declared that he had not been duly elected and that the election was void. On an appeal on the ground that the judgment was too general and vague, *Held*, that the general finding that corrupt acts had been proved was a sufficient compliance with the terms of the statute R. S. C. c. 9, s. 43. *Pontiac Election Case; Murray v. Lyon*, xx., 626.

12. LIBEL AND SLANDER.

90. *Libel—Slander—Privileged statements — Public interest — Charging corruption against political candidate — Challenging to sue—Costs.*]—Both parties were candidates for election and present at a public meeting when defendant stated that he had bribed the plaintiff at a former election to retire for money paid him. He afterwards printed the statement in a newspaper and on "doggers" circulated through the constituency with a printed challenge to the plaintiff and others implicated to justify their innocence of the charges by a suit for damages, offering to deposit costs of suit. Curran, J., gave a ver-

dict for plaintiff which was reversed on appeal. The reversal of the trial court judgment was affirmed by the Supreme Court, without costs, the Chief Justice dissenting. *Gauthier v. Jeannotte*, xxviii., 590.

13. PETITION, 91-122.

- (a) *Status of Petitioner*, 91-99.
- (b) *Filing of Petition*, 100-104.
- (c) *Form of Petition*, 105-111.
- (d) *Service of Petition*, 112-122.

(a) *Status of Petitioner.*

91. *Controverted election—Status of petitioner—Evidence—Filing list of electors.*—At the trial the returning officer, who was also the registrar of the county, and secretary of Inverness, was called as witness, and produced, in his official capacity, the original list of electors for the Township of Inverness, and proved that the name of one of the petitioners, whom he personally knew, was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way. *Held*, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 37 Vict. c. 10, s. 7 (D.) *Megantic Election Case; Frechette v. Goulet*, ix., 279.

92. *Status of petitioner—Onus probandi—Costs.*—By preliminary objections respondent claimed the petition should be dismissed because the petitioner had no right to vote at the election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed. *Held*, per Sir W. J. Ritchie, C.J., and Taschereau and Patterson, J.J., that the *onus probandi* was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed.—*Per* Strong, J., that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence the appeal should be allowed without costs.—*Fournier and Gwynne, J.J., contra*, were of opinion that the *onus probandi* was on the respondent. *Megantic Election Case* (8 Can. S. C. R. 169) discussed. *Stanstead Election Case; Rider v. Snow*, xx., 12.

See No. 94, *infra*.

93. *Description of petitioner—Additions—Redundancy of nomenclature.*—A petition simply stated that it was the petition of "A. C." of Lochiel, County of Glengarry, without describing his occupation, and it was shewn by affidavit that there are two or three other persons of that name on the voters' list for that township. *Held*, affirming the judgment appealed from, that the petition should not be dismissed for the want of a more particular description of the petitioner. *Glengarry Election Case; McLennan v. Chisholm*, xx., 38.

See No. 105, *infra*.

94. *Election petition—Status of petitioner—Onus probandi.*—The appellant filed preliminary objections as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners and the court dismissed the objections. *Held*, reversing the judgment appealed from, Gwynne, J., dissenting, that the onus was on the petitioners to prove their status as voters. *Stanstead Election Case* (20 Can. S. C. R. 12) followed. *Bellechase Election Case; Amyot v. Labrecque*, xx., 181.

95. *Preliminary objections—Reservation of question in judgment—Res judicata—Failure to appeal—Status of petitioner—Practice—R. S. C. c. 9, ss. 12 & 13—Evidence.*—The preliminary objection was to the status of petitioner, and copies of the voters' lists were filed but no other evidence offered. The court set aside the objection "without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision and the case went to trial, where the objection was renewed but was overruled by the trial judges who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. The appeal to the Supreme Court of Canada was on the ground that the onus was on petitioner to prove status, which had been done. *Held*, affirming the judgment appealed from, that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection and disposed of, and the judges at the trial had no jurisdiction to entertain such objection. *Prescott Election Case; Proulx v. Fraser*, xx., 196.

96. *Controverted election—Evidence—Status of petitioner—Preliminary objection—Dominion Elections Act, R. S. C. c. 8, ss. 30 (b), 31, 33, 41, 54, 58 & 65—Electoral Franchise Act, R. S. C. c. 5, s. 32.*—*Held*, affirming the decision of Gill, J., Gwynne and Patterson, J.J., dissenting, that where the petitioner's status in a controverted election is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election, or a copy thereof certified by the Clerk of the Crown in Chancery, and the production at *enquête* of a copy certified by the revising officer of the list of voters upon which petitioner's name appears, but which has not been compared with the voters' list actually used at said election is insufficient proof. *Richelieu Election Case; Paradis v. Bruneau*, xxi., 168.

See No. 97, *infra*.

97. *Election petition—Copy of voters' list—Status of petitioner—Certificate.*—On the hearing of preliminary objections to an election petition to prove the status of the petitioner a list of voters was offered with a certificate of the Clerk of the Crown in Chancery, which, after stating that said list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district . . . which original list of voters was returned to me by the returning officer for said electoral district in the same plight and

condition as it now appears, and said original list of voters is now on record in my office." *Held*, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the Clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said clerk. It was then a sufficient certificate of the paper offered being a true copy of the list actually used at the election. *Richelieu Election Case* (21 Can. S. C. R. 168) followed. *Winnipeg Election Case*; *Macdonald Election Case*, xxvii., 201.

98. *Controverted election—Preliminary objections—Status of petitioner—61 Vict. c. 14; 63 & 64 Vict. c. 12 (D.)—59 Vict. c. 9, s. 272 (Que.)—Dominion franchise—Construction of statute.*—The principal contention on preliminary objections to a controverted election petition was that the petitioner had been guilty of corrupt practices before and during the election, and that, by the effect of the statutes 61 Vict. c. 14 and 63 & 64 Vict. c. 12, the Dominion Franchise Act was repealed, and the provisions of the "Quebec Elections Act" regulating the franchise in the Province of Quebec substituted therefor so as, thereby, to deprive the petitioner of a right to vote under 59 Vict. c. 9, s. 272, and being so deprived of a vote that he had no status as petitioner. In the Election Court, evidence was taken on issues joined and the judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada: *Held*, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise.—*Per* Gwynne, J. The amendment to the Dominion Franchise Act by 61 Vict. c. 14 (D.) and 63 & 64 Vict. c. 12 (D.) has not introduced into the Act the provisions of s. 272 of "The Quebec Elections Act" so as to deprive a person properly on the list of voters for a Dominion election of his right to vote at such election. *Beauharnois Election Case*; *Loy v. Poirier*, xxxi., 447.

99. *Election petition—Service—Copy—Status of petitioner—Preliminary objection—Evidence—Electoral franchise.*
See Nos. 96 and 97, *ante*, and No. 108, *infra*.

(b) Filing of Petition.

100. *Dominion Controverted Elections Act, 1874, s. 8, s.s. 2—Cross petition—Time for filing.*—V. the sitting member, against whom a petition had been filed by L., presented a cross-petition under s. 8, s.s. 2, of the Dominion Controverted Elections Act, 1874, which was not filed within thirty days after the publication of the return by the Clerk of the Crown in Chancery, but within the fifteen days after the service of the petition. A preliminary objection, that the cross-petition was filed too late, was maintained by Meredith, C.J. *Held*, on appeal, that the sitting member could not file a cross-petition, within the fifteen days mentioned in the last part of s.s. 2 of s. 8, against a person who was an unsuccessful candidate and is a petitioner.—*Per* Fournier, Taschereau and Gwynne, J.J. The extra fifteen days is given only when a peti-

tion has been filed against the sitting member, alleging corrupt practices after the return. (Henry, J., dissenting.) *Montmorency Election Case*; *Vulin v. Langlois*, iii., 90.

101. *Dominion controverted election—Ontario Judicature Act, 1881—Presentation of petition—Court.*—The election petition against the election and return of the respondent was intitled in the High Court of Justice, Queen's Bench Division, presented to the official in charge, filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction. *Held*, Henry and Taschereau, J.J., dissenting, reversing the judgment of Cameron, J., (1 O. R. 43), that the Ontario Judicature Act, 1881, makes the High Court of Justice and its divisions a continuation of the former courts merged in it, and that those courts still exist under new names; and that the petition had not been irregularly intitled and filed. *West Huron Election Case*; *Mitchell v. Cameron*, viii., 126.

102. *Controverted election—Preliminary objections—English general rules—Copy of petition—R. S. C. c. 9, ss. 9 (h), 63.*—*Held*, affirming the judgment appealed from (7 Man. L. R. 581), Strong and Gwynne, J.J., dissenting, that the judges of the court in Manitoba not having made rules for practice and procedure in controverted elections the English rules of Michaelmas Term, 1868, were in force, and that (under rule 1) the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the court to be sent to the returning officer, and his failure to do so is the subject of a substantial preliminary objection and fatal to the petition. *Lisgar Election Case*; *Collins v. Ross*, xx., 1.

See No. 104, *infra*.

103. *Preliminary objections—Filing of petition—Construction of statute—Interpretation of words and terms—Legal holiday.*—When the time limited for presenting a petition against the return of a member of the House of Commons of Canada expires or falls upon a holiday, such petition may be effectively filed upon the day next following which is not a holiday. This decision was followed in *The Burrard Election Case* (31 Can. S. C. R. 459). *Nicolet Election Case*, xxix., 178.

(Leave to appeal to Privy Council refused, 32 Can. Gaz. 293.)

104. *Election petition—Deposit of copy—Time limit—Preliminary objections.*—Where a copy of an election petition was not left with the prothonotary when the petition was filed, and, when deposited later, the forty days within which the petition had to be filed had expired: *Held*, Gwynne, J., dissenting, that the petition was properly dismissed on preliminary objections (8 B. C. Rep. 65). *Lisgar Election Case* (20 Can. S. C. R. 1) followed.—*Per* Gwynne, J. The Supreme Court is competent to overrule a judgment of the court differently constituted if it clearly appears to be erroneous. *Burrard Election Case*; *Duval v. Maxwell*, xxxi., 459.

(c) Form of Petition.

105. *Form of petition—Description of petitioner—Amendment.*—*Held*, reversing the

judgment appealed from (7 Man. L. R. 581), that the omission to set out in the petition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and is therefore not fatal. *Lisgar Election Case; Collins v. Ross*, xx., 1.

See No. 93, ante.

106. *Election petition—Preliminary objections—Affidavit of petitioner—Bona fides—Examination of deponent—Form of petition—R. S. C. c. 9—54 & 55 Vict. c. 20, s. 3 (D.)*—By 54 & 55 Vict. c. 20, s. 3, amending The Controverted Elections Act (R. S. C. c. 9), an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit. *Held*, that the respondent to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief. *Held*, further, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit, as in case of an exhibit, the references in the affidavit being sufficient to shew what petition was referred to.—It is no objection to an election petition that it is too general (as by the Act it may be in any prescribed form) if it follows the form that has always been in use in the province. Moreover, any inconvenience from generality may be obviated by particulars. *Lunenburg Election Case*, xxvii., 226.

107. *Controverted election—R. S. C. c. 9—No return of member—Illegal deposit—Parties to petition.*—A petition under The Dominion Controverted Elections Act (R. S. C. c. 9) alleged that T., a respondent, who had obtained a majority of the votes at the election was not properly nominated, and claimed the seat for his opponent, and that if it should be held that T. was duly elected his election should be set aside for corrupt acts by himself and agents. *Held*, that the petition as framed came within the provisions of s. 5 of the Act and that T. was properly made a respondent. *West Durham Election Case*, xxxi., 314.

108. *Controverted election—Status of petitioner—Evidence—Certified copy of voters' list—Imprint of Queen's Printer—Form of petition—Jurat—61 Vict. c. 14, s. 10 (D.)*—On the hearing of preliminary objections to a controverted election petition the production of a list appearing on its face to be an imprint emanating from the Queen's Printer, certified by the Clerk of the Crown in Chancery to be a copy of the voters' list used at the election, and upon which the name of the petitioner appeared as a person having a right to vote at such election, is sufficient proof of the status of the petitioner. A copy of the list of electors bearing upon its face a statement that it is issued by the Queen's Printer makes proof of its contents without further verification.—The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne." *Per Gwynne, J.* An objection to the regularity of the subscription to the jurat does not constitute proper matter to be inquired into by way of preliminary objection to the petition. *Two Mountains Election Case; Ethier v. Legault*, xxxi., 437.

109. *Appeal—Preliminary objections—R. S. C. c. 9, ss. 12 & 50—Order dismissing petition—Affidavit of petitioner.*

See No. 93, ante.

110. *Election petition—Preliminary objections—Affidavit of petitioner—Bona fides—Examination of deponent—Form of petition—R. S. C. c. 9—54 & 55 Vict. c. 20, s. 3.*

See No. 106, ante.

111. *Technical objections—Form of affidavit—Stamps on petition.*

See No. 118, infra.

(d) Service of Petition.

112. *Service of petition—R. S. C. c. 9, s. 11—Art. 57, C. C. P.—Preliminary objections.*—The service of an election petition made in Quebec, at defendant's law office, on the ground floor of his residence and having a separate entrance, by delivering a copy to defendant's law partner who was not a member of, nor resident with, defendant's family, is not a service within R. S. C. c. 9, s. 11, and art. 57, C. C. P., and a preliminary objection setting up defective service was maintained and the election petition dismissed. *Gwynne, J., dissenting. Montmagny Election Case; Choquette v. Laberge*, xv., 1.

113. *Controverted election—Preliminary objections—Service at domicile—R. S. C. c. 9, s. 10.*—Leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household during the five days after the presentation of the same is a sufficient service under s. 10 of the Dominion Controverted Elections Act even though the papers served do not come into the possession or within the knowledge of the respondent. *King's (N.S.) Election Case; Borden v. Berteaux*, xix., 526.

See No. 116, infra.

114. *Service of petition—Personal service outside territorial jurisdiction—Necessity for order.*—Personal service of an election petition outside the territorial jurisdiction of an Election Court is good service under R. S. C. c. 9, s. 10, although no order for such service has been obtained from the judge. *Queen's and Prince Election Cases*, xx., 26.

See No. 116, infra.

115. *Controverted election—Re-service of petition—Order extending time—Preliminary objections—R. S. C. c. 9, s. 10.*—Petitioner omitted to serve on appellant with the petition a copy of the deposit receipt, but applied to a judge to extend the time for service that he might cure the omission. An order extending the time (subsequently affirmed by the Court of Appeal) was made and the petition was re-served. Before the order extending the time had been drawn up respondent filed preliminary objections and by leave contained in the order he filed further preliminary objections after re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction of the Court of Appeal, or a judge thereof, to extend the time for service of the petition beyond the five days prescribed by the Act.

Held, that the order was valid and the re-service made thereunder was proper and regular service. *Glengarry Electric Case; McLennan v. Chisholm*, xx., 38.

116. *Preliminary objections—Service of petitions—Security—Payment to acting officer—R. S. C. c. 9, s. 10, and s. 9 (e) and (g).*—Appeals from decisions dismissing preliminary objections to the election petitions.—The questions raised were: 1st. whether a personal service on the respondent at Ottawa without or with an order of the court at Halifax, or at his domicile is a good service. 2ndly, whether the payment of the security required by R. S. C. c. 9, s. 9 (e), into the hands of a person who was discharging the duties of and acting for the prothonotary at Halifax, and a receipt signed by said person in the prothonotary's name, [s. 9 (g).] were valid.—The court, following *King's County (N.S.) Case*, (19 Can. S. C. R. 526), and *Queen's County (P. E. I.) Case*, (20 Can. S. C. R. 26), held the service and payment valid and a substantial compliance with the requirements of the statute. *Election Cases of Shelburne (N. S.), White v. Greenwood; Annapolis (N. S.), Mills v. Ray; Lunenburg (N. S.), Kaulbach v. Eisenhauer; Antigonish (N. S.), Thompson v. McGilivray; Pictou (N. S.), Tupper v. McColl; and Inverness (N. S.), McDonald v. Cameron*, xx., 169.

117. *Election petition—Preliminary objections—Service of petition—Bailiff's return—Cross-examination—Production of copy.*—A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. (Articles 56 and 78 C. C. P.).—Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. *Beauharnois Election Case*, xxvii., 232.

118. *Stamps on petition—Technical objections to form—Prête-nom—Preliminary objections—Abandonment of proceedings—Re-instatement—Costs—Matter of procedure.*—The Supreme Court, in dismissing the appeal with costs, held, (1) that objection to the stamping of the petition was not open on appeal, (2) that the affidavit would be deemed sufficient as the objections thereto were purely technical, (3) that an objection that the petitioner was merely a *prête-nom* for an interested person who made the deposit and guaranteed costs was not proper subject for preliminary objection, and (4) that the service anew of the petition, after abandonment of original proceedings and extension of time, without payment of costs of the former proceedings, was only matter of procedure and should not be interfered with on appeal. *Laval Election Case; Leonard v. Labelle*, 10th December, 1902.

119. *Discretionary order—Extending time for service of petition.*

See No. 65, ante.

120. *English general rules—Service of copy of petition on clerk of court.*

See No. 102, ante.

121. *Election petition—Preliminary objections—Service of petition.*

See No. 104, ante.

122. *Abandonment of proceedings—Serving petition anew.*

See Nos. 66-69 and 118, ante.

14. PRELIMINARY OBJECTIONS.

123. *Status of petitioner—Reservation of question—Res judicata.*

See No. 95, ante.

124. *Objections to petition—Status of petitioner—Dominion franchise—Construction of statute.*

See No. 98, ante.

125. *Deposit of petition—Time limit—Grounds of objections.*

See Nos. 102, 104, ante, and 136, infra.

15. PROCEDURE.

126. *Commencement of trial—Staying proceedings—Session of Parliament—Adjournments—Recriminatory charges—R. S. C. c. 9, s. 31, s.-s. 4, ss. 32, 33, s.-s. 2, and ss. 35, 24—Withdrawal of claim to seat—Order voiding election.*—After the trial of an election petition has been commenced, the trial judge may adjourn the case from time to time, as to him seems convenient.—Where the proceedings for the commencement of the trial have been stayed during a session of Parliament by an order of a judge, and a day has been fixed for the trial within the statutory period of six months as so extended, on which day the petitioners proceeded with their *enquête* and examined two witnesses after which the hearing was adjourned to a day beyond the statutory period as so extended to allow the petitioners to file another bill of particulars, those already filed having been declared insufficient.—*Held*, there was sufficient commencement of the trial within the proper time and the future proceedings were valid under the Controverted Elections Act, R. S. C. c. 9, s. 32.—In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against the defeated candidate and the trial judge, after having found that the election of the sitting member should be set aside for corrupt practices, fixed a day for the evidence upon the recriminatory charges. Thereupon the petitioners withdrew the claim to the seat, and the judge gave judgment avoiding the election.—*Held*, that s. 42 of c. 9, R. S. C., no longer applied, and the judge was right in refusing to proceed upon the recriminatory charges.—*Per Gwynne, J.*, that it would have been competent for the trial judge to have received evidence on the recriminatory charges, but his refusal to do so was not a sufficient ground for reversing the judgment avoiding the election. *Joliette Election Case; Guilbault v. Dessert*, xv., 458.

127. *Factum filed too late—Irregular inscription—Refusal to hear ex parte.*—Where the appellant's factum was filed only on the morning the appeal was called for hearing, and no one appeared for the respondent, the

court refused to hear the appeal *ex parte*.
Levis Election Case, Cass. Dig. (2 ed.) 686.

128. *Controverted election — Stay of proceedings pending appeal on preliminary objections—Trial within six months—Extension of time—Disqualification.*—Preliminary objections to an election petition filed on 22nd Feb., 1902, were dismissed by Loranger, J., on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court was given, and the same was given dismissing the appeal on Oct. 10th, making Nov. 17th the day fixed for the trial under the order of 31st May. On Nov. 14th a motion was made before Loranger, J., on behalf of the member elect to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th Nov., but the judge held that the trial could not proceed on that day as the order for adjournment had not fixed a certain time and place, and on motion by the petitioner he ordered that it be commenced on Dec. 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial judges was renewed.—*Held*, that the effect of the order of May 31st was to fix Nov. 17th as the date of commencement of the trial; that the time between May 31st and Oct. 10th when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun, and that Dec. 4th on which it was begun was therefore within the said six months.—*Held*, also, that if the order of 31st May could not be considered as fixing a day for the trial it operated as a stay of proceedings and the order of Mr. Justice Lavergne on Nov. 17th was proper.—As to the disqualification of the member elect by the judgment appealed from the members of the court were equally divided and the judgment stood affirmed. *St. James Election Case*, xxxiii., 137.

129. *Controverted election — Prompt procedure necessary.*—On a motion to postpone the hearing of an election appeal, the court (Taschereau, C.J., presiding), stated that, henceforth it would insist upon election appeals being prosecuted diligently. *Tro Moutains Election Case*, 24th Nov., 1902.

130. *Judgment on preliminary objection—Reservation of question—Jurisdiction to reconsider on trial of merits—Res judicata—Failure to appeal—Evidence of status of petitioner.*

See No. 95, *ante*.

131. *Enlarging time for commencement of trial—Notice of trial—Shorthand notes—Reading evidence to witnesses.*

See No. 138, *infra*.

132. *Bracketing petitions—Separate trials—Overruling preliminary objections—Appeal.*

See No. 140, *infra*.

16. RECRIMINATORY CHARGES.

133. *Recriminatory charges — Counter-petition*—37 Vict. c. 10, s. 66.]—The appellant claimed under 37 Vict. c. 10, s. 66, that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, but filed no counter petition and did not otherwise comply with the provisions of 37 Vict. c. 10. *Held*, that s. 66 of 37 Vict. c. 10 applies only to cases of recriminatory charges, and not to a case where neither of the parties or their agents are charged with doing a wrongful act. *Queen's (P. E. I.) Election Case; Jenkins v. Brecken*, vii., 247.

134. *Recriminatory charges — Procedure—Withdrawal of claim to seat—Order avoiding election.*

See No. 126, *ante*.

135. *Rules of procedure — English rules — Copy of petition for returning officer.*

See No. 102, *ante*.

17. TRIAL.

136. *Controverted elections—Want of prosecution—Ruling at trial—Appeal—R. S. C. c. 9, ss. 32, 33 & 50—Extension of time—Jurisdiction.*—The decision of a judge at the trial of an election petition overruling an objection to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition is appealable to the Supreme Court of Canada under s. 50 (b), c. 9, R. S. C. Gwynne, J., dissenting.—In computing the time within which the trial of an election petition shall be commenced the term of a session of Parliament shall not be excluded unless the court or judge has ordered that the respondent's presence at the trial is necessary. Gwynne, J., dissenting.—The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition, unless an order had been obtained on application made within said six months; an order granted on an application made after expiration of the said six months is an invalid order and can give no jurisdiction to try the merits of the petition, which is then out of court. Ritchie, C.J., and Gwynne, J., dissenting. *Glengarry Election case; Purcell v. Kennedy*, xiv., 453.

(Leave to appeal was refused by the Privy Council, 59 L. J. 279; 4 Times L. R. 664.)

137. *Preliminary examination of respondent — Postponement till after session — Enlargement of time for prosecution — Six months' limit*—R. S. C. c. 9, ss. 14 & 32.]—On 23rd April, 1891, after the petition was at issue, petitioner moved to have respondent examined prior to the trial so that he might use the deposition upon the trial. Respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case it would not "be possible for him to appear, answer the interrogatories and attend to the case in which his presence was necessary before the closing of the session." This motion was supported by affidavit of respondent stating that it

would be "absolutely necessary for him to be constantly in court to attend to the present election trial" and that it was not possible "for him to attend to the present case for which his presence is necessary before the closing of the session." The court ordered respondent not to appear until after the session of Parliament. Immediately after the session was over, on 1st Oct., 1891, application was made to fix a day for trial, and it was fixed for 10th Dec., 1891. Respondent was examined in the interval. On 10th Dec., respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition and the objection was maintained.—*Held*, reversing the judgment appealed from, that the order was in effect an enlargement of the time for the commencement of the trial until after the session of Parliament and, therefore, in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included. *Laprairie Election Case*; *Gibeault v. Pelletier*, xx., 185.

138. *Procedure—Enlargement of time for commencement of trial—Jurisdiction—R. S. C. c. 9, ss. 31, 33, 43, 50 (b)—Notice of trial—Shorthand notes—Appeal.*—On 10th Oct., 1891, the judge, within 6 months after filing of election petition, enlarged the time for the commencement of trial to 4th Nov., the 6 months expiring 18th Oct. On 19th Oct., another order was made by the judge fixing the trial for 4th Nov., and 14 clear days' notice of trial was given. Respondent objected to the jurisdiction of the court.—*Held*, that the orders made were valid.—That the objection to sufficiency of notice of trial given under R. S. C. c. 9, s. 31, was not an objection which could be relied on in an appeal under s. 50 (b) of that Act.—That evidence taken by a shorthand writer, not an official stenographer of the court, who has been appointed by the judge, need not be read over to witnesses when extended. *Pontiac Election Case*; *Murray v. Lyon*, xx., 626.

139. *Trial after lapse of time limit—Consent judgment—R. S. C. c. 8, s. 32; c. 135, s. 52—Reserve of objection.*—The trials were commenced on 22nd Dec., 1892, more than 6 months after filing petition, and subject to objection that the court consequently had no jurisdiction. No order was made enlarging the time for commencement of trial. Respondents consented that the elections be voided by reason of corrupt acts committed by agents without their knowledge.—On appeal to the Supreme Court petitioner's counsel signed and filed a consent to reversal of the judgments appealed from without costs, admitting that the objection upon the question of jurisdiction was well taken.—Upon the filing of an affidavit as to the facts stated in respondent's consent, the appeal was allowed and the petitions dismissed without costs. *Bagot Election Case*; *Dupont v. Morin*; *Rouville Election Case*; *Brodeur v. Charbonneau*, xxi., 28.

140. *Bracketing petitions—Separate trials—R. S. C. c. 9, ss. 30 and 50—Appeal—Jurisdiction.*—Two election petitions were filed against the appellant, one by A. C., on 4th April, 1892, and the other by A. V., the respondent, on 6th April, 1892. The trial of the A. V. petition was by order in chambers, dated 22nd Sept., 1892, fixed for 26th Oct. 1892.

On 24th Oct., appellant petitioned in chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial judges, who, on 26th Oct., before proceeding with the trial, dismissed the motion to have both petitions joined and proceeded to try the A. V. petition. Thereupon appellant objected to the petition being tried then as no notice had been given that the A. C. petition had been fixed for trial, and, subject to such objection, filed an admission that sufficient bribery by appellant's agent without his knowledge had been committed to avoid the election. The trial judges then delivered judgment setting aside the election.—On an appeal to the Supreme Court, *Held*, 1. That under s. 30 of c. 9, R. S. C., the trial judge could try the A. V. petition separately.—2. That the ruling of the court below on the objection relied on in the present appeal, viz.: That the trial judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary as directed by R. S. C. c. 9, s. 30, was not a judgment or decision appealable to the Supreme Court of Canada. *Sedgewick, J.*, doubting. *Vaudreuil Election Case*, xxii., 1.

141. *Dominion Controverted Elections Act, 1874—Legislative powers—Provincial courts—Civil rights—Procedure—B. N. A. Act, 1867—Dominion courts.*

See CONSTITUTIONAL LAW, 12.

142. *Procedure—Commencement of trial—Stay of proceedings—Session of Parliament—Adjournments—Recriminatory charges—Withdrawal of claim to seat—Order avoiding election.*

See No. 126, ante.

143. *Controverted election—Preliminary objections—Stay of proceedings pending appeal—Trial within six months—Extension of time.*

See No. 128, ante.

EMINENT DOMAIN.

1. *Appeal—Jurisdiction—Title to lands—Municipal by-law—Widening streets—Expropriation.*—In an action to quash a by-law passed for the expropriation of land, the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than \$2,000.—The judgment on the merits in the court below (Q. R. 6 Q. B. 345) held, on the annulment of a by-law for widening a street, that the arrangement with the Turnpike Road Trustees by which they handed over the care of the roads to the municipality, within its limits, in consideration of the assumption of obligations, was authorized by 42 & 43 Vict. c. 43 (Q.) That the corporation in passing the by-law was acting within the powers of its charter, and that the right of the trustees over municipal streets was limited to the road-bed, and so long as repairs and toll collection was not interfered with, they could not prevent widening of the streets, laying sewers, etc.—This decision was affirmed for the reasons stated in the judgment appealed from. *Murray v. Town of Westmount*, xxvii., 579.

2. *Expropriation of lands—Public work—Reversion of land not used for canal purposes.*

See RIDEAU CANAL LANDS, 2.

3. *Public work — Construction of trestles — Interference with private property — Injury caused by the works — Damages peculiar to the property in question — Compensation.*

See PUBLIC WORK, 4.

4. *Crown — Construction of public work — Interference with public rights — Injury to private owner.*

See PUBLIC WORK, 3.

5. *Railway expropriations — Arbitration — Death of arbitrator — Lapse of time for award.*

See RAILWAYS, 30.

6. *Old trails in Rupert's Land — Substituted highway — Necessary way — Reservation in Crown grant — Dedication — User — Estoppel — Evidence.*

See HIGHWAY, 3.

7. *Highways — Old trails in Rupert's Land — Substitution of new way — Dedication of highway.*

See HIGHWAY, 4.

8. *Railways — Eminent domain — Expropriation of lands — Arbitration — Evidence — Findings of fact — Duty of appellate court — 51 Vict. c. 29 (D.)*

See RAILWAYS, 31.

9. *Municipal corporation — Expropriation — Widening streets — Assessments — Excessive valuation — 52 Vict. c. 79, s. 228 (Que.).*

See MUNICIPAL CORPORATION, 128.

10. *Expropriation of land — Tenants in common — Propriétaires par indivis — Construction of agreement — Misdescription — Plans and books of reference — Surveys — Registry laws — Satisfaction of condition as to indemnity.*

See RAILWAYS, 32.

11. *Municipal corporation — Expropriation proceedings — Negligence — Interference with proprietary rights — Abandonment of proceedings — Damages — Servitudes established for public utility — Arts. 406, 417, 507, 1053 C. C. — Eminent domain.*

See SERVITUDE, 6.

12. *Assessment — Montreal harbour improvements — Widening streets — Construction of statute — 57 Vict. c. 57 (Que.) — 52 Vict. c. 79, s. 139 (Que.)*

See MUNICIPAL CORPORATION, 129.

AND see CROWN — EXPROPRIATION — PUBLIC WORKS — TOLLS.

EMPHYTEUSIS.

1. *Railway lands and permanent way — Adverse occupation — Petitory action — Lease for 999 years — Injuries to road-bed — Right of action for damages — Ownership.* — The plaintiffs had leased a railway constructed by them to operating companies for 999 years, reserving a rental payable at stated times and upon terms as to maintaining the railway and its proper operation by the lessees. In the action brought *au pétitoire* for the recovery of part of the leased lands from an adverse occupant and for damages caused to the line

of railway by the defendant, the pleas raised questions that the lease was actually an alienation of all plaintiffs' interests in the lands occupied by the railway and left them without any right of action either to recover the possession or to obtain damages for injuries sustained by the lands. *Held*, affirming the judgment appealed from, that the lease amounted to an emphyteutic lease assigning the *domaine utile* of the railway and all the plaintiffs' rights in respect thereof, reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of bringing the action *au pétitoire* which lies in the party having the legal estate, and that the lessees might, on an application for an amendment, be added as parties plaintiffs in the action for the purposes of recovering any damages shewn to have been sustained upon the leased lands, the action for which would lie only in the holder of the beneficial estate therein. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

2. *Transfer of lease — Alienation for rent — Emphyteusis — Bail-à-rente — Bail a longues années — Droit mobilier — Cumulative demand — Incompatible pleadings — Réintigrande — Dénonciation de nouvel œuvre — Arts. 567, 572, 1593 C. C. — Arts. 176, 177 (b), 1064, 1066 C. P. Q.*

See ACTION, 120.

EMPLOYER AND EMPLOYEE.

1. *Negligence — Electric railway — Motor-man — Workmen's Compensation Act — Injury to conductor.* — The motorman of an electric car may be a "person who has charge or control" within the meaning of s. 3 of the Workmen's Compensation Act (R. S. O. [1897] c. 160), and if he negligently allows an open car to come in contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured the electric company is liable in damage for such injury. Judgment appealed from (27 Ont. App. R. 151) affirmed. *Toronto Ry. Co. v. Snell*, xxxi., 241.

2. *Government Railways Act, 1881 — Suits against Crown officials — Notice of action.*

See CROWN, 64.

3. *Injury to employee — Lord Campbell's Act — Exoneraton from liability — Art. 1056 C. C.*

See NEGLIGENCE, 219.

4. *Railway company — Grass on siding.*

See NEGLIGENCE, 210.

5. *Common employment — Negligence — Dangerous material — Arts. 1053, 1056 C. C.*

See MASTER AND SERVANT, 26.

6. *Operation of railway — Defective ways or plant — Lock on switch — Negligence — Findings of jury — Common law liability — Employer and employee — Assessment of damages.*

See NEGLIGENCE, 100.

7. *Negligence — Use of dangerous materials — Proximate cause of accident — Injuries to workmen — Employers' liability — Presumptions — Finding of jury sustained by court below.*

See NEGLIGENCE, 144.

8. *Insecure scaffolding—Dangerous employment—Liability for injury to employee—Disobedience of orders.*

See NEGLIGENCE, 91.

ENTAIL.

See SUBSTITUTION—TITLE TO LAND.

ENVOIE EN POSSESSION.

Testamentary executors—Succession—Balance due by tutor—Practice—Action for account—Provisional possession—Envoie en possession—Parties—Extra judicial consent to form of actions.

See EXECUTORS, 8.

AND see SERVITUDE.

EQUITY OF REDEMPTION.

Mortgage—Loan to pay off prior incumbrance—Interest—Assignment of mortgage—Purchase of equity of redemption—Accounts.

See MORTGAGE, 64.

ERROR.

See MISTAKE.

ESCHEATS.

1. *Failure of heirs—Legislative jurisdiction—B. N. A. Act, 1867, ss. 91, 92, 102, 109—R. S. O. (1877) c. 94.*

See CROWN, 56.

2. *Failure of heirs—Information—Omission of party—Limitation of action—Collusive judgment—Tierce-opposition.*

See TITLE TO LAND, 131.

ESCROW.

1. *Policy of insurance—Delivery without countersigning—Unpaid premium—New trial.*

See INSURANCE, LIFE, 7.

2. *Delivery of policy—Payment of premium—Countersigning by agent—Evidence.*

See INSURANCE, LIFE, 8.

3. *Contract of insurance—Cancelled policy—Trover—Conversion.*

See INSURANCE, MARINE, 21.

4. *Commencement of contract—Policy of life insurance—Delivery.*

See INSURANCE, LIFE, 12.

AND see DEED.

ESTATE TAIL.

Devise to great-grandson unborn—Appointment of heir-at-law to hold estate in the interim.

See WILL, 25.

AND see SUBSTITUTION—TITLE TO LAND.

ESTOPPEL.

1. ESTOPPEL BY CONDUCT, 1-38.
2. ESTOPPEL BY DEED, 39-61.
3. ESTOPPEL BY RECORD, 62-76.

1. ESTOPPEL BY CONDUCT.

1. *Sufferance—Trespass—Nuisance—Damages—Long possession—Constructions on public property—Right of action.*—C. built a wharf in the bed of the St. Lawrence River, which communicated with the shore by means of a gangway, and had enjoyed the possession of this wharf and its approaches for many years, when R. claimed that it was a public nuisance, and destroyed the means of communication from the wharf to the shore. C. sued for damages, and to have the works restored. After issue joined, R. filed a supplementary plea, alleging, that since the institution of the action, the person on whose land C.'s bridge rested had erected buildings which prevented the restoration of the bridge and wharf, and further that the wharf had been destroyed by natural causes and abandoned, and that its re-establishment would be a public nuisance without utility. On appeal from the judgment of the Court of Queen's Bench affirming the dismissal of the action, *Held*, reversing the judgment appealed from, that as it appeared C. had been openly, and with implied consent of public authority, allowed to erect the bridge and wharf on public property and remain in possession of it for over 16 years, the defendant, who had full knowledge of the fact, was estopped and debarred of any right to remove what might have been originally a nuisance to him, and that, notwithstanding any subsequent abandonment of this wharf and bridge, C. was entitled to substantial damages. *Caverhill v. Robillard*, ii., 575.

2. *Survey—Standing by—Conventional boundary line.*—A neighbouring proprietor who stands by without objecting to a boundary line while it was being located by a surveyor, the line being staked and a building up to that line partly erected by the adjacent proprietor was held to be estopped from disputing that the line located by the surveyor was the true boundary line. *Grassett v. Carter*, x., 105.

3. *Action by ratepayer—Improper construction of municipal work—Contractor bringing suit—Accentance of surplus money.*—A ratepayer of a municipality cannot maintain an action, on behalf of himself and the other ratepayers, against the municipality for the improper construction of a drain authorized by by-law when such ratepayer has himself been a contractor for a portion of the work and has received his share of the money voted for the work in excess of the amount expended. Judgment appealed from

(13 Ont. App. R. 53) affirmed. *Dillon v. Township of Raleigh*, xiv., 739.

4. *Lease of mining rights—Option of locating—Adoption of boundary.*—McA. leased a portion of a lot of land for mining purposes described by metes and bounds with the option: "Pourra le dit acquéreur changer la course des lignes et bornes du dit lopin de terre sans en augmenter les bornes, l'étendue ou superficie en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit, après que lui, le dit bailleur, aura prospecté le dit lopin de terre susbaillé," adopted lines of survey made by P, as containing the vein. B. leased another portion of the same lot. In an action *en bornage* the court appointed three surveyors to fix the boundaries. Each surveyor made a separate report, and the report and plan of the surveyor L., adopting P's lines, was adopted and homologated by the court.—*Held*, affirming the judgment appealed from (13 Q. L. R. 168), Gwynne, J., dissenting, that McA. having located the claim in accordance with the terms of the deed was estopped from claiming that the property should be bounded according to the true course of the vein of quartz, and that the judgment homologating the survey adopting P's lines and survey was right and should be affirmed. *McArthur v. Brown*, xvii., 61.

5. *Solicitor—Practising without certificate—Name appearing as member of firm—Estoppel.*—M., a solicitor, who had not taken out his certificate, allowed his name to appear as a member of a firm in active practice. He was not in fact a member, received no profits and paid none of the expenses and the firm did not appear as solicitors of record in any proceedings. The Law Society sued for the penalty, and shewed that the name of the firm was indorsed on certain papers filed of record in suits carried on by the firm. *Held*, reversing the judgment appealed from (15 Ont. App. R. 150), that M. did not "practice as a solicitor" within the meaning of the Act imposing the penalties (R. S. O. (1877) c. 140), and that he was not estopped by permitting his name to appear as a member of the firm, from shewing that he was not in fact a member. *Macdougall v. Law Society of Upper Canada*, xviii., 203.

6. *Conduct—Contract—Free boomage—Repairs—36 Vict. c. 81, (Que.)*—M. sued B. for charges authorized under 36 Vict. c. 81 (Que.) for the use of booms in the Nicolet River during 1887-1888. B. pleaded that under contracts between M. and B. and his *auteurs*, and the interpretation put upon them by M. the repairs to the booms were to be and were, in fact, made by him, and in consideration thereof he was to be allowed to pass his logs free; and, also, pleaded compensation for use by M. of other booms, and repairs made by B. on M.'s booms, and which by law he was bound to make.—*Held*, reversing the judgment of the Court of Queen's Bench, that there was evidence that M. had led B. to believe that under the contracts he was to have the use of the booms free in consideration of the repairs made by him to piers, &c., and that M. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect.—*Held*, further, that even if M.'s right of action was authorized by the statute the amount claimed was fully com-

pensated for by the amount expended in repairs for him by B. *Ball v. McCaffrey*, xx., 319.

See No. 7, *infra*.

7. *Conduct of parties—Possession—Contract—Booms—Proprietary rights—Replevin—Revendication—36 Vict. c. 81.*—O'S. claiming to be the legal depositary, and T. McG. claiming to be usufructuary under 36 Vict. c. 81 (Q.), of certain booms, chains, and anchors in the Nicolet River, of which G. B. had possession for several years under deeds and agreements from T. McG. and had stored in a shed for the winter, brought an action *en revendication* and for \$5,000 damages.—*Held*, affirming the judgment appealed from, that O'S. and T. McG. were not entitled to the possession as alleged, and that they were precluded by their conduct and acquiescence from disturbing G. B.'s possession. *Ball v. McCaffrey* (20 Can. S. C. R. 319) approved. *O'Shaughnessy v. Ball*, xxi., 415.

8. *Representation of indebtedness—Equitable assignment—Garnishee process.*—Plaintiff held a judgment against C. and was about to sue R. and M., whom he understood to be C.'s partners. Before doing so he consulted one of the defendants, by whom he was informed that there was a balance due from defendants to C., for work performed for defendants on the W. C. Ry. under a contract, and defendants suggested that this amount might be made available to satisfy plaintiff's claim. On the strength of this representation garnishee process issued, when defendants denied that there was any debt due. Previous to the garnishment, C. had drawn an order requesting defendants to pay all sums coming due to him under the engineer's monthly certificate to K., but there was no evidence of any indebtedness of C. to K.—*Held*, affirming the judgment appealed from (2 R. & G., 199), Strong and Gwynne, JJ., dissenting, that defendants were estopped by their representation from denying indebtedness to C., and that there was not evidence of such an assignment as would prevent the attachment from operating on the fund. *Shanly v. Fitzrandolph*, Cass. Dig. (2 ed.) 279.

9. *Signal posts—Running of railway trains—"Stop" notice—Res ipsa loquitur—Negligence.*—The act of a railway company in placing signal posts along the line of railway indicating rules for the running of trains amounts to a declaration that the omission to obey the instructions so given would be negligence. *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2 ed.) 729.

10. *Fire insurance—Contract—Termination—Notice—Statutory conditions—Premium note—Waiver—Estoppel.*—Where an insurer has demanded and received payment of a note given for the premium of insurance he is estopped from denying that an applicant is insured.—Judgment appealed from (22 Ont. App. R. 68) affirmed, Gwynne, J. dissenting. *Dominion Grange Mutual Assurance Co. v. Bradt*, xxv., 154.

11. *Fraudulent conversion—Past due bonds—Debentures transferable by delivery—Implied notice—Innocent holder for value.*—Debentures transferable by delivery used and marked as exhibits in court were afterwards lost and advertised for in newspapers.

Ten years later the owners' agent pledged them to a broker for advances on his own account, the bonds being then long past due, but payment provided for by special statutes.—*Held*, affirming the judgment appealed from (Q. R. 3 Q. B. 539), Fournier and Tasche-reau J.J., dissenting, that neither the advertisement, nor marks on the bonds, nor the broker's knowledge of the agent's insolvency were notice to the pledgee of defects in the pledgor's title and that the owners, having by their act enabled their agent to transfer the bonds by delivery, were estopped from asserting title thereto, to the detriment of a *bonâ fide* holder. *Young v. MacNider*, xxv., 272.

12. *Nova Scotia Probate Act—Executors and administrators—License to sell lands—Res judicata.*]—An executrix obtained a license to sell real estate of a deceased testator for payment of his debts. Judgment creditors of devisees moved to set aside the license but failed on the motion and in appeal. The lands were sold under the license and executrix paid part of the price to the judgment creditors, who received the same knowing the moneys to be proceeds of the sale. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought action for a declaration that the judgments were not a charge thereon. *Held*, affirming the judgment appealed from (27 N. S. Rep. 384), that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected upon the grounds invoked or which might have been invoked upon the motion and that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action. *Clark v. Phinney*, xxv., 633.

13. *Transshipment in transit—Custom of trade—Continuing bills of lading—Delivery—Payment of freight—Transfer by indorsement—"Bank Act"—Estoppel.*]—Grain was shipped from Chicago to Montreal, the bills of lading being made only from Chicago to Kingston, where it was, according to the usual custom of trade, transhipped into barges belonging to the defendants, and thence conveyed by them to Montreal, without the issue of new bills of lading. It appeared, however, to have been the custom that such bills of lading were, in cases of the kind, treated as continuing. The bills had been transferred by indorsement and delivery to the plaintiff, upon whose order the defendant had delivered the greater part of the cargo, after exacting payment of full freight upon the shipment. The defendant had also recognized the custom of the grain trade as to the bills of lading continuing.—In an action to recover an undelivered balance of the grain so shipped. *Held*, affirming the decision of the Court of Review, at Montreal, that, under the circumstances, the defendant was estopped from questioning the validity of the transfer of the bills of lading under the provisions of "The Bank Act," or objecting that they had become extinct upon delivery of the cargoes at Kingston. *St. Lawrence and Chicago Forwarding Co. v. Molsons Bank* (28 L. C. Jur. 127) referred

to. *Kingston Forwarding Co. v. Union Bank of Canada*, 9th December, 1895.

14. *Loss of right to appeal—Acceptance of costs awarded appellant—Acquiescence in judgment appealed from.*]—The judgment appealed from decided against appellant upon the construction of a will but gave him certain costs which were taxed and paid to him out of moneys in court to the credit of the cause. *Held*, that the reception of these costs was not inconsistent with an appeal against the judgment upon the construction of the will. *In re Ferguson; Turner v. Bennett; Turner v. Carson*, xxviii., 38.

15. *Incorporated company—Action against—Forfeiture of charter—Estoppel—Compliance with statute—Res judicata.*]—In an action for re-payment of tolls alleged to have been unlawfully collected by a River Improvement Company, it appeared that the plaintiff had treated the company as a corporation, used its works and paid tolls fixed by the commissioner, and the company had also been sued as a corporation. *Held*, that the plaintiff was precluded from impugning the legal existence of the company by claiming that its corporate powers were forfeited. *Hardy Lumber Co. v. Pickers River Improvement Co.*, xxix., 211.

16. *Sale of land—Misrepresentation by vendor.*]—A vendor of land who wilfully misstates the position of the boundary line and thereby leads the purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards claiming such strip as his own property. Judgment appealed from (31 N. S. Rep. 232) reversed. *Zwicker v. Feindel*, xxix., 516.

17. *Unauthorized issue of stock—Proceedings against holder of unpaid shares—Setting up illegality.*

See COMPANY LAW, 36.

18. *Waiver—Winding-up insolvent bank—Notice—Acceptance of dividends—Prerogative—45 Vict. c. 23 (D.)*

See CROWN, 73.

19. *Conditions of policy of insurance—Policy withheld from insured—Waiver.*

See INSURANCE, FIRE, 82.

20. *Illegal assessment—Fear of process—Payment under protest—Waiver—Subsequent proceedings to quash.*

See ASSESSMENT AND TAXES, 8.

21. *Delay in bringing action—Promotion of joint stock company—Misrepresentation.*

See COMPANY LAW, 37.

22. *Railway crossings—Parol agreement—Reliance on statutory provisions.*

See RAILWAYS, 41.

23. *Sale of property bequeathed—Investment of proceeds by testator—Partage by legatees—Ratification by heir of beneficiary.*

See WILL, 26.

24. *Execution of writ of attachment—Abandonment of seizure—Action against sheriff.*

See SHERIFF, 5.

25. *Error in policy of insurance — Reference of claim under arbitration clause—Waiver.*

See INSURANCE, FIRE, 93.

26. *Payment of cheque—Joint payees—Indorsement by partner—Acquiescence in payment—Monthly receipts.*

See PARTNERSHIP, 16.

27. *Tenant by sufferance — Distress—Subtenancy—Notice to quit—Expiration of lease—Overholding tenant.*

See LANDLORD AND TENANT, 22.

28. *Fraud—Breach of trust — Forgery—Ratification.*

See BILLS AND NOTES, 19.

29. *Attorney compromising client — Agreement not to appeal.*

See APPEAL, 412.

30. *Execution and delivery of deed—Registration—Representation to mortgagee.*

See DEED, 36.

31. *Débats de compte—Judgment ordering account—Quality of defendant—Acquiescence—Merchants' books of account.*

See TUTORSHIP, 2.

32. *Irregular appearance—Disavowal of attorney—Long delay—Waiver.*

See REQUÊTE CIVILE, 1.

33. *Trespass to mortgaged property—Practice—Parties to action—Mortgagee in possession—Sale of property to trespasser.*

See MORTGAGE, 60.

34. *Trustee—Administrator of estate—Release by next of kin—Recession of release—Laches—Estoppel—Delays.*

See TRUSTS, 13.

35. *Trustee — Misappropriation — Surety—Knowledge by cestui que trust—Parties.*

See EVIDENCE, 175.

36. *Mistaken consideration—Artifice—Misrepresentation — Delays in action to rescind contract—Ratification—Waiver.*

See VENDOR AND PURCHASER, 26.

37. *Non-negotiable note — Receipt of proceeds—Acknowledgment of liability.*

See BILLS AND NOTES, 32.

38. *Railways—Location of permanent way—Fencing — Laying out boundaries — Construction of deed — Estoppel by conduct — Words of limitation—Description of lands—Registry laws—Notice of prior title—Riparian rights—Possession — Acquisitive prescription — Tenant by sufferance — Right of action—Adding parties—Practice.*

See RAILWAYS, 153.

2. ESTOPPEL BY DEED.

39. *Grant of provincial lands—Foreshore of harbour — Conveyance by grantee—Dower—Claim by widow—Estoppel by deed.]—After*

the B. N. A. Act came into force the Government of Nova Scotia granted to S. part of the foreshore of the harbour of Sidney. § conveyed through another party to the appellant, defendant, which, in an action by his widow for dower in the lands, pleaded that the grant to S. was void as the lands were vested in the Dominion of Canada. *Held*, affirming the judgment appealed from (23 N. S. Rep. 214), Strong and Gwynne, JJ., dissenting, that as the defendant had obtained title from S. he was estopped from saying that his title was defective.—*Per* Strong and Gwynne, JJ., dissenting. The conveyance by S. to the defendant's vendor was an innocent conveyance by which S. himself would not have been estopped and, as estoppel must be mutual, his grantee would not be estopped. There were no recitals in the deed that would estop them and estoppel could not be created by the covenants. *Sydney and Louisburg Ry. Co. v. Sword*, xxi., 152.

40. *Conveyance to married woman—Execution by husband—Assent.]—Where a husband assented to a conveyance by his wife and performed subsequent Acts consistent with such assent it was held that he was estopped from denying the title of his wife's grantor. *Webb v. Marsh*, xxii., 457.*

40a. *Life insurance—Wagering policy—Nullity—Waiver of illegality—Insurable interest—Estoppel—14 Geo. III., c. 48 (Imp.)—Arts. 2474, 2480, 2590 C. C.]—A condition in a policy of life insurance by which the policy is declared to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy.—Judgment of the Court of Queen's Bench reversed, Sedgewick, J., dissenting. *Manufacturers Life Ins. Co. v. Anctil*, xxviii., 103.*

(Affirmed on appeal [1899] A. C. 604).

41. *Bona fides — Conveyance by married woman—Agreement—Recital.]—B., a married woman, in order to carry out an agreement between her husband and his creditors consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on it, and of indemnity against her personal liability on a mortgage against said farm. The conveyance, agreement and bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels but giving the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor. *Held*, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife, and that the Court of Appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage. *Boulton v. Boulton*, xxviii., 592.*

42. *Acquiescence — Floatable waters — Water power — River improvements—Joint user—Servitude—Arts. 400, 549, 550, 551 and*

1213 C. C.]—Where a riparian owner of lands on a lower level had been permitted by the plaintiffs, for a number of years, to take water power necessary to operate his mill through a flume he had constructed along the river bank partly upon the plaintiffs' land connecting with the plaintiffs' mill-race, subject to the contribution of half the expense of keeping their mill-race and dam in repair, and these facts had been recognized in deeds and written agreements to which the plaintiffs and their *auteurs* had been parties, the plaintiffs could no longer claim exclusive rights to the enjoyment of such river improvements nor require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill-race and a portion of the flume had been constructed. *City of Quebec v. North Shore Ry. Co.* (27 Can. S. C. R. 102) and *La Commune de Berthier v. Denis* (27 Can. S. C. R. 147) referred to. *Lafrance v. Lafontaine*, xxx., 20.

43. *Quashing appeal — Practice — Acquiescement — Voluntary execution — Question of costs.*] — Defendants filed judicial abandonments as ordered by the judgments appealed from, declaring, however, in the deeds, that exception was taken thereto, and that they intended to appeal, but made the abandonment to avoid *capias*, &c.—*Held, per Strong, C.J., and Taschereau and Girouard, J.J.* That appellants had acquiesced in the judgments, executed the order against them and left matters in a position where it was impossible to obtain relief. Gwynne, J., concurred on the understanding that there should not be *res judicata* in respect to an alleged partnership. Sedgewick, J., assented doubtfully, as he did not feel satisfied that the abandonment had not been made under stress. *Schlomann v. Doucker*, xxx., 323.

(The appeal, involving costs only, was quashed on the question of jurisdiction.)

See APPEAL, 396.

44. *Covenant for title — Warranty clause in an escrow.*

See DEED, 20.

45. *Statute of Limitations — Interruption — Acceptance of contingent interest — Possession.*

See WILL, 56.

46. *Married woman — Renunciation of community — Possession — Prescription — Arts. 1379, 2191 C. C.*

See TITLE TO LAND, 75.

47. *Deed — Ratification — Bona fides — Prescription.*

See TITLE TO LAND, 76.

48. *Shabby defence — "Want of a seal" — Policy of life insurance — Equitable relief.*

See COMPANY LAW, 28.

49. *Landlord's title — Tax deed — Ejectment — Evidence.*

See TITLE TO LAND, 99.

50. *Public sale of lots bounded by lanes — Closing of lane — Subsequent lease according to plan shewing lane closed — Acceptance by purchaser.*

See TITLE TO LAND, 33.

S. C. D.—18.

51. *Construction of deed — Estoppel — User by Crown — Reversion.*

See RIDEAU CANAL LANDS, 2.

52. *Bond to the Crown — Acceptance — Execution — Certificate of magistrate — Weight of evidence — Proximate cause.*

See EVIDENCE, 153.

53. *Promissory note — Collateral to mortgage — Prescription — Suit by trustee.*

See TRUSTS, 5.

54. *Agreement to compound with debtor — Execution of deed — Ratification — Release.*

See DEBTOR AND CREDITOR, 5.

55. *Conditions of sale — Incumbrances — Mistake in Mortgage.*

See VENDOR AND PURCHASER, 19.

56. *Sheriff's sale — Lands conveyed by usufructuary — Remainder — Discharge of incumbrances.*

See WILL, 12.

57. *Missing deed — Secondary evidence — Certified copy.*

See DEED, 36.

58. *Equity running with estate — Description of lands — Falsa demonstratio — Accretion — Parol evidence.*

See MORTGAGE, 52.

59. *Deed of compromise — Nullified instrument.*

See EVIDENCE, 49.

60. *Settlement of partnership accounts — Mutual releases — Mistake.*

See PARTNERSHIP, 8.

61. *Conveyance of land — Form of deed — Trust — Notice to equitable owner — Inquiry.*

See TITLE TO LAND, 7.

3. ESTOPPEL BY RECORD.

62. *Res judicata — Judgment in litation — Binding effect — Constitutional law — Incorporation of company — Vendor to company — Validity of incorporating Act.*]—The Island of Anticosti, held in joint ownership by a number of people, was sold by litation. The report of distribution allotted to plaintiff his share, as owner of one-sixth of the island acquired from the Island of Anticosti Co., which had previously acquired one-sixth from the widow of H. G. Forsyth. The respondent's claim was disputed by appellant, the daughter and legal representative of the widow, alleging that the sale by her through her attorney, F., of the one-sixth to the Anticosti Co. was a nullity, because the Act incorporating the company was *ultra vires* of the Dominion Government, and that the sale by F., as attorney for his mother, to him, as representing the Anticosti Co., was not valid. The Anticosti Co. was one of the defendants in the action for litation and appellant an intervening party; no proceedings were taken by appellant, prior to judgment, attacking either the constitutionality of the Island of Anticosti Co.'s charter or the status of plaintiff.—*Held*, affirming

the judgment of the Court of Queen's Bench, Ritchie, C.J., and Gwynne, J., dissenting, that as the widow had herself recognized the existence of the company, and as appellant, her legal representative, was a party to the suit ordering the licitation of the property, the appellant could not now, on a report of distribution, raise the constitutional question as to the validity of the Act of Dominion Parliament constituting the company, and was now estopped from claiming the right of setting aside the deed of sale, for which her mother had received good and valuable consideration. *Forsyth v. Bury*, xv., 543.

[Leave to appeal refused by the Privy Council, (11 Can. Gaz. 418.)]

63. *Seizure of dividends—Holder of shares—Judgment setting aside intervention—Different title.*—A final judgment setting aside an intervention to a seizure of dividends of bank shares, founded upon an allegation that such dividends formed part of a substitution, is not *res judicata* as to the *corpus* of the shares nor as to the dividends of other shares claimed under a different title. *Muir v. Carter*; *Holmes v. Carter*, xvi., 473.

64. *Carriers—Partial loss of goods—Notice of claim—Limitation of time—Demurrer—Acquiescence in judgment—Res judicata—Joint tort-feasors—Release of one.*—A shipping bill provided that no claim for damage, loss, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within 36 hours after delivery of the goods in respect to which the claim was made.—*Held*, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to, and plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*.—*Per* Strong, J., (Gwynne, J., *contra*) that part of the consignment having been lost such notice should have been given in respect to the same within 36 hours after delivery of the goods which arrived safely.—*Quere*, In the present state of the law is a release to, or satisfaction from one of several joint tort-feasors a bar to an action against the others? The judgment appealed from (15 Ont. App. R. 14) reversed. *G. T. R. Co. v. McMillan*, xvi., 543.

65. *Search warrant—Magistrate's jurisdiction—Justification of ministerial officer—Goods in custodia legis—Replevin—Res judicata—Judgment inter partes.*—A judgment on *certiorari* quashing a warrant will not estop a constable from justifying under it in an action to replevy goods seized where he was not a party to the proceedings to set aside the warrant and the judgment quashing it was *inter partes* only. *Sleeth v. Hurlbert*, xxv., 620.

66. *Nova Scotia Probate Act—Executors and administrators—Contesting license to sell lands—Res judicata.*—An executrix obtained a license to sell real estate of a deceased testator for payment of his debts. Judgment creditors of devisees moved to set aside the license but failed on the motion and in appeal. The lands were sold under the license and executrix paid part of the price to the judgment creditors, who received the same knowing the moneys to be proceeds of the sale. Afterwards the judgment creditors, still claim-

ing the license to be null, issued execution against the lands and the purchaser brought action for a declaration that the judgments were not a charge thereon. *Held*, affirming the judgment appealed from (27 N. S. Rep. 384) that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected upon grounds invoked or which might have been invoked upon the motion. *Clark v. Phinney*, xxv., 633.

67. *Title to land—Entail—Life estate—Fiduciary substitution—Privileges and hypothecs—Mortgage by institute—Preferred claim—Prior incumbrancer—Vis major—Chose jugée—Parties—Grosses réparations.*—An institute *grevé de substitution* may validly affect and bind the interest of the substitute in real estate subject to fiduciary substitution where the bulk has been destroyed by *vis major* in order to make *grosses réparations*, upon judicial authorization, and the property is then charged and the authorization operates as *res judicata* estopping the substitute from contesting the necessity and extent of the repairs. *Chef dit Vadeboncœur v. City of Montreal*, xxix., 9.

68. *Admissions in pleadings—Agreement as to evidence—Estoppel.*—In one count of his declaration plaintiff admitted a breach of a condition but alleged that it was waived. On the trial counsel agreed that the facts proved in a similar case against another insurance company should be taken as proved in the present case. These facts shewed, as held by the decision in the previous case, that there was no breach.—*Held*, that the agreement at the trial prevented the appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition. *Western Assurance Co. v. Temple*, xxxi., 372.

69. *Sale of goods—Option to take bill of lading or re-weigh—Notice to seller—Deficient delivery—Undisclosed principal—Right of action—Pleading—Tender and payment into court—Acknowledgment of liability.*

See ACTION, 128.

70. *Judgment in former suit—Estoppel as against Crown.*

See RES JUDICATA, 2.

71. *Suits by Attorney-General—Crown lands—Setting aside grant—Res judicata against the Crown.*

See TITLE TO LAND, 130.

72. *Controverted election—Preliminary objections—Decision with reservation to re-new question at trial—Failure to appeal.*

See ELECTION LAW, 95.

73. *Missing deed—Evidence of execution and delivery—Certified copy—Registration.*

See DEED, 36.

74. *Sheriff—Trespass—Sale of goods by insolvent—Bona fides—Judgment of inferior tribunal—Bar to action—Fraudulent preferences—Pleading—Estoppel.*

See RES JUDICATA, 4.

75. *Foreign judgment — Res judicata — Judgment obtained after action begun—R. S. N. S. (5 ser.) c. 104, s. 12.*

See RES JUDICATA, 7.

76. *Judicial admissions — Nullified instruments — Cadastral plans and books of reference—Compromise.*

See EVIDENCE, 49.

EVICTIION.

1. *Sheriff's sale — Vacating sale — Arts. 706-715 C. C. P.—Arts. 1511, 1535, 1586, 1591 and 2060 C. C. — Substitution.]—Mere exposure to eviction is not a sufficient ground for vacating a sheriff's sale. Deschamps v. Bury, xxix., 274.*

2. *Landlord and tenant — Conditions of lease—Construction of deed.]—Where a written lease of land provides for the payment of indemnity to the lessees in case they should be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim indemnity upon being so dispossessed although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the condition therein mentioned. The Queen v. Poirier, xxx., 36.*

3. *Joint debt — Joint and several hypothec—Hypothecary action—Délaissement en justice by part owner—Exception to personal action.*

See MORTGAGE, 50.

4. *Entry by lessor to repair — Deprivation of benefit — Suspension of rent — Interest.*

See LANDLORD AND TENANT, 12.

5. *Title to land — Legal warranty — Description—Plan of sub-division—Accession—Troubles de droit — Eviction — Issues on appeal—Parties.*

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EVIDENCE.

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1. ADMISSIBILITY; PAROL TESTIMONY.

1. *Cross-examination — Objection by counsel—Question disallowed—32 & 33 Vict. c. 20, s. 80—32 & 33 Vict. c. 36—New trial.]—The prosecutrix, in an indictment for rape, after she had declared she had not previously had connection with a man other than the prisoner, was asked in cross-examination whether she remembered having been in the milkhouse of G. with two persons named M., one after the other. Held, that the witness might have objected, or the judge might, in his discretion, have told the witness that she was not bound to answer the question; but the court ought not to have refused to allow the question to be put because counsel for the prosecution objected to the question. Held, also, that since the passing of 32 & 33 Vict. c. 20, s. 80, repealing so much of C. S. L. C. c. 77, as would authorize any court in Quebec to order a new trial in a criminal case; and of 32 & 33 Vict. c. 36, repealing C. S. L. C. c. 77, s. 63, the Court of Queen's Bench (Que.) has no power to grant a new trial. Larliberté v. The Queen, i., 117.*

2. *Sale of goods — Breach of warranty—Recovery of special damages—Subsequent action for price—Evidence as to inferiority of goods delivered — Consequential damages.]—C. wished to procure a wheel which, with existing water power, would be sufficient to drive the machinery in his mill. A. undertook to put in a "Four-foot Sampson Turbine Wheel," which he warranted would be sufficient for the purpose. The wheel was put in, but proved insufficient for the purpose warranted. The time for payment of the price having elapsed, C. sued A. for breach of the warranty and recovered \$438 damages. A. subsequently sued C. for the price, and on his defence, C. offered evidence that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C. to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended. The trial judge declared the evidence inadmissible, and verdict was entered for the amount sued for in the action. A new trial was ordered by the Court of Common Pleas but on appeal the rule was set aside by the Court of Appeal for Ontario, and judgment entered on the verdict for a reduced amount. (26 U. C. C. P. 338.) Held, reversing the judgment of the Court of Appeal for Ontario and restoring the order for a new trial (Strong, J., dissenting), that, as the time for payment of the price had elapsed when the first action was brought, and only special damages for breach of warranty had been recovered therein, the evidence tendered by C. in the subsequent action as to the worthlessness or inferiority of the article ought to have been admitted. Church v. Abell, i., 442.*

3. *R. S. N. S. (4 ser.) c. 96, s. 41—Testimony by surviving party as to transactions with deceased party to suit—Administrators joined in suit before trial.]—C. sued M. & R. and M. accepted service and admitted debt, but R. pleaded to the action. Before trial both defendants died. Then C. R. & R. R., as administrators of R., were, before trial, made parties to the action. At the trial C. was examined as a witness in support of his own case, and when asked what had taken*

place between him and the deceased M. & R., the learned judge ruled that the evidence was inadmissible under s. 41, c. 96, R. S. N. S. (4 ser.) *Held*, affirming the judgment of the court below, Henry, J., dissenting, that under the provisions of said section prohibiting a surviving party to an action testifying therein as to dealings, transactions or agreements with deceased parties thereto, the surviving plaintiff could not be allowed to give evidence in his own behalf in respect to dealings with a deceased defendant, notwithstanding that his administrators were made parties after issue joined, but before trial. (See 10 N. S. Rep. 112.) *Chesley v. Murdock*, ii, 48.

4. *Cross-examination—Question as to letter annexed to affidavit filed — Rejection—Non-direction.*—Plaintiff sued upon notes signed by one E. and W. dated at Halifax and made payable to plaintiff's order in Boston, Mass. The notes were stamped, but before action double stamps were affixed and no contract as to interest appeared on the face of them. W. pleaded that he had signed upon agreement that he should be liable thereon as surety only for E., and the plaintiffs, without the knowledge or consent, gave time to E., and forbore to enforce payment when they might have been paid. W. sought to cross-examine plaintiff on an affidavit made by the witness, to which was annexed a letter to plaintiff from E. This evidence was rejected by the judge, and verdict given for plaintiffs with interest. A rule to set aside verdict was discharged by the Supreme Court (N.S.), but a reference to the master made as to the rate of interest. *Held*, reversing the court below, that there was an improper rejection of evidence, and that the jury should have been directed as to interest. *Wallace v. Souther*, ii, 598.

5. *Witness refusing to answer—Incriminating testimony—Oath as to belief that reply would criminate.*—E., alleged to have been a teller in a bank in New York, and to have absconded with funds, was arrested at St. John, N. B., by a detective and imprisoned for several hours, when, no charge having been made against him, he was released. While a prisoner at the police station, the detective demanded and obtained from E.'s wife, money she had in her possession telling her that it belonged to the bank, and that her husband was in custody. In an action by E. for assault and false imprisonment and for money had and received, the defendant pleaded, *inter alia*, that the money had been stolen by the plaintiff at the City of New York, from the bank, and was not the money of the plaintiff; that defendant, as agent of the bank, received the money to and for the use of and paid the same over to the bank. Plaintiff being examined as a witness on his own behalf, on cross-examination, refused by advice of counsel to answer certain questions, and on being interrogated as to his belief that his so doing would tend to criminate him, he remained silent, and refused to say whether or not he apprehended serious consequences if he answered the questions proposed. The trial judge decided that he was not bound to answer and, on the finding of the jury entered a verdict for the plaintiff which was affirmed by the full court. *Held*, reversing the judgment appealed from (20 N. B. Rep. 40), Henry, J., dissenting, that the defendant was entitled to a statement on oath by the witness that he objected to answer because he believed his

answering would tend to criminate him, and that the ruling of the trial judge was wrong. *Power v. Ellis*, vi, 1.

6. *Commercial contract — Rejection of evidence—Acceptance — Parol testimony—Art. 1235 C. C.—New trial.*—In an action upon an unwritten commercial contract for the sale of goods exceeding \$50, oral evidence of earnest given or acceptance, or receipt, of the whole, or any part of the goods, is admissible, under art. 1235 of the Civil Code. (The judgment of the Court of Queen's Bench, affirming the Superior Court at Montreal (4 Legal News 218; 6 Legal News 363; 27 L. C. Jur. 349) was reversed and a new trial ordered.) *Munn v. Berger*, x, 512.

7. *Commission — Defective return—Direction provisions—Failure to administer interrogatories.*—A commission issued to two commissioners, one named by each of the parties—to take evidence at St. Thomas, W.I., with liberty to plaintiff's commissioner to proceed *ex parte* if the other neglected or refused to attend. Both commissioners attended and defendant's nominee cross-examined the witness, but the return was signed by one commissioner only. Some of the interrogatories and cross-interrogatories were not put to witnesses by the commissioners. *Held*, reversing the judgment appealed from (23 N. B. Rep. 160), that the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received. —*Per Ritchie, C.J.*, and Strong, Fournier and Henry, J.J., that the refusal of one commissioner to sign the return, did not vitiate it.—*Per Gwynne, J.*, that the return should have been signed by both commissioners, and not having been so signed, was void, and the evidence under it should not have been read. *Millville Mutual Marine and Fire Ins. Co. v. Driscoll*, xi, 183.

8. *Negligence—Running of railway trains—Examination of company's officers—R. S. O. (1877) c. 50, s. 136—Company's books.*—The locomotive superintendent and locomotive foreman of a railway company are "officers of the corporation" who may be examined under the provisions of R. S. O. (1877) c. 50, s. 136, as to matters under their control or supervision and entries in the company's books may properly be admitted as evidence without the testimony of the persons by whom such entries were made. Judgment appealed from (14 Ont. App. R. 309) affirmed. *Canada Atlantic Ry. Co. v. Mowley*, xv, 145.

9. *Canada Temperance Act — Service of summons—Assault on constable—Indictable offence—Competency of wife as witness.*—On the trial of an indictment for assault upon a constable attempting to serve a summons under the Canada Temperance Act, the defendant's wife is not a competent witness on his behalf. *McFarlane v. The Queen*, xvi, 393.

10. *Partnership — Cross-examination—Entries in books of third party—Verdict against evidence—New trial.*—McK. was a member of two firms, C. McK. & Co. and McK. & M. In an action against McK. & M. for goods sold and delivered it appeared that the goods were ordered by McK. and shipped to the place of business of McK. & M., but were

charged in plaintiff's books to C. McK. & Co., which he said was done at McK.'s request. McK., as a witness for plaintiff, corroborated this, and on cross-examination produced, subject to objection, the books of C. McK. & Co., in which these goods were credited to that firm. A verdict for defendant, M. was set aside and a new trial ordered.—*Held*, reversing the judgment appealed from (27 N. B. Rep. 143) that the books of C. McK. & Co. were properly in evidence on the cross-examination of McK., and the rule for a new trial should be discharged. *Miller v. White*, xvi., 445.

11. *Lost writing—Proof of handwriting—Subsequently acquired knowledge—Change of signature.* — A document not in existence written by a particular individual may be proved by a person who has had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed and could only say that from his recollection of the document it was written by the same person. Gwynne, J., dissenting. — In an action for a written libel defendant was asked on cross-examination, if he had not changed his signature since the action began, which he denied. *Held*, Gwynne and Patterson, JJ., dissenting, that documentary evidence was admissible to shew that the signature had been changed.—*Per* Patterson, J. The witness could properly be asked, on cross-examination, if he had not changed his signature, but the opposing party must be satisfied with his answer, and could not go further and give affirmative evidence of the fact. (See 28 N. B. Rep. 89.) *Alexander v. Vye*, xvi., 501.

[Leave to appeal refused by Privy Council.]

12. *New trial—Improper admission—Cross-examination—Conversation partly given on examination in chief—Belief as to signature on note — Evidence of counsel.* — To an action on a bond defendants pleaded that it was given in settlement of promissory notes made by a brother of defendants the indorsements to which were forged to the knowledge of the bank, which settlement was the only consideration for the execution of the bond. Verdict for plaintiff was set aside by the full court and a new trial ordered on the ground of improper admission of evidence: 1st, evidence by a solicitor of what one of the officers of the bank had told him relative to an admission by the alleged forger that the notes were genuine; part of this conversation, which related to a different matter, had been given in evidence by the same witness on direct examination, but the court below held that the balance could not be given on cross-examination as it was not connected with what had already been proved. 2nd, evidence by counsel for plaintiff in the proceedings on the notes which had led to the making of the bond of his belief in their genuineness, which the court below held was not good evidence. *Held*, reversing the Supreme Court (N. B.), that the evidence objected to was properly admitted. *Halifax Banking Co. v. Smith*, xviii., 710.

13. *New trial—Improper rejection — Excessive damages — Pleading — New grounds taken on appeal.* — Action on policy of fire insurance on a stock of goods, verdict for the plaintiff moved against as against weight of evidence and for

improper exclusion of evidence. The first ground was mainly urged in regard to amount of damages. As to the second ground the evidence tendered related to the fact that a quantity of unburnt matches and shavings had been found near the part of the premises in which the fire occurred where the bulk of the goods were alleged to have been burnt. The evidence was rejected by the trial judge for the reason that there was no defence pleaded that the fire was incendiary, and on appeal to the full court it was for the first time urged that it was admissible as shewing the nature and extent of the fire in the vicinity. The verdict for the plaintiffs was sustained by the full court. *Held*, Gwynne, J., dissenting, that the decision of the Supreme Court of Nova Scotia should be affirmed.—*Per* Ritchie, C.J., though the amount of damages found was not satisfactory and might well have been submitted to a jury of business men as a question proper for their determination he would not dissent from the judgment dismissing the appeal. As to the other ground the evidence was rightly rejected. When evidence is tendered the judge and opposing counsel are entitled to know the ground on which it is offered and none can be urged on appeal that has not been put forward at the trial. *Royal Ins. Co. v. Dufus*, xviii., 711.

14. *Sale of goods — Partnership — To whom credit given—Entries on previous dealings—New trial—Reduction of verdict.* — The plaintiffs, P. J. and T. were partners in lumbering transactions and as such, under the name of P. O'B. & Bros. had dealings with defendant from 1879 to the fall of 1882. At the end of 1880, 1881 and 1882 the parties had settlements of accounts, shewing a balance due on each settlement from defendants to plaintiffs, the total of the three balances being \$3,427.05, for which plaintiffs brought action. Defendant set off a larger claim for goods supplied to the partnership in 1883 and 1884, but plaintiffs contended that the partnership, to the knowledge of defendant, had been dissolved in 1882 and that the goods had been supplied by the defendant to P. O'B. alone. Defendant denied knowledge of the dissolution. Between the fall of 1882 and 1884, while some entries in defendant's books shewed the charges to have been made against P. O'B. & Bros., greater numbers of entries were against P. O'B. alone. Defendant's counsel, to meet inferences from such entries, established by evidence of defendant, by reference to his books, that from 1879 to the fall of 1882 (when plaintiffs were partners) defendant kept his books in the same manner, making the charges sometimes against P. O'B., and at other times against P. O'B. & Bros.—The judgment appealed from (27 N. B. Rep. 145) decided, Wetmore, J., dissenting, that this evidence was rightly admitted; and also, that it was not misdirection to tell the jury that in considering the question of partnership since 1882 they might, in connection with the other facts of the case, consider the way in which defendant kept his accounts both before and after that date and whether he was dealing differently with plaintiffs after 1882, from his mode of dealing with them before that.—It was held further that in the amount awarded to defendant was included a sum of \$1,209.50 for goods, of the delivery of which the proof was insufficient, and that unless defendant consented to a reduction of his balance by that

amount there should be a new trial. *Held*, affirming judgment appealed from, *per* Ritchie, C.J., and Taschereau and Patterson, J.J., that the evidence objected to was properly admitted; that, taking the charge of the learned judge at the trial as a whole, there was no misdirection, and that the condition as to avoidance of a new trial had been properly imposed. Strong and Gwynne, J.J., dissented. —Patterson, J., delivered notes of reasons for judgment which appear in Cassels' Digest. —*Per* Gwynne, J. The evidence failed to establish a partnership between plaintiffs, or any joint liability by them to defendant in respect of the goods charged for in his set-off.—Further, the practice of refusing a new trial upon condition of the party in whose favour a verdict has been rendered agreeing to a reduction named by the court, has been confined to cases of objection for excessive damages only. *O'Brien v. O'Brien*, Cass. Dig. (2nd ed.) 297.

(444.) 15. *Life insurance — Delivery of policy — Rejection of evidence — New trial — R. S. N. S. (Ser.) c. 96, s. 41*—In an action on a policy of life assurance, the defendants pleaded that the policy was never delivered. The evidence of the agent of the company, as to conversations between himself and the assured, was objected to, and rejected by the judge as inadmissible under the R. S. N. S., c. 96, s. 41. A rule to set aside the verdict for plaintiff was discharged by the Supreme Court (N. S.) *Held*, reversing the judgment appealed from (2 Russ. & Ches. 570), that the evidence was not inadmissible under the statute and should not have been withheld from the jury. Appeal allowed with costs, and new trial ordered. *Confederation Life Ass'n of Canada v. O'Donnell*, Cass. Dig. (2 ed.) 370.

16. *Contract — Collateral agreement — Question for jury — Verdict — New trial ordered by court below*.]—Whether a memorandum in writing set up by the defendant was or was not intended to settle a contract in whole or in part is a question for the jury, and the *onus* to shew that it settled the whole contract being upon the defendant and oral testimony admissible on behalf of both parties, a verdict based on the appreciation of the credulity of the respective witnesses ought not to be interfered with. *Peters v. Hamilton*, Cass. Dig. (2 ed.) 763.

17. *Parol testimony — Variation of written agreement — New trial*.]—The defendant agreed in writing to accept a quantity of goods in payment of two acceptances by the plaintiff. The agreement was carried out by the plaintiff, but he was subsequently sued by an indorsee of one of the acceptances, and obliged to pay the same. An action was brought by him to recover the amount thus paid from the defendant. At the trial evidence was offered by defendant, and admitted by the trial judge, of an oral agreement between him and the plaintiff at the time the written agreement was made, to the effect that the goods were not to be accepted as payment in full of the acceptances but only in part payment thereof. It was held by the Supreme Court of Nova Scotia, that there was error in the admission of such evidence. On appeal to the Supreme Court of Canada, the judgment appealed from (28 N. S. Rep. 210) was affirmed. *Cox v. Seeley*, 6th May, 1896.

18. *Relevancy — Previous transaction — Bona fides — Removal of suspicions — Inferences drawn by jury — Collateral facts*.]—It appeared that the defendant for the purpose of supporting his plea of fraud and shewing his bona fides, had offered, in evidence, a transaction between himself and the plaintiff similar to the one in issue, but which had occurred about a year previously, and it had been held in the Supreme Court of New Brunswick, *per* Hannington, Landry and Van Wart, J.J., Tuck, J., dissenting, Baker, J., *dubitante*, that such evidence was admissible, as shewing grounds for the removal of defendant's suspicions, and as a fact from which a reasonable inference might be drawn by the jury, bearing upon the question in issue. (33 N. B. Rep. 326).—On appeal to the Supreme Court of Canada, the appeal was dismissed after hearing upon the merits. *Bank of Nova Scotia v. Robinson*, 6th June, 1896.

19. *Action for personal injuries caused by negligence—Examination of plaintiff de bene esse—Death of plaintiff—Action by widow under Lord Campbell's Act—Admissibility of evidence taken in first action—Rights of third party*.]—Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect claiming through the deceased. Therefore where an action is by a person so injured in which his evidence is taken *de bene esse* and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the Act. (Taschereau and Gwynne, J.J., dissenting).—The admissibility of such evidence as against the original defendants, a municipal corporation sued for injuries caused by falling into an excavation in a public street, is not affected by the fact that they have caused a third party to be added as defendant, as the person who was really responsible for such excavation, and that such third party was not notified of the examination of the plaintiff in the first action, and had no opportunity to cross-examine him. (Taschereau and Gwynne, J.J., dissenting).—Judgment appealed from (20 Ont. App. R. 444) affirmed. *Town of Walkerton v. Erdman*, xxiii., 352.

20. *Absolute transfer — Commencement of proof by writing — Oral evidence*.]—Verbal evidence is inadmissible to contradict an absolute notarial transfer, even where there is a commencement of proof by writing. *Bury v. Murray*, xxiv., 77.

21. *Partnership — Registered declaration—Art. 1835 C. C.—C. S. L. C. c. 65, s. 1—Oral evidence—Life policy*.]—Action by W. McL. and F. W. R. to recover amount of an accident policy insuring the members of the firm of McL. Bros. & Co., alleging that J. S. McL., one of the partners, had been accidentally drowned. After the policy was issued the plaintiffs signed and registered a declaration to the effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, and they also signed and registered a declaration of a new partnership under the same name, comprising the plaintiffs only. Plaintiffs tendered oral evidence to prove that these declarations were incorrect, and that J.

S. McL. was a member of the partnership at the time of his death.—*Held*, affirming the judgment appealed from, which had affirmed the Court of Review (Q. R. 3 S. C. 230), *sub nom.*, *McLauchlan v. Accident Ins. Co.*, that such evidence was inadmissible. *Caldwell v. Accident Ins. Co. of North America*, xxiv., 263.

22. *Promissory note — Consideration — Accommodation—Evidence—New trial.*—Appeal was from judgment of the Supreme Court (N. B.) varying the verdict at the trial, pursuant to leave reserved. The action was against respondent on notes indorsed and bills accepted by him. The defence was that the bills and notes were accepted and indorsed for accommodation of the bank, and that defendant had been induced to accept and indorse by fraud and misrepresentation. M., agent of the bank, had represented to defendant that the transactions were in the business and for the interest of the bank, which was engaging in matters forbidden by the Bank Act, and had to adopt the course pursued by the agent. The trial judge rejected evidence of conversation between a third party, who was on some of the paper in suit, and the agent who succeeded M. as to what had taken place between said third party and M. in regard to some of the notes, on the ground that the evidence was irrelevant and only arose out of cross-examination. He admitted other objectionable evidence, ruling that only the answer had been objected to. A verdict was given for plaintiff for the amount of one note and of an overdrawn account, and for defendant in respect of all other claims. The court *en banc* gave the bank judgment for another and a larger note, and defendant judgment for all the rest, including that on which he failed at the trial. Both appealed.—The Supreme Court of Canada ordered a new trial on the ground that the evidence rejected at the trial should have been admitted, as it related to a matter relevant to the issue, and that the trial judge was wrong in ruling that only the answer to another question was objected to, as there was a general objection to all the evidence at the time. *Bank of Nova Scotia v. Fish*, 6th May, 1895, xxiv., 709.

23. *Negligence — Infant—Servant deviating from employment.*—In a case tried without a jury, if evidence has been improperly admitted, a court of appeal may reject it and maintain the verdict provided there is sufficient evidence remaining to warrant it.—Judgment appealed from (33 N. B. Rep. 91) affirmed. *Merritt v. Hempinstal*, xxv., 150.

24. *Disqualification of arbitrator — Probable bias — Rejection of evidence — Discretion — Marshalling evidence.*—At the trial the plaintiff tendered evidence to shew that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to shew that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved, and if necessary, what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants.—*Held*, that this ruling did not constitute a rejection, but was merely a direction

as to the marshalling of evidence within the discretion of the trial judge. *Neelon v. City of Toronto*, xxv., 579.

25. *Rules of evidence — “The Canada Evidence Act, 1893.”*—Gambling instruments and moneys were seized in a gambling house under a warrant issued under s. 575, Criminal Code, and confiscated by judgment of a police magistrate in Montreal. Action was brought against the Attorney-General for recovery of the money.—*Held*, that in an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke “The Canada Evidence Act, 1893,” so as to be a competent witness in his own behalf: *O’Neil v. Attorney-General of Canada*, xxvi., 122.

26. *Frauds, Statute of — Memorandum in writing—Repudiating contract.*—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. *Martin v. Hawbner*, xxvi., 142.

27. *Contract — Sale of goods — Evidence to vary written instrument—Admission of evidence.*—The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 21) which in effect held, under the special circumstances of the case, involving dealings with two companies, connected in business and having almost similar names, that it was not inconsistent with a written agreement with the plaintiff to prove that defendant supposed he was dealing with another party with whom he had made other arrangements in respect to payment for goods purchased. *Wilson et al. v. Windsor Foundry Co.*, xxxi., 381.

28. *Life insurance — Condition of policy—Payment of premium — Delivery of policy—Evidence — Art. 1233 C. C.*—The production from the custody of representatives of the insured, of a policy of life insurance, raises a *prima facie* presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional.—The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of article 1233 of the Civil Code. *Mutual Life Assurance Co. of Canada v. Giguère*, xxxii., 348.

29. *Parol testimony — Commencement of proof in writing — Admissions — Arts. 1233, 1243 C. C.—60 Vict. c. 50, s. 20 (Que.)*—Where a contract is admitted to have been entered into, by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the adduction of evidence by parol as to the amount of the consideration or as to the conditions of the contract.—In such a case, the rule that

admissions cannot be divided against the party making them does not apply. *Campbell v. Young*, xxxii, 547.

30. *Libel — Privilege — Proof of malice—Admissibility of evidence—Misdirection—New trial.*—G. local manager for Nova Scotia of the Confederation Life Association, of which M. had been a local agent wrote to Mrs. Freeman, a policy-holder, the following letter: "I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settlement of the premium with Mr. Miller your policy will, of course, be maintained in force, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow, in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy?" In an action for libel it was shewn that he had not been dismissed from the agency but wanted larger commissions in continuing which were refused and that he was not a defaulter but was dilatory in making his returns. On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money.—*Held*, that such evidence was improperly received and there was a miscarriage of justice by its admission.—The judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a corrupt statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away." — *Held*, that this was misdirection, that the question for the jury was not the truth or falsity of the statements but whether or not, if false, the defendant honestly believed them to be true, so that it was misdirection on a vital point.—The majority of the court were of opinion, Girouard and Davies, JJ., *contra*, that as defendant had asked for a new trial only in the court below this court could not

order judgment to be entered for him and a new trial was granted.—Judgment of the Supreme Court of Nova Scotia (35 N. S. Rep. 117) reversed. *Green v. Miller*, xxxiii, 193.

31. *Criminal law — Canada Evidence Act, 1893 — Husband and wife — Competency of witness—"Communication"—Construction of statute—Privilege—Directions by legal adviser—Practice—Reference to Hansard debates—Method of interpretation.*—Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify. Mills, J., dissenting.—Evidence by the wife of the person accused of acts performed by her under directions of counsel sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills, J., dissenting. — *Per* Girouard, J., (dissenting). The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo, de facto or de corpore*. Sexual intercourse is such a communication and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received.—*Per* Mills, J., (dissenting). Under the provisions of the Canada Evidence Act, 1893, and its amendments the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.—*Per* Taschereau, C.J. The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. *Gosselin v. The King*, xxxiii, 255.

32. *Common rumour — Admission of evidence—Weight of evidence.*—Evidence of common rumour is unsatisfactory and should not generally be admitted. *Lefeunteum v. Beaudoin*, xxviii, 89.

AND see No. 239, *infra*.

33. *Bribery—Corrupt acts — Undue influence—Agency.*

See ELECTION LAW, 72.

34. *Murder—Manslaughter — Reception of evidence—Cause for submission to jury.*

See CRIMINAL LAW, 3.

35. *Objection at trial—Special damages—Excessive verdict—New trial.*

See LIBEL, 1.

36. *Indictment for perjury—Negative averments—Proof of special facts.*

See CRIMINAL LAW, 4.

37. *Award — Concealment—New evidence—Re-consideration.*

See ARBITRATIONS, 51.

38. *Policy of insurance — Warranties — Collateral representations—Parol testimony.*

See INSURANCE, FIRE, 78.

39. *Libel — Justification—General issue—Fair comment—Pleading — Rejection of evidence—Verdict.*

See NEW TRIAL, 33.

40. *Immaterial facts—Reference—Improper admission by master.*

See PRACTICE AND PROCEDURE, 124.

41. *Husband and wife—Rejection of testimony—Waste—Fraud.*

See EXECUTORS AND ADMINISTRATORS, 6.

42. *Amending case — Exclusion of party's testimony—Art. 251 C. C. P.*

See PRACTICE OF SUPREME COURT, 3.

43. *New trial—Improper reception and rejection of evidence—Nominal damages.*

See NEW TRIAL, 37.

44. *Trustee — Account of trust funds — Abandonment by cestui que trust.*

See TRUSTS, 18.

45. *Damages — Effect on jury — Improper admission—Misdirection.*

See NEW TRIAL, 80.

46. *Appeal — Vendor and Purchaser Act—Reference to master—Admission of evidence—Appeal from certificate—Final judgment—R. S. C. c. 135, s. 24 (e).*

See APPEAL, 199.

47. *Mining law—Location of mining claim—Certificate of work—Vacant location—Reception of evidence.*

See MINES AND MINERALS, 11.

AND see, *infra*, "VARYING TERMS OF WRITINGS," (Sub-head No. 12.)

2. ADMISSIONS.

48. *Admissions by pleadings—Proof of private writing—Traversing validity of instrument.*—H. agreed to invest trust funds of C. with M. in a land speculation, mentioning in the letter notifying M. of the acceptance of his draft the undertaking H. had as to the share he was to get and adding: "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed and the conditions of the prospectus never carried out. C. transferred *sous seing privé* this claim to plaintiff who brought action for the draft. Objection was taken that the transfer had not been proved.—*Held*, affirming the judgment appealed from (M. L. R. 6 Q. B. 354), that as defendant had traversed the validity of the transfer in his pleas, it must be held to have been judicially admitted. *Moody v. Jones*, xix., 266.

49. *Evidence — Judicial admissions—Nullified instruments—Cadastral—Plans and official books of reference—Compromise—"Transaction."*—A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law, and declared by the judgment to be an *acte faux*, and therefore to be null and void and of no effect. In a subsequent

petitory action between the same parties:—*Held*, Girouard, J., dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law, by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not shew any such admission.—The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under C. C. P. art. 225, cannot be invoked as a judicial admission, in a subsequent action of a different nature between the same parties.—Statements entered upon cadastral plans and official books of reference made by public officials and filed in the Lands Registration Offices, in virtue of the provisions of the Civil Code, do not in any way bind persons who were not cognizant thereof, at the time the entries were made.—Where a deed entered into by the parties to a suit, in order to effect a compromise of family disputes and prevent litigation, failed to attain its end and was annulled and set aside by order of the court as being in contravention of art. 311 C. C., no allegation contained in it could subsist even as an admission.—Judgment appealed from (Q. R. 5 Q. B. 458) affirmed. *Durocher v. Durocher*, xxvii., 363.

50. *Jury trial — Insufficient proof—Testimony improperly admitted—Withdrawal from jury—Practice.*

See NEW TRIAL, 35.

3. (ON) APPEALS.

51. *Instrument first introduced on appeal—Case in appeal.*—A document not proved at the trial cannot be introduced on an appeal nor invoked or made part of the case on an appeal to the Supreme Court of Canada. (See 16 R. L. 663.) *Exchange Bank v. Gilman*, xvii., 108.

52. *Negligence of servant—Deviation from employment — Resumption — Contributory negligence—Infant.*—If in a case tried without a jury evidence has been improperly admitted, a Court of Appeal may reject it and maintain the verdict if the remaining evidence warrants it. Judgment appealed from (33 N. B. Rep. 91) affirmed. *Merritt v. Hepenstal*, xxv., 150.

53. *Railway company—Negligence—Sparks from engine or "hot-box"—Damages by fire—Evidence — Burden of proof — C. C. art. 1053 — Questions of fact.*—In an action against a railway company for damages for loss of property by fire, alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. Judgment appealed from (Q. R. 9 S. C. 319) affirmed. *Sénéac v. Central Vermont Ry. Co.*, xxvi., 641.

54. *Appeal—Evidence by commission—Reversal on questions of fact.*—Where the witnesses have not been heard in the presence of

the judge but their depositions were taken before a commissioner, a Court of Appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury and may reverse the finding of the trial court if such evidence warrants it. *Matzard v. Hart*, xxvii., 510.

55. Plans filed on appeal—Document not produced at trial.

See APPEAL, 345.

56. Appeal—Material in 'record—Sheriff's return—Contradiction by extrinsic evidence.

See HABEAS CORPUS, 1.

57. Supplementary evidence tendered on appeal—Amendment of pleadings.

See PRACTICE OF SUPREME COURT, 218.

4. EXPERTS.

58. Onus of proof—Expert testimony—Concurrent findings.]—Where the burthen of proof to make out a counterclaim for damages depended upon expert testimony of an unsatisfactory character, the judgment appealed from (4 B. C. Rep. 101) was set aside against the concurrent findings of two courts below. *William Hamilton Mfg. Co. v. Victoria Lumbering and Mfg. Co.*, xxvi., 96.

59. Expert opinions—Hearsay—Extra judicial statements—Assessor's reports.]—Where there is direct contradiction between equally credible witnesses the evidence of those who speak from personal knowledge should be preferred to experts' opinions based upon extra judicial statements and municipal reports. *Crawford v. City of Montreal*, xxx., 406.

60. Expert testimony—Appreciation of evidence—Reversal on questions of fact.]—In an action by the owner of adjoining property for damages caused by the operation of an electric power house, the evidence was contradictory, and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality. *Held*, *Taschereau, J.*, dissenting, that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. *Gareau v. Montreal Street Ry. Co.*, xxxi., 463.

61. Medical testimony—Gun shot wounds—Indicia—Means of knowledge—Cross-examination—Capacity as expert.

See CRIMINAL LAW, 6.

62. Construction of policy—Testimony of experts—Commercial usage—Loading on coast of South America—Inference for jury.

See INSURANCE, MARINE, 19.

5. FINDINGS OF FACT.

(a) By a Judge.

63. Onus of proof—Expert testimony—Concurrent findings.]—Where the burthen of

proof to make out a counterclaim for damages depended upon expert testimony of an unsatisfactory character, the judgment appealed from (4 B. C. Rep. 101) was set aside against the concurrent findings of two courts below. *William Hamilton Mfg. Co. v. Victoria Lumbering and Mfg. Co.*, xxvi., 96.

64. Concurrent findings on questions of fact—Reversal on appeal.]—Although there may be concurrent findings on questions of fact in both courts below, the Supreme Court of Canada will, upon appeal, interfere with their decision where it clearly appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary. *Taschereau, J.*, dissented, and held that as there had been concurrent findings in both courts below supported by the evidence, an appellate court ought not to interfere. *City of Montreal v. Cadieux*, xxix., 616.

65. Sale of sample—Evidence of contract—Findings of fact.]—In an action for the price of a tombstone the defence was that it was not of the design ordered. It had been ordered from photographic samples and an order form was filled in which, when produced at the trial, contained the words "E. M. Lewis, Reporter Design" which the defence claimed was not in it when it was signed by the purchaser but which was there two or three hours later when handed to one of the vendors by his foreman who had taken the order and filled in the form. The evidence at the trial was confictory and the chancellor, trying the case without a jury, decided for the defence and dismissed the action. His judgment was reversed by the Court of Appeal. *Held*, *per Taschereau, C.J.*, that the evidence establishes that the words in dispute were on the order when it was signed and the plaintiffs were entitled to recover. *Held*, *per Sedgewick and Davies, JJ.*, *Mills, J.*, *hesitante*, that even if these words were not originally on the order the circumstances disclosed in evidence shew that the design supplied was substantially that ordered and the judgment appealed from should stand. *Held*, *per Girouard, J.*, that, following *Village of Granby v. Ménard* (31 Can. S. C. R. 14), findings on contradictory evidence ought not to be reversed by an appellate court. *Dempster v. Lewis*, xxxiii., 292.

66. Diligence of master of vessel—Constructive total loss—Inferences—Findings of fact.

See INSURANCE, MARINE, 34.

67. Master and owner—Evidence—Measure of damages—Breach of contract.

See NEW TRIAL, 17.

68. Arbitration—Hearing further evidence on appeal—Increased award—Appreciation of evidence—Weight of evidence.

See APPEAL, 12.

69. Drawing inferences—Controverted election—Proof of agency.

See ELECTION LAW, 3.

70. Findings of facts—Interference on appeal.

See WINDING-UP ACT, 8.

71. —*Appreciation of testimony—Title to land—Boundaries—Road allowance.*
See TITLE TO LAND, 101.

72. *Fraudulent statement—Proof of fraud — Presumption — Assignment of policy — Fraud by assignor—Reversal on questions of fact.*

See INSURANCE, FIRE, 67.

73. *Negligence—Master and servant—Employer's liability — Concurrent findings of fact—Contributory negligence.*

See NEGLIGENCE, 121.

74. *Findings by judge at trial—Reversal on appeal.*

See APPEAL, 238.

75. *Copyright — Infringement — Textual copy—Common sources of information.*

See No. 182, *infra*.

76. *Expert testimony—Appreciation of evidence—Reversal on questions of fact.*

See No. 60, *ante*.

77. *Collision — Proper navigation—Negligent lookout — Sufficiency of anchor light—Findings of fact—Appreciation of evidence—Practice.*

See ADMIRALTY LAW, 3.

78. *Expropriation of land — Damages—Valuation.*

See EXPROPRIATION OF LANDS, 3.

79. *Admiralty law—Collision—Ship at anchor—Anchor light — Lookout—Weight of evidence—Credibility—Findings of trial judge—Negligence.*

See ADMIRALTY LAW, 4.

80. *Appeal—Concurrent findings of fact—Duty of appellate court.*

See APPEAL, 245.

(b) By a Jury.

81. *Inferences drawn by jury—Condition of locomotive engine—Negligence.*—There is a presumption that damages might have been caused by a locomotive engine shewn to have been in bad order sufficient to justify an inference to that effect drawn by a jury in arriving at their verdict. Judgment appealed from (14 Ont. App. R. 309) affirmed. *Canada Atlantic Ry. Co. v. Mowley*, xv., 145.

82. *Parol evidence — Memo in writing—Question for jury—Statute of Frauds—Damages—Common counts.*—Action upon a contract alleged to have been made to deliver to plaintiff at St. John, N. B., 300 cords of good merchantable hemlock bark, suitable for tanning, at \$4 per cord, plaintiff paying freight from Shediac; also upon the common money counts.—The contract was wholly verbal that defendants had agreed that the bark should be all good bark; that it was to be delivered at St. John and measured on the cars there; that defendants were to send some one to measure it, and that if they did not plaintiff's son was to measure it; that plaintiff was to pay freight from Shediac, where defendants

were to load it on the cars, and as to payment plaintiff gave evidence that \$304.84, then due by defendants to plaintiff, was to be applied upon the bark; that defendants were to take leather from plaintiff in payment of balance; that the bark was to be delivered in two or three months, as plaintiff wanted it. In answer to plaintiff's order to forward bark defendants sent forward three car loads, which proved to be utterly worthless. Plaintiff also gave evidence that at the solicitation of defendants he gave them his note for \$500 at 4 months on defendants promising that the bark would be all in before the note was due, and that, notwithstanding the giving of the note, defendants would take leather in payment of the bark as agreed; that when plaintiff asked defendant Hamilton for a receipt for the note for \$500, the latter wrote out the following paper:—"C. H. Peters, Esq.—To Hamilton & Smith, 1876, April 20, To 200 cords hemlock bark at Shediac, \$4, \$800; April 20, To . . . cords hemlock bark at Shediac, \$4.84 (total), \$804.84. Cr.—By note at 4 months, \$500; By goods per statement of account, \$304.84; total \$804.84. The above bark to be measured on the cars in St. John. Settled as above. Hamilton & Smith."—Upon this document being produced defendants insisted that it contained the contract and that plaintiff's evidence of the contract must fall to the ground. Both parties were permitted to give oral testimony to establish what the contract was. The evidence was chiefly that of the plaintiff and defendant Hamilton, and was very contradictory. The jury believed the plaintiff and rendered a verdict for him for \$945.80 damages.—The Supreme Court (N. B.) made a rule for a new trial absolute, being of opinion that the contract had been reduced to writing and was contained in the memo. of 20th April, 1876; that the words "at Shediac" in the memo. shewed that the bark was at Shediac at that time, and that the parties were contracting with reference to that particular bark. That being the case, it was unnecessary to make any stipulation about the delivery, because by the sale the property vested in plaintiff without delivery, and the evidence of plaintiff as to delivery should not have been received, for it was either immaterial, or the effect of it was to vary the terms of the written contract, which, being for the sale of goods above the value of £10, was required by the Statute of Frauds to be in writing.—*Held*, reversing the judgment appealed from (19 N. B. Rep. 284), that whether the memo. of 20th April, 1876, was or was not drawn up by consent of both parties with intent to be that which should settle and contain their contract in whole or in part was a question for the jury, and the onus of proving that the document was drawn up for that purpose lay upon defendants. That the nature of the case required that both parties should be permitted to give oral testimony to establish what the contract was and, as the jury had wholly disbelieved defendants' evidence, plaintiff was entitled to recover both on common counts and on special counts, and the verdict of the jury should not have been set aside. *Peters v. Hamilton*, Cass. Dig. (2 ed.) 763.

83. *Negligence—Use of dangerous materials —Proximate cause of accident — Injuries to workman — Employer's liability — Presumptions — Findings of jury sustained by courts below.*—As there can be no responsibility on the part of an employer for injuries sustained

by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the finding of a jury in favour of the plaintiff, not assented to by the trial judge, have been sustained by two courts below. *Taschereau, J.*, dissented, taking a different view of the evidence, and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co. v. Bouchard* (28 S. C. R. 580,) and *The Metropolitan Ry. Co. v. Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal. *The Asbestos and Asbestic Co. v. Durand* (30 S. C. R. 285) discussed and approved. *Dominion Cartridge Co. v. McArthur*, xxxi., 392. — *Leaves to appeal to Privy Council, in favour of jury, granted Aug. 1902*

84. Question of negligence — Reasonable care — Use of wood as fuel — Sparks from railway engine — Jury — Unsatisfactory findings — New trial.

See RAILWAY, 102.

85. Vessel stranded — Constructive total loss — Recovery for partial loss — Findings by jury — Revision on appeal.

See INSURANCE, MARINE, 41.

86. Issue of insurance policy — Receipt of premium — Acts of agent — Finding of jury.

See INSURANCE, MARINE, 15.

87. Contract — Collateral agreement — Question for jury — Verdict — New trial ordered by court below.

See No. 16, ante.

88. Possession of marsh lands — Accretion — Staking boundaries — Cutting hay — Findings of jury.

See TITLE TO LAND, 100.

89. Negligence — Master and servant — Employer's liability — Imprudence of servant — Defective way — Necessity of passing over dangerous machinery — New trial.

See NEGLIGENCE, 87.

90. Fire insurance — Contract — Termination — Notice — Waiver — Estoppel.

See INSURANCE, FIRE, 45.

91. Accident insurance — Renewal of policy — Payment of premium — Agent's authority — Instructions to agent — Finding of jury.

See INSURANCE, ACCIDENT, 3.

92. Negligence — Findings of jury — Evidence — Concurrent findings of courts appealed from.

See NEGLIGENCE, 217.

93. Negligence — Findings of jury — Contributory negligence — New trial.

See NEGLIGENCE, 48.

94. Negligence — Railway accident — Shunting cars — Warning — Proof of negligence.

See NEGLIGENCE, 221.

95. Operation of railway — Negligence — Sufficiency of evidence — Findings of jury — Defective machinery — Sparks from engine — Setting aside verdict.

See NEGLIGENCE, 101.

96. Negligence — Injury to workman — Proximate cause — Ontario Factories Act — Fault of fellow workman.

See NEGLIGENCE, 21.

97. Proof of accidental death — Waiver of condition in policy — Finding of jury — Verdict.

See INSURANCE, ACCIDENT, 7.

98. Possession of lands — Verdict — Statute of Limitations.

See TITLE TO LANDS, 88.

6. (OF) MALICE.

99. Malice — Negligence — Manitoba Libel Act — Disagreement of jury.

See JURY, 43.

100. Demand of assignment — Reasonable and probable cause.

See MALICE, 3.

101. Privileged communication — Unfriendly relations of parties — Charge to jury.

See LIBEL, 7.

102. Libel — Privilege — Proof of malice — Admissibility of evidence — Misdirection — New trial.

See No. 30, ante.

7. ONUS OF PROOF.

103. Slander — Malice — Act of public officer — Suspension of post office clerk — Privileged communication — Onus of proof. — In an action of slander against a public officer in respect of the communication of his decision on the case of a subordinate whom he accused of criminal acts, the onus is upon the plaintiff to shew that the slanderous statement was actuated by motives of personal spite and ill-will in order to sustain a verdict for malicious slander. (See 3 Pugs. 670; 18 N. B. Rep. 6; 19 N. B. Rep. 225.) *Deuce v. Waterbury*, vi., 143.

104. Election petition — Status of petitioner — Onus probandi. — Appellant filed preliminary objections as to status of petitioners. When heard upon the merits of preliminary objections no evidence was given as to the status of the petitioners and the court dismissed the objections. *Held*, reversing the judgment appealed from, *Gwynne, J.*, dissenting, that the onus was on the petitioners to prove their status as voters. *Stanstead Election Case* (20 Can. S. C. R. 12) followed. *Bellechasse Election Case; Amyot v. Labrecque*, xx., 181.

105. *54 & 55 Vict. (Imp.) c. 19, s. 1, s.-s. 5*—*Presence of a British ship equipped for sealing in Behring Sea—Onus probandi—Lawful detention.*—On 30th August, 1891, the "Oscar and Hattie," a fully equipped sealer, was seized in Gotzleb Harbour, in Behring Sea, while taking in a supply of water. *Held*, affirming the judgment appealed from, (3 Ex. C. R. 241), that when a British ship is found in the prohibited waters of the Behring Sea, the burthen of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the Seal Fishery (Behring Sea) Act, 1891, 54 and 55 Vict. (Imp.) c. 19, s. 1, s.-s. 5.—*Held* also, reversing the judgment appealed from, that there was positive and clear evidence that the "Oscar and Hattie" was not used or employed at the time of her seizure in contravention of 54 & 55 Vict. c. 19 s. 1, s.-s. 5. *The "Oscar and Hattie" v. The Queen*, xxiii., 396.

106. *Will — Action to annul — Testamentary incapacity—Onus of proof.*—In an action for the annulment of a will alleged to have been procured at a time when the testator was not capable of making it, the onus of proving capacity lies upon the party procuring its execution.—Judgment appealed from (Q. R. 3 Q. B. 552) affirmed. *Currie v. Currie*, xxiv., 712.

107. *Action — Conductio indebiti — Répétition de l'indu — Fictitious claims — Misrepresentation—Onus probandi—Art. 1090 C. C.—Railway subsidies—54 Vict. c. 68 (Que.)—Insolvent company—Construction of railway by new company—Payment of claims by Crown—Transfer by payee.*—A company formed for the construction of a subsidized railway having failed, another company undertook to complete it, and the Government of Quebec agreed to pay all the actual debts against the road out of the unearned subsidies. A., the contractor of the former company, presented a claim for \$175,000, which was approved of and paid, whereupon he paid over \$100,000 of the amount to P. for services performed in organizing the new company and obtaining payment of the claim. The Government afterwards brought an action against P. to recover back the \$100,000 on the ground that A.'s claim was fictitious and was paid on false representations. *Held*, reversing the judgment of the Court of Queen's Bench, that the action must fail if it could not have been maintained against A.; that the onus was on the Crown of proving A.'s claim to be fictitious; that the Crown not only failed to satisfy such onus, but the evidence clearly established the claim to be a just and reasonable one.—By consent of parties, certain evidence which had been taken before a Parliamentary Royal Commission was filed of record "to avail as evidence" on the trial. *Held*, that, notwithstanding the consent, such evidence could not be accepted as evidence in the cause. *Pacaud v. The Queen*, xxix., 637.

108. *Débats de comptes—Charges against succession—Onus of proof—Affidavit.*

See ACCOUNT, 1.

109. *Fraudulent preference — Contemplation of bankruptcy — Onus probandi — Insolvent Act of 1875.*

See MORTGAGE, 9.

110. *Donation—Revocation—Insolvency of donor — Onus probandi—Arts. 803, 1034 C. C.*

See DONATION, 1.

111. *Onus probandi—Contents of certificate—Oral testimony.*

See RAILWAYS, 145.

112. *Rescission of contract—Title to land—Boundaries—Deceit—Notice—Inquiry.*

See TITLE TO LAND, 2.

113. *Bank shares held "in trust"—Substitution — Presumption—Onus probandi — Res judicata—Art. 1241 C. C.*

See TRUSTS, 4.

114. *Pleadings of co-defendant—Admission—Condition precedent—Onus of proof—Signature by officer de facto.*

See MUNICIPAL CORPORATIONS, 83.

115. *Controverted election—Status of petitioner—Onus probandi.*

See ELECTION LAW, 92.

116. *Contract — Collateral agreement — Question for jury — Verdict — New trial ordered by court below.*

See No. 16, ante.

117. *Will—Executors and trustees — Dealing with assets — Lapse of time — Presumptions—Burden of proof.*

See TRUSTS, 12.

118. *Seal Fisheries Act—Judicial notice of order-in-council—Protocol—Sealing in prohibited waters—Burden of proof.*

See No. 162, infra.

119. *Maritime law—Foreign vessel fishing within British waters of Canada—Three mile limit — License—R. S. C. c. 94, s. 3—Onus probandi.*

See FISHERIES, 6.

120. *Landlord and tenant—Loss by fire—Negligence—Legal presumption—Rebuttal of — Onus of proof—Construction of agreement — Covenant to return premises in good order — Art. 1629 C. C.*

See LANDLORD AND TENANT, 18.

121. *Action—Condition precedent—Allegation of performance — Burden of proof—Waiver—Insurance policy.*

See PRACTICE AND PROCEDURE, 9.

122. *Trespass—Overhanging roof—Right of view—Boundary line.*

See TITLE TO LAND, 41.

S. PRESUMPTIONS.

123. *Payment under error of law — Onus probandi—Actio conductio indebiti.*—Ignorance or error of law is not to be presumed but must be proved in order to support an action en répétition de l'indu. (See 5 Legal News 76; 2 Dor. Q. B. 221.) *Bain v. City of Montreal*, viii., 252.

124. *Inferences drawn by jury—Condition of locomotive engine—Negligence.*—There is

a presumption that damages might have been caused by a locomotive engine shewn to have been in bad order sufficient to justify an inference to that effect drawn by a jury in arriving at their verdict.—Judgment appealed from (14 Ont. App. R. 309) affirmed. *Canada Atlantic Ry. Co. v. Mozley*, xv., 145.

125. *Negligence—Cause of accident—Conjecture—Circumstantial evidence—Onus of proof.*—To maintain an action for damages through negligence, it is necessary to shew by weighty, concise, and consistent presumptions arising from facts proved, in case of want of direct evidence, that the accident was actually caused by the positive fault, imprudence or neglect of the defendant. *Montreal Rolling Mills Co. v. Corcoran*, xxvi., 595.

126. *Controverted election—Corrupt practices—Presumption.*

See ELECTION LAW, 37.

127. *Presumption—Dedication—Expropriation—User—Lost record.*

See HIGHWAY, 1.

128. *Sale of substituted land—Possession—Bad faith—Prescription—Action by substitute—Revendication—Damages—Art. 2268 C. C.*

See SUBSTITUTION, 4.

129. *Will—Executors and trustees under—Dealing with assets—Lapse of time—Presumption—Burden of proof.*

See TRUST, 12.

130. *Municipal corporation—Ownership of streets—Ad medium filum viae—Presumption—Rebuttal.*

See MUNICIPAL CORPORATION, 165.

131. *Purchase of land—Registered hypothec—Knowledge of—Presumption of good faith—Admission—Judicial avowal—Possession.*

See TITLE TO LAND, 29.

132. *Lease for lives—Renewal—Insertion of new life—Evidence of insertion—Duration of life—Presumption.*

See LEASE, 31.

133. *Destruction of writings—Omnis parsumuntur contra spoliatores.*

See No. 165, *infra*.

134. *Constitutional law—Navigable waters—Title to bed of stream—Crown—Dedication of public lands—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.*

See NAVIGABLE WATERS, 2.

135. *Contact—Sale by sample—Objections to invoice—Reasonable time—Acquiescence—Presumptions.*

See CONTRACT, 213.

136. *Construction of deed—Title to lands—Ambiguity of description—Possession—Conduct of parties—Presumptions from occupation—Possession.*

See No. 227, *infra*.

137. *Donation in form of sale—Gifts in contemplation of death—Mortal illness of*

donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts. 762, 989 C. C.

See SALE, 86.

138. *Old trails in Rupert's Land—User—Dedication—Presumption—Necessary way—Substituted roadway—Reservation in Crown grant.*

See HIGHWAY, 3.

139. *Negligence—Use of dangerous material—Presumption of fault.*

See No. 177, *infra*.

140. *Lease—Negligence—Hire of tug—Conditions—Repairs—Compensation—Presumption of fault—Evidence—Measure of damages.*

See NEGLIGENCE, 143.

141. *Powers—Donatio mortis causa—Future succession—Illegal consideration—Ratification by will—Seisin.*

See DONATION, 3.

142. *Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workman—Employers' liability—Presumptions—Findings of jury sustained by courts below.*

See No. 83, *ante*.

143. *Life insurance—Condition of policy—Payment of premium—Delivery of policy—Art. 1233 C. C.*

See No. 28, *ante*.

144. *Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Repetition—Presumption of good faith—Arts. 1047, 1049 C. C.*

See CUSTOMS DUTIES, 5.

145. *Gift—Confidential relations—Parent and child—Public policy—Principal and agent.*

See GIFT, 1.

9. SECONDARY EVIDENCE.

146. *Foundation for secondary evidence—Execution of agreement—Laches—Right to relief inconsistent with claim.*—On the hearing of an equity suit secondary evidence of a document was tendered on proof that its proper custodian was out of the jurisdiction and supposed to be in Scotland; that a letter had been written to him asking for it, and to his sister and other persons connected with him inquiring as to his whereabouts, but information was not obtained. *Held*, affirming the decision of the Supreme Court of New Brunswick, that this was not a sufficient foundation for secondary evidence; that the letters should have stated that this specific paper was wanted; that an independent person should have been employed to make inquiries in Scotland for the custodian of the document, and to ask for it if he had been found; and that a commission might have been issued to the Court of Session in Scotland, and a commissioner appointed by that court to procure the attendance of the custodian and his examination as a witness.—The suit was for a specific performance of an agreement by C., one of the beneficiaries under a will vesting the testator's estate in trustees for division among

her children, to sell lands of the estate in New Brunswick to the plaintiff, P.; and the document as to which secondary evidence was offered was an alleged agreement by the trustees and other beneficiaries to convey the said lands to C. The evidence was received, but only established the execution of the alleged agreement by one of the trustees and one of the beneficiaries, and the proof of the contents was not consistent with the documentary evidence, and the case made out by the bill. *Held*, that if the evidence was admissible it would not establish the plaintiff's case; that the alleged agreement, not being signed by both the trustees, could convey no estate legal or equitable, to C.; and that the proof of its contents was not satisfactory. *Porter v. Hale*, xxiii., 265.

147. *Election petition—Preliminary objections—Service of petition—Bailiff's return—Cross-examination—Production of copy.*—A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. Articles 56 and 78 C. C. P.—Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. *Beauharnois Election Case*, xxvii., 232.

148. *Last grant of land—Statute of Frauds—Parol testimony—Trust.*

See TITLE TO LAND, 28.

149. *Missing deed—Copy certified by registrar—Affidavit of search—Estoppel.*

See DEED, 36.

10. SUFFICIENCY OF PROOF.

150. *Débats de compte—Taking accounts—Liability of joint executors—Interest—Books of account.*—Entries in merchants' books regularly kept, and unchanged during a term of years, with an annual rendering of accounts conforming to such entries to creditors, make proof against such merchants, particularly after the death of the creditors. (See 21 L. C. Jur. 92.) *Darling v. Brown*, ii., 26.

151. *Parol—Determination of suit—Proof of judgment.*—In an action of damages for malicious arrest and imprisonment of plaintiff, under a *capias*, issued by a stipendiary magistrate in Nova Scotia, whose judgment, it was alleged, was reversed in appeal, oral evidence "that the decision of the magistrate was reversed" was held to be inadmissible to prove a final judgment. Judgment appealed from (2 R. & C. 528) reversed. *Gunn v. Cox*, iii., 296.

152. *Onus probandi—Action on bond—Execution of bond—Seal.*—Action on a bond against sureties of defaulting clerk. Defence, that the bond was not executed by them as it had no seals attached when the sureties signed. *Held*, affirming the judgment appealed from (19 N. S. Rep. 171), *Henry, J., dubitante*, that plaintiff had proved a *prima facie* case of a bond properly executed on its face, and as defendants had not negatived due execution, it being quite consistent with the evi-

dence that it was duly executed, the *onus* of proving want of execution was not thrown off defendants, and as neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendants, plaintiff was entitled to recover. *Marshall v. Municipality of Shelburne*, xiv., 737.

153. *Instrument signed in blank—Execution of bond—Magistrate's certificate—Weight of evidence—Acceptance of bond—Proximate cause—Estoppel.*—Action by the Crown on a bond of suretyship. Defendant pleaded *non est factum*; swore he signed the bond in blank; that he made no affidavit of justification, and that the magistrate's certificate of execution of the bond, as required by statute, was irregular and unauthorized. The witness to C's execution of the bond, and the magistrate, each swore to the correctness of his own action, and that C. must have properly executed the bond or the affidavit would not have been made or the certificate given. *Held*, per Ritchie, C.J., Strong, Fournier and Gwynne, JJ., reversing the judgment appealed from (6 R. & G. 313), that the weight of evidence was in favour of the due execution of the bond by C.—Per Patterson, J., that C. was estopped from denying that he had executed the bond. *Held*, also, per Patterson, J., reversing the judgment appealed from, that the execution of the bond, and not the certificate of the magistrate, was the proximate, or real, cause of its acceptance by the Crown. *The Queen v. Chesley*, xvi., 306.

154. *Representations—Partnership—Names of partners—Letter heads.*—The representation of an agent that his principals are a firm in a distant province, and that such firm is composed of A. and B., coupled with the evidence of receipt by the person to whom the representation is made of letters from one of the alleged members of the firm, written on paper on which the names of such members are printed, in answer to letters from such persons, is *prima facie* evidence that A. and B. constitute said firm. (See 28 N. B. Rep. 102.) *McDonald v. Gilbert*, xvi., 700.

155. *Statute of Frauds—Contract affecting lands—Specific performance—Part performance.*—B. in British Columbia wrote several letters to a sister in England asking for some of her children to be sent to him and in one he said, "I want to get some relation here, for what property I have, in case of sudden death, would be eat up by outsiders, and my relations would get nothing."—On hearing of these letters T., a son of B.'s sister and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter, T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours. Answer immediately. (Sgd.) B." Under

these circumstances, T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death. *Held*, affirming the judgment appealed from, that as there was no agreement in writing for the transfer of the property to T., and the facts shewn were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with, and no performance of the contract could be decreed. *Turner v. Prevost*, xvii., 283.

156. *Injury by vicious dog—Ownership—Scienter—Evidence for jury.*—W. brought action for injuries to her daughter committed by a dog owned or harboured by V. Defence was that V. did not own the dog, and had no knowledge that he was vicious. The dog was formerly owned by a man in V.'s employ who lived and kept the dog at V.'s house, and went away leaving the dog behind with V.'s son, to be kept until sent for, and afterwards the dog lived at the house going every day to V.'s place of business with him, or his son who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial judge ordered a nonsuit, which was set aside by the full court and a new trial ordered. *Held*, affirming the judgment appealed from (28 N. B. Rep. 472), that there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities and the nonsuit was rightly set aside. *Vaughan v. Wood*, xviii., 703.

157. *Suretyship—Condition—Letter of guarantee—Proof of loss—Account sales.*—H. upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. with guarantee against loss shipped cattle, 3 days after suspension of the bank, consigned to their own agents at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of \$7,965 on the shipments, and the claim being contested their only witness, one of their employees who knew nothing personally about what the cattle realized, put in account of sales, received by mail, as evidence of loss. *Held*, affirming the judgment appealed from (M. L. R. 7 Q. B. 317), that assuming there was a valid guarantee given by the bank, (upon which the court did not express any opinion) the evidence as to the alleged loss was insufficient to entitle H. to recover. —*Per Taschereau, J.* That the guarantee was subjected to a delivery of the cattle to M. and that H. having shipped the cattle in their own name could not recover on the guarantee. *Hathaway v. Chaplin*, xxi., 23.

158. *Supreme and Exchequer Courts of Canada—Solicitor and client—Costs—Quantum meruit—Parol evidence—Art. 3597, R. S. Q.*—In proceedings before the Supreme and Exchequer Courts, there being no tariff as between attorney and client, an attorney has the right to establish the *quantum meruit* of his services by oral evidence in an action for his costs. *Paradis v. Bossé*, xxi., 419.

159. *Interrogatories on articulated facts—Evasive answers taken as affirmative—C. C. P. Arts. 228, 229.*—Plaintiff alleged that he

made for defendant 50,980 railway ties, according to a contract between defendant (acting by R. McG. his brother, agent and mandatory) on one part, and L. & D. on the other part, said L. & D. having made over to plaintiff all right, claims and interests in the contract; that 33,900 ties were delivered by plaintiff to defendant on the line of railway, and 17,080 on river banks and were of the price and value stipulated in the contract. Further, that he made for defendant and delivered to him 2,822 cull ties, for which defendant promised to pay \$8 per 100 and which were worth that price. Lastly, having paid for defendant, for rent of ground, \$40, making in all, according to price stipulated and value of ties, \$6,855.89. He credited defendant \$3,765, leaving \$3,090.89 claimed.—Defendant met the whole claim by a general denial, and alleged that the contract was never entered into by himself, but by the said R. McG. in his personal name and capacity; that plaintiff did not fulfil his contract nor make the ties as stipulated, and that the amount which he received was sufficient payment for the ties which had been delivered. On articulated facts defendant answered, with one or two exceptions: "I do not know." The Superior Court, on motion to take the interrogatories *pro confesso*, held that these answers were evasive and insufficient, and that the facts, as articulated, must therefore be declared to be true and proved, and on these and on the evidence adduced condemned defendant to pay plaintiff \$3,090.89 for balance on price and value of the ties, which judgment was affirmed by the Queen's Bench. *Held*, affirming the judgment appealed from (4 Legal News 95), that defendant did not answer the interrogatories which referred to the matters in issue, in a categorical, explicit, and precise manner as he was bound to do. If he had no personal knowledge he should have obtained the information from his general agent, clerks and others acting for him in executing the contract. These interrogatories, therefore, were properly taken as affirmatively answered and proved the plaintiff's case. *McGreevy v. Paillé*, Cass. Dig. (2 ed.) 141.

160. *Contract for extra work—Decision of engineer—Interrogatories on faits et articles—Taking pro confesso—Art. 229 C. C. P.—Practice.*—The contention that the *faits et articles* submitted to the appellant should be taken *pro confesso*, because the answers thereto were not direct, categorical and precise is not open to a party who fails to move to that effect in the court of first instance. The case of *McGreevy v. Paillé* (4 Legal News 95), affirmed by Supreme Court (No. 159, ante), was not in point as, in that case, a motion had been regularly made and granted in the Superior Court. Nor has *Douglas v. Ritchie* (18 L. C. Jur. 274), any application, as there defendant made default and had not answered at all. Here defendant had answered, and if plaintiffs desired to have the answers set aside, they ought to have applied to the court by motion.—2. The appellant was entitled to reversal as to \$1,882.15, allowed by oversight.—3. The \$3,765.20 added by the Queen's Bench to Superior Court judgment should also be deducted the difference between 20 and 24 cents per yard for earth work done in 1878, there being sufficient evidence to establish that the engineer, who was to fix prices of extras, finally had fixed the price of such work at 20 cents.—Appeal allowed with costs and judgment varied. *McGreevy v. McCarron*, Cass. Dig. (2 ed.) 144.

161. *Plaintiff's testimony—Want of corroboration—Contradictory evidence—Verdict against weight of evidence—New trial.*—In an action for price of goods sold by the plaintiff to the defendant's brother, plaintiff gave evidence of an agreement with the defendant wherein the latter undertook to give notes at four months to retire notes at three months given by his brother, the purchaser of the goods; the agreement was carried out for a time, but defendant finally refused to continue it any longer. The evidence shewed that defendant always gave his notes to his brother who carried them to the plaintiff. Defendant, on the other hand, swore that he never made any such agreement, but only gave notes to his brother to help him in his business. The evidence of the plaintiff was entirely uncorroborated. A verdict was found for the plaintiff and the Supreme Court of New Brunswick refused a new trial. — *Held*, Ritchie, C.J., and Taschereau, J., dissenting, that the weight of evidence was not sufficiently in favour of the plaintiff to justify the verdict, and there must be a new trial.—Appeal allowed with costs and new trial granted. (See 24 N. B. Rep. 482; 26 N. B. Rep. 326.) *Fraser v. Stephenson*, Cass. Dig. (2 ed.) 575.

162. *Seal Fishery (North Pacific) Act, 1893, 56 & 57 Vict. c. 23 (Imp.) ss. 1, 3, and 4—Judicial notice of order-in-council thereunder—Protocol of examination of offending ship by Russian war vessel, sufficiency of—Presence within prohibited zone—Bona fides—Statutory presumption of liability—Evidence—Question of fact.*—The Admiralty Court is bound to take judicial notice of an order-in-council from which the court derives its jurisdiction, issued under the authority of the Act 56 & 57 Vict. c. 23 (Imp.). The Seal Fishery (North Pacific) Act, 1893.—A Russian cruiser manned by a crew in the pay of the Russian Government, and in command of an officer of the Russian Navy is a "war vessel" within the meaning of said order-in-council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the Admiralty Court in an action for condemnation under the Seal Fishery (North Pacific) Act, 1893, and is proof of its contents. — The ship in question in this case having been seized within the prohibited waters of the thirty mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the onus cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order-in-council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order-in-council. *The "Minnie" v. The Queen*, xxiii., 478.

163. *New trial—Negligence—Question for jury—Withdrawal of case from jury.*—Action against defendant for negligence, causing the death of a servant. The trial judge withdrew the case from the jury and directed a verdict for defendant on the ground that there was no evidence of negligence. The full court granted a motion for a new trial with costs, and remitted the cause for further inquiry, and *held*, (Graham, J., dissenting), that the trial judge erred in withdrawing the case from the jury, as there was evidence of negligence and want of proper and reasonable care, which should have been submitted to the jury. The Supreme Court of Canada s. c. d.—19

held, affirming the decision appealed from (26 N. S. Rep. 268), that the new trial had been properly ordered. *New Glasgow Iron, Coal & Ry. Co. v. Tobin*, 7th November, 1894.

164 *Bar to action—Foreign judgment—Estoppel—Res judicata—Judgment obtained after action begun—R. S. N. S. (5 ser.) c. 104, s. 12, s. 8. 7; orders 24 and 70, rule 2; order 35, rule 38.*—The provision of R. S. N. S. (5 ser.) c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia, who has brought an unsuccessful action in a foreign court against the plaintiff. *Law v. Hansen*, xxv., 69.

165. *Evidence—Presumptions—Omnia præsumuntur contra spoliatores.*—St. L. filed a petition of right to recover balance on a contract for public works. Certain time books and original documents from which his accounts had been made up, and also his books of account had disappeared. The judge found that these books and documents had been destroyed in view of a commission to inquire into the manner in which the works had been carried on, and dismissed the petition. *Held*, reversing the judgment appealed from (4 Ex. C. R. 185), that the evidence did not warrant the finding that the documents had been destroyed with a fraudulent intent, and to prevent inquiry; that all that could have been proved by what was destroyed had been supplied by other evidence; and that the rule *omnia præsumuntur contra spoliatores* did not justify the judge in assuming that, if produced, the documents destroyed would have falsified St. L.'s accounts, the evidence on the trial shewing instead that the accounts would have been corroborated. *St. Louis v. The Queen*, xxv., 649.

166. *Onus of proof—Expert testimony—Concurrent findings.*—Defendants counter-claimed damages caused by the defective construction of a boiler for their steamer, which had collapsed: *Held*, reversing the decision appealed from (4 B. C. Rep. 101) that conclusive effect should not be given to the evidence of witnesses, called as experts as to the cause of the collapse, who were not present at the time of the accident; whose evidence was not founded upon knowledge, but was mere matter of opinion; who gave no reasons and stated no facts to shew upon what their opinion was based, and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern which the evidence shewed were in general use.—The judgment therefore allowing the counterclaim was set aside, though against the concurrent findings of two courts below. *William Hamilton Mfg. Co. v. Victoria Lumbering and Mfg. Co.*, xxvi., 96.

167. *Circumstantial evidence—Negligence—Cause of accident—Conjecture—Onus of proof.*—Plaintiff's husband was accidentally killed whilst engineer in charge of defendant's engine and machinery. The evidence was altogether circumstantial, and left the manner in which the accident occurred a matter to be inferred from circumstances proved. *Held*, that in order to maintain the action it was

necessary to prove by direct evidence, or by weighty, concise and consistent presumptions arising from the facts proved that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility. *Montreal Rolling Mills Co. v. Corcoran*, xxvi., 595.

168. *Will—Undue influence.*—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator, it is not sufficient to shew that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shewn that they are inconsistent with a contrary hypothesis. Judgment appealed from (3 B. C. Rep. 513) affirmed. *Adams v. McBeath*, xxvii., 13.

169. *Landlord and tenant—Loss by fire—Cause of fire—Negligence—Civil responsibility—Legal presumption—Rebuttal of—Onus of proof—Hazardous occupation.*—To rebut the presumption created by art. 1629 C. C., it is not necessary for the lessee to prove the exact or probable origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible.—Judgment appealed from (Q. R. 5 Q. B. 88) affirmed, Strong, C.J., dissenting. *Murphy v. Labbé*, xxvii., 126.

170. *Negligence—Defective machinery—Evidence for jury.*—T. was employed as a weaver in a cotton mill, and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence shewed that the accident was caused through a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle, the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal. *Held*, (Gwynne, J., dissenting), that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify the finding, the verdict should stand.—*Per* Gwynne, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to shew that such examination could have prevented the accident, and there should be a new trial. *Canadian Coloured Cotton Mills Co. v. Talbot*, xxvii., 198.

171. *Will—Sheriff's deed—Evidence—Proof of heirship—Rejection of evidence—New trial—Champerty—Maintenance.*—A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid.

Held, affirming judgment appealed from (23 Ont. App. R. 785), that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship-at-law was dependent upon the alleged heir having survived his father and it was not established, and the court would not presume that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust, and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed, and the appeal should be dismissed. *May v. Logie*, xxvii., 443.

172. *Action on disturbance—Possessory action—"Possession annale"—Arts. 946 and 948 C. C. P.—Nature of possession of unenclosed vacant lands—Boundary marks—Delivery of possession.*—In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him on the ground, and shewed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance. *Held*, that the *possession annale*, required by art. 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action. *Gauthier v. Masson*, xxvii., 575.

173. *Master and servant—Negligence—Probable cause of accident.*—Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant, and the actual cause of the accident is purely a matter of speculation or conjecture. *Canada Paint Co. v. Trainor*, xxviii., 352.

174. *Railways—Eminent domain—Expropriation of lands—Arbitration—Evidence—Findings of fact—Duty of appellate court—51 Vict. c. 29 (D.).*—On an arbitration in a matter of the expropriation of land under the provisions of "The Railway Act," the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average on the different estimates made on behalf of both parties according to the evidence before them. *Held*, reversing the decision of the Court of Queen's Bench and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded. *Grand Trunk Ry. Co. v. Coupal*, xxviii., 531.

175. *Trustee — Misappropriation — Surety — Knowledge by cestui que trust — Estoppel — Parties.*—Funds held by F. as trustee for C. were misappropriated by being deposited with the firm of F. F. & Co., of which F. was a member, and after being so kept for upwards of 6 years, were lost through failure of the firm. In an action against defendants, (sureties of F.), to recover the funds so misappropriated and lost, the defence relied upon knowledge of the misappropriation on the part of C., shewn by the fact that payments of interest were made to C. from time to time, by cheque by the insolvent firm.—The court *en banc* held, that the manner in which these payments were made was not evidence of knowledge by C., that she was bound to communicate to the sureties; that at most it shewed nothing more than assent by C. to the deposit of the income to which she was entitled, with the firm of which her trustee was a member; that the trial judge could have disposed of the contention raised on behalf of the defendants without making C. a party to the suit; and, *semble*, that knowledge by C. that some part of the trust fund had been placed by the trustee temporarily with F. F. & Co., awaiting investment on good security, would not be held to be knowledge, assent or acquiescence by C., in the misconduct of the trustee which led to the loss of the funds.—The Supreme Court of Canada affirmed the decision appealed from (30 N. S. Rep. 173, *sub nom. Eastern Trust Co. v. Forrest*), and dismissed the appeal with costs. *Bayne v. Eastern Trusts Co.*, xxviii., 606.

176. *Marine insurance — Partial loss on cargo — Stranding — Jury trial.*—On a voyage from Porto Rico to Halifax the "Donzella" put into Barrington, N. S., for shelter, the wind being south-east with a heavy snow storm prevailing. She was anchored near the light ship with one anchor out, but, as the wind increased a second anchor was put out. Subsequently during a heavy gale that sprang up from the north-west, with thick snow, both chains parted. The vessel was then on a lee shore studded with reefs and shoals, and the tide low. She was abandoned by the master and crew, and the following morning was not visible from shore. Some time afterwards she was picked up at sea by salvors, and was brought into port and put upon the slip and repaired. When brought in she had four feet of water in her hold, and her cargo was badly damaged. On being put upon the slip it appeared that twelve feet of the shoe were off abaft the main chains, and another twelve feet about off forward under the main chains. The butts on the bottom were open. The keel was more or less chafed and broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side which looked as if the vessel had dragged or pounded on something. The sides of the keel were bruised more or less and pieces off of it. The main keel was broomed up. The flying jib-boom and main boom were broken, and the fore boom was split.—The judgment appealed from (30 N. S. Rep. 380) dismissed a motion for a new trial, and held that there was sufficient evidence to warrant the jury in coming to the conclusion that the vessel had been on shore, and beating on the rocks for some time, and on which they could properly find a verdict for the plaintiff, and that the trial judge had acted properly, under the circumstances, in refusing to withdraw the case from the jury. *Held*, that the judgment of the Supreme Court

(N. S.) should be affirmed, and the appeal dismissed with costs. *British and Foreign Marine Ins. Co. v. Rudolf*, xxviii., 607.

177. *Negligence — Use of dangerous material — Trespass.*—Work on the construction of a railway was going on, near the unused part of a public cemetery, in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place the workmen would hurriedly place any explosives they might have in their possession under their tool box, and then run away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require. *Held*, reversing the judgment appealed from, that in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shewn to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M. in exploding the cap as he did did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser, was also a question for the jury, who did not pass upon it. *Makins v. Piggott*, xxix., 188.

178. *Deed — Delivery — Retention by grantor — Presumption — Rebuttal.*—The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument. The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately the grantor retained the possession and enjoyment of it until his death.—Judgment appealed from (31 N. S. Rep. 333) reversed. *Zwicker v. Zwicker*, xxix., 527.

179. *Highway — Dedication — User.*—In order to establish the existence of a public highway by dedication it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway but also that the public accepted such dedication by user thereof as a public highway.—In a case where the evidence as to user was conflicting, and the jury found that there had been no public user of the way in question, the trial judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full court. *Held*, that as such decision did not take into account the necessity of establishing public user of the locus, it could not

stand. Judgment of the Supreme Court (N. B.) reversed. *Moore v. Woodstock Woollen Mills Co.*, xxix., 627.

180. *British ship at foreign port — Merchants' Shipping Act — Distressed seaman — Recovery of expenses — Proof of ownership and payment.*—A certificate of the Assistant Secretary of the Board of Trade that expenses for the relief of a distressed seaman left in a foreign port were incurred and paid, under the provisions of "The Merchants' Shipping Act, 1854," s. 213, is sufficient proof of payment under the Act though the above section does not provide for a mode of proof by certificate.—Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under The Merchants' Shipping Act of 1854, proof of ownership of a ship may be made according to the mode provided in The Merchants' Shipping Act, 1894, by which the former Act is repealed.—Under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the Registrar General of Shipping at London is sufficient proof of ownership. *The Queen v. The Sailing Ship "Troop" Co.*, xxix., 662.

181. *Company—Judgment creditor—Action against shareholders—Transfer of shares.*—Judgment creditors of an incorporated company being unable to realize anything on their judgment, brought action against H. as a shareholder in which they failed from inability to prove that he was owner of any shares. They then brought action against G. in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but were not registered in the company's books. On this evidence the courts below gave judgment in favour of G. *Held*, affirming such judgment, that the shares were duly transferred to H. though not registered, as it appeared that H. had acted for some time as president of, and executed documents for, the company, and the only way he could have held shares entitling him to do so was by transfer from G. *Held*, also, that although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first case could not affect the rights of G. in the subsequent suit. *Hamilton v. Grant*, xxx., 566. *Judgment appealed from 33 N. B. Rep. 77 affirmed.*

182. *Copyright — Infringement — Evidence — Textual copy.*—In an action for infringement of copyright in a dictionary the unrebutted evidence shewed that the publication complained of treated of almost all its subjects in the exact words used in the dictionary first published and repeated a great number of errors that occurred in the plaintiff's work. *Held*, affirming the judgment appealed from (Q. R. 10 Q. B. 255), that the evidence made out a *prima facie* case of piracy against the defendants which justified the conclusion that they had infringed the copyright. *Cadieux v. Beauchemin*, xxxi., 370.

183. *Negligence—Findings of jury—Operation of railway—Lights on train—Evidence.*—A conductor in defendant's employ while engaged in the performance of the duty for which he was engaged at the Windsor station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station-yard. There was no light on the rear end of the last car of the train nor was there any person stationed there

to give warning of the movement of the train. *Held*, that by omitting to have a light on the rear end of the train the railway company failed in its duty and this constituted *prima facie* evidence of negligence. *Canadian Pacific Ry. Co. v. Boisseau*, xxxii., 424.

184. *Controverted election—Status of petitioner—Evidence — Certified copy of voters' list—Imprint of Queen's Printer—61 Vict. c. 14, s. 10 (D.)*—On the hearing of preliminary objections to a controverted election petition the production of a list appearing on its face to be an imprint emanating from the Queen's Printer, certified by the Clerk of the Crown in Chancery to be a copy of the voters' list used at the election, and upon which the name of the petitioner appeared as a person having a right to vote at such election, is sufficient proof of the status of the petitioner. A copy of a list of electors bearing upon its face a statement that it is issued by the Queen's Printer makes proof of its contents without further verification. *Two Mountains Election Case; Ethier v. Legault*, xxxi., 437.

185. *Donatio mortis causa — Deposit receipts — Cheques and orders — Delivery for beneficiaries—Corroboration—Construction of statute.*—McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for \$6,000 which he then handed to his brother telling him that he wanted the money equally divided among his wife, brother and sister. The brother then, on his own suggestion or that of McD., drew out three checks or orders for \$2,000 each payable out of the deposit receipt to the respective beneficiaries which McD. signed and returned to his brother who handed to McD.'s wife the one payable to her and the receipt and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards. *Held*, affirming the judgment appealed against (35 N. S. Rep. 205) Sedgewick and Armour, J.J., dissenting, that this was a valid *donatio mortis causa* of the deposit receipt and the sum it referred to notwithstanding there was a small amount for interest not specified in the gift.—By R. S. N. S. [1900] c. 163, s. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife or both unless it is corroborated by other material evidence. *Held*, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. *McDonald v. McDonald*, xxxiii., 145.

186. *Interruption of prescription — Entries in merchant's books — Acknowledgment in writing—C. S. L. C. c. 67—Arts. 2250, 2260 C. C.*

See PRESCRIPTION, 26.

187. *Sale of goods—Agent of foreign company—Use of corporate seal—Conversion of chattels—Mesne process.*

See SHERIFF, 1.

188. *Special assumpsit—Plea of accord and satisfaction—Onus of proof—Question for jury—Nonsuit.*

See CONTRACT, 194.

189. *Contract by agent—Want of corporate seal—Adoption—Ratification — Questions for jury.*

See CONTRACT, 117.

190. *Sale of goods—Payment — Appropriation—Nonsuit.*

See CONTRACT, 2.

191. *Controverted election—Proving status of petitioner—Extension of stenographer's notes.*

See ELECTION LAW, 74.

192. *Contract for public work—Assignment—Consent on the part of the Crown—Knowledge and acquiescence by Crown officers—Cancellation—Breach of contract.*

See CONTRACT, 93.

193. *Delivery in escrow—Policy of insurance — Unpaid premium — New trial—Appreciation of testimony.*

See INSURANCE, LIFE, 7.

194. *Lessor and lessee—Ejectment — Proof of title—Estoppel.*

See TITLE TO LAND, 99.

195. *Possession annale—Equivocal possession—Trespass—Right of way.*

See ACTION, 125.

196. *Indictment—Alias dictus — Proof of names—Variance.*

See CRIMINAL LAW, 9.

197. *Halifax Assessment Act, 1883—Sealed statements—Healing clauses—Curing irregularities.*

See ASSESSMENT AND TAXES, 59.

198. *Crown lands—Setting aside grant—Error — Improvidence — Superior title — Res judicata—Estoppel.*

See TITLE TO LAND, 130.

199. *Controverted election—Status of petitioner—Preliminary objection.*

See ELECTION LAW, 96.

200. *Possession by trustee—Statute of Limitations.*

See TITLE TO LAND, 118.

201. *Misrepresentation — Plea of fraud — Death of witness.*

See NEW TRIAL, 32.

202. *Evidence on reference — Master's report—Irrelevant evidence—Credibility of witnesses—Apportionment of damages.*

See PRACTICE AND PROCEDURE, 124.

203. *Regnête civile—New Evidence—Fraud—Nullity.*

See SHERIFF, 10.

204. *Public work—Wharf property injuriously affected—Damages peculiar to the property—Unusual interference—Eminent domain.*

See PUBLIC WORK, 4.

205. *Principal and surety—Giving time to principal — Reservation of rights against surety.*

See PRINCIPAL AND SURETY, 3.

206. *Statute of Frauds — Memorandum in writing—Repudiating contract by.*

See CONTRACT, 249.

207. *Will — Execution of — Testamentary capacity.*

See WILL, 3.

208. *Master and servant — Negligence — Cause of accident — Contributory negligence.*

See NEGLIGENCE, 46.

209. *Bornage — Concession line — Survey — Presumptions.*

See BOUNDARY, 5.

210. *Negligence — Necessary proof — Statutory officer—Ratepayer—Statute labour.*

See NEGLIGENCE, 122.

211. *Negligence — Dangerous machinery—Statutory duty—Cause of accident.*

See NEGLIGENCE, 19.

212. *Misrepresentation — Onus of proof—Payment of claims by Crown — Transfer by payee.*

See No. 107, ante.

213. *Operation of railway—Defective ways or plant—Lock on switch—Negligence—Employer and employee.*

See NEGLIGENCE, 100.

214. *Action for conversion — Defect in plaintiff's title.*

See STATUTE OF FRAUDS, 4.

215. *Operation of railway—Negligence — Sufficiency of evidence—Findings of jury — Defective machinery — Sparks from engine—Setting aside verdict.*

See NEGLIGENCE, 101.

216. *Infringement of trade-mark—Use of corporate name—Fraud and deceit—Evidence.*

See TRADE-MARKS, 6.

217. *Sale by sample—Evidence of contract — Findings of fact.*

See No. 65, ante.

11. USAGES.

218. *Sale of goods by sample—Place of delivery—Inspection—Mercantile usage — Contract made abroad.*

See CONTRACT, 211.

12. VARYING TERMS OF WRITINGS.

219. *Improbable statement—Parol contradiction of written instrument—Judicial admissions — Aveu judiciaire — Deed — Error in stating consideration — False statement — Art. 1243, C. C.—Art. 231 C. C. P. (old text)—Dividing answers.]—In May, 1875, McN. purchased printing materials from C. The price, \$5,000, was paid; but the deed erroneously stated it to be \$7,188.40, which was therein acknowledged. C. remained in possession and carried on the printing business in partnership with M. for several months, when they failed, appellant being assignee to their estate. In March, 1876, McN. claimed the plant, stating they purchased in good faith, and paid the agreed price, but the*

deed erroneously stated the price at \$7,188.40. The assignee claimed payment of \$2,188.40, balance between the consideration mentioned and \$5,000 paid, before delivery. The evidence for the assignee was the testimony of McN. that the price, \$5,000, as agreed, had been paid, corroborated by C. *Held*, affirming the judgment of the court below, that the only evidence in support of appellant's contention being that of respondent, the appellant could not divide the admission in order to avail himself of what was favourable and reject what was unfavourable.—*Per Strong, J.*, dissenting. That the part of the admission, objected to, appeared improbable and rendered it divisible; that the unconfirmed testimony of the parties thereto was insufficient to contradict, to vary or to shew that there was an error, or even a false statement in the deed. *Fulton v. McNamee*, ii., 470.

220. *Boundaries — Description in deed of land—Parol testimony.*—Extrinsic evidence of monuments and actual boundary marks is admissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they call for courses, distances, or computed contents which do not agree with those in the deed. (See 14 Ont. App. R. 685.) *Grassett v. Carter*, x., 105.

221. *Written instrument — Collateral parol agreement — Work and labour done—Security—Lien.*—By agreement in writing B. contracted to cut for A. a quantity of wood and haul and deliver the same at a time and to a place mentioned, B. to pay for the same on delivery. The agreement made no provision for securing to A. the payment of his labour, but when it was drawn up there was a verbal agreement between the parties that in default of payment by B. the wood could be held by A. as security and sold for the amount of his claim. *Held*, reversing the judgment appealed from (4 Man. L. R. 76), *Henry, J.*, dissenting, that evidence of this verbal agreement was admissible on the trial of an action of replevin for the wood by an assignee of A., and that its effect was to give B. a lien on the wood for the amount due him. *Byers v. McMillan*, xv., 194.

222. *Commercial matters — Receipt—Error—Parol evidence — Prohibitive law — Arts. 14, 1234, C. C.*—The prohibition of art. 1234, C. C. against the admission of parol evidence to contradict or vary a written instrument, is not *d'ordre public*, and if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a court of appeal.—*Parol evidence in commercial matters* is admissible against a written document to prove error. *Etna Ins. Co. v. Brodie* (5 Can. S. C. R. 1) followed. *Schwarsenski v. Vineberg*, xix., 243.

223. *Contract — Deed of land — Undisclosed trust — Security by deed to third party—Specific performance—Proof by parol.*—M. agreed by written contract to give to B. as security for a loan an absolute deed to be held by B. in trust for the time the loan was to run. By B.'s directions the deed was made out in his daughter's name. She claimed to have purchased absolutely for her own benefit, and action was brought against her and B. for specific performance of contract with B. and a declaration that she was a trustee only subject to re-payment of the loan.

Defendants denied collusion and conspiracy charged and pleaded the Statute of Frauds. *Held*, affirming the judgment appealed from (19 Ont. App. R. 602), *Strong, J.*, dissenting, that the evidence shewed that the daughter was aware of the agreement made with B., and the Statute of Frauds did not prevent parol evidence being given of such agreement. *Barton v. McMillan*, xx., 404.

224. *Varying terms of writings—Deed intended to operate as mortgage—Evidence.*—Evidence of a most conclusive and absolute character is necessary to induce the court to declare a deed, absolute on its face, to operate as a mortgage only. *McMicken v. Ontario Bank*, xx., 548.

225. *Statute of Frauds — Bill of redemption — Absolute deed to take effect as a mortgage — Parol evidence — Evidence of plaintiff—Corroboration—36 Vict. c. 10 (O.)*—The bill, filed in 1876 by the heirs-at-law of J. W. R., alleged that deceased had, in 1861, conveyed certain real estate to his brother, I. N. R., upon express trust that he would advance him \$1,000, and hold the property as security for the re-payment of that sum with interest; that he never did advance that sum; that J. W. R. died in 1872; that I. N. R. died in 1874, having devised this property to his son; that the trusts upon which it had been conveyed had been fulfilled; and sought an account of I. N. R.'s dealings therewith. The defendant, the executor and executrix of I. N. R., set up an absolute sale, and relied on the Statute of Frauds and the Statute of Limitations.—The evidence in part consisted of the testimony of C. H. R., one of the plaintiffs, a son of J. W. R., to the effect that his father being in difficulties in 1861, I. N. R. told him (C. H. R.) that he would take an assignment of the property, pay off certain mortgages thereon, advance J. W. R. \$1,000 and re-convey it at any time.—*Proudfoot, V.-C.*, made a decree directing an account, and allowing plaintiffs to redeem the lands on payment of the amount due to defendants in respect of the advances made. The Court of Appeal for Ontario reversed the decree (3 Ont. App. R. 309). *Held*, that parol evidence was admissible to shew that the absolute conveyance was intended to take effect as a mortgage, but the judgment appealed from, so far as it proceeded upon the ground that the testimony of the plaintiff, C. H. R., required corroboration, was correct and ought to be affirmed. *Rose v. Hickey*, Cass. Dig. (2 ed.) 534.

226. *Duress — Undue influence — Valuable consideration — Action to set aside deed.*—An action was brought by an executrix to have a deed set aside and cancelled, on the grounds of undue influence, and incompetence on the part of the grantee. The deed had been executed about two months prior to the will. The executrix alleged that the testator was eighty years of age and of child-like simplicity, that the grantees under the deed had kept him under their control, treated him with violence, and prevented him leaving their house, and that when he had requested the executrix to live with him and take care of him until he died, they would not permit her to do so. The deed purported to have been made in consideration of the grantees paying the testator's debts and maintaining him for the rest of his life.—*Held*, affirming the decision of the Supreme Court of Nova Scotia, that the evidence shewed that the deed had

been given for valuable consideration, that there had been no evidence establishing that undue influence had been resorted to in order to obtain it, and that the action to set aside the deed could not be maintained. *Corbett v. Smith*, 1st May, 1893.

227. *To vary or explain deed—Construction of deed—Title to lands—Ambiguous description—Possession—Conduct of parties—Presumptions from occupation of premises—Arts. 1019, 1238, 1242, 1473, 1599, C. C.—47 Vict. c. 87 s. 3 (D.)—48 & 49 Vict. c. 58 s. 3 (D.)—45 Vict. (Q.) c. 20.*—By a deed made in August, 1882, the appellant ceded to the Government of Quebec, which subsequently conveyed to the respondent, an immovable described as part of lot No. 1937, in St. Peter's Ward, in the City of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the River St. Charles, with the wharves and buildings thereon erected. The respondents entered into possession of the lands by virtue of said deeds and remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882. *Held*, reversing the judgment of the Queen's Bench (C. J. and King, J., dissenting), that the words "Henderson street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shewn to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusion at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence, and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors. *City of Quebec v. North Shore Ry. Co.*, xxvii., 102.

228. *Contract — Oral agreement — Withdrawal of questions from jury—New trial.*—D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of 5 per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale. *Held*, affirming the judgment appealed from (6 B. C. Rep. 505), that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to shew that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question

that ought to have been submitted to the jury. *Dunsmuir v. Lowenberg, Harris & Co.*, xxx., 334.

229. *Sale of goods—Evidence to vary written instrument—Admission of evidence.*—Plaintiffs carried on business at Montreal under the style of "A. R. Williams & Co." and sued respondent for the price of an engine, ordered by respondents in writing, and other machinery supplied in connection with repairs to the foundry, amounting to \$495.91. The order was given through the plaintiffs' agent W. The principal defence was that the company supposed it was dealing with a company carrying on business in Toronto as "The A. R. Williams Machinery Co." with which it had previous dealings, and which, at the time, had in its possession machinery belonging to the defendant of the value of \$780 which it was agreed with W. should be accepted in payment for the machinery ordered. The Supreme Court, Gwynne, J., dissenting, affirmed the judgment appealed from (33 N. S. Rep. 21) affirming the trial judge (33 N. S. Rep. 22), who found that the business carried on in Montreal was distinct from that carried on in Toronto, but that at the time the order was given defendant believed it was contracting with the Toronto company, and that there were surrounding circumstances to lead to the belief that the business carried on in Montreal and Toronto were one and the same. He held that the plaintiffs were bound by the bargain made with W., and, on the ground that it was not inconsistent with the written agreement to prove that payment was to be made otherwise than in cash, he received evidence of the agreement relied on by the defendant. *Wilson v. Windsor Foundry Co.*, xxxi., 381.

230. *Parol testimony—Varying character of deed—Art. 1234 C. C.—Consideration.*

See DEED, 4.

231. *Parol testimony—Policy of insurance—Mistake—Amount insured.*

See INSURANCE, LIFE, 28.

232. *Bill of lading—Printed conditions — Proof of further condition stated verbally.*

See CARRIERS, 15.

233. *Plan of subdivision — Explanatory testimony — Boundaries — Specific description of lands.*

See TITLE TO LANDS, 129.

234. *Construction of will — Oral proof of severance of tenancy — Partition of lands.*

See TENANTS IN COMMON, 1.

235. *Registration of bill of sale—Defective jurat—Parol proof.*

See BILL OF SALE, 1.

236. *Instrument in writing — Parol testimony — Sale of timber limits — Description of lands—Property included in deed—Agreement for sale—New contract in conveyance—Statement of account—Notice.*

See SALE, 75.

237. *Contract—Sale of goods — Varying written contract—Admission of evidence.*

See No. 229, ante.

238. *Sale by sample—Evidence of contract—Findings of fact.*

See No. 65, ante.

AND see ante, sub-head, No. 1, "ADMISSIBILITY."

13. WEIGHT OF EVIDENCE.

239. *Affirmative testimony — Interested witnesses — Art. 1232 C. C. — Arts. 251, 252 C. C. P. — Mala fides — Common rumour.*] — In the estimation of the value of the evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.—The evidences of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses.—Evidence of common rumour is unsatisfactory and should not generally be admitted. *Lefeunteum v. Beaudoin*, xxviii., 89.

240. *Purchase of land — Joint negotiations—Deed to one party only—Interest of associate—Resulting trust.*

See TITLE TO LAND, 117.

241. *Description of lands — Discrepancy—Metes and bounds.*

See NEW TRIAL, 36.

242. *Expert testimony — Appreciation of evidence—Reversal on questions of fact.*

See No. 60, ante.

243. *Admiralty law — Collision — Ship at anchor—Anchor light—Lookout—Weight of evidence—Credibility—Findings of trial judge—Negligence.*

See ADMIRALTY LAW, 4.

244. *Operation of tramway—Contributory negligence—Pleadings—Issues—Evidence—Verdict—New trial—Objections taken on appeal.*

See NEW TRIAL, 82.

EXCEPTION.

See PLEADING—PRACTICE AND PROCEDURE.

EXCHANGE.

Title to lands—Ambiguous description — Possession—Conduct of parties—Presumptions from occupation of premises—Art. 1599 C. C.

See DEED, 27.

EXCHEQUER COURT OF CANADA.

1. *Final judgment — Decision — Right of appeal — 38 Vict. c. 11—R. S. C. c. 135—53 Vict. c. 35.*

See APPEAL, 159.

2. *Jurisdiction — Arbitration — Debts of Province of Canada—Deferred liabilities—Toll bridge—Reversion to Crown—Indemnity—Petition of right—Condition precedent—Remedial process.*

See CONSTITUTIONAL LAW, 8.

3. *Exchequer Court appeal — Assessment of damages—Interference with findings of Exchequer Court judge.*

See APPEAL, 241.

4. *Injury from public work—Negligence of Crown officials—Right of action—Liability of the Crown—50 & 51 Vict. c. 16, ss. 16, 23, 58—Jurisdiction of Exchequer Court—Prescription—Art. 2261 C. C.*

See ACTION, 113.

EXCISE.

See DUTIES—INLAND REVENUE.

EXECUTION.

1. *Will — Prohibition to alienate—Exemptions from seizure—Judgment against executor—Res inter alios acta.*]—The will gave extensive powers of discretion to the executor in respect to the administration of the affairs of the succession, the partition of the property among the beneficiaries and dispensed with the necessity of an inventory or rendering of accounts. It also provided that the property bequeathed should be exempt from seizure, save for debts due by the succession. The executor indorsed promissory notes for the accommodation of one of the beneficiaries, upon which judgment was recovered under which lands belonging to the estate were seized in execution. *Held*, that the transaction in respect to the notes was an affair *dehors* the estate and that effect should be given to the provision of the will as to exemption from seizure. *Lionais v. Molsons Bank*, x., 526.

2. *Sale of railway shares en bloc—Arts. 595, 599 C. C. P.*]—Where a number of shares of railway stock were seized and advertised to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken in execution, such sale in the absence of proof of fraud or collusion was held good and valid. Judgment appealed from (*M. L. R. 2 Q. B. 303*) affirmed. *Connecticut & Passumpsic Rivers Ry. Co. v. Morris*, xiv., 318.

3. *Writs — Seal — Signature.*]—In Nova Scotia writs of execution need not be signed by the prothonotary of the court. It is the seal of the court which gives validity to such writs, not the signature of the officer. *Archibald v. Hubley*, xviii., 116.

4. *Real Property Act—Registration — Unregistered transfers — Equitable rights — Sales under execution — R. S. C. c. 51—51 Vict. (D.) c. 20.*] — The provisions of s. 94 of the Territories Real Property Act (*R. S. C. c. 51*), as amended by 51 Vict. (D.), c. 29, do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior

unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor.—If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers. *Jellett v. Wilkie*; *Jellett v. The Scottish Ontario and Manitoba Land Co.*; *Jellett v. Powell*; *Jellett v. Erratt*, xxvi., 282.

5. *Fi. fa. de terris*—*Opposition to seizure*—*Assignment for benefit of creditors*—*Insolvency*—*Practice*—*Stay of execution*—*Art. 772 C. C. P.*—On appeal the Supreme Court affirmed the judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 517) which held that an incomplete *cession de biens* by an insolvent execution debtor cannot be opposed to a seizure of his goods under execution, and that notwithstanding the provisions of art. 772 C. C. P. (old text) the judgment creditor could proceed by *fi. fa. de terris* to make his debt out of the lands of the execution debtor. *Birks v. Lewis*, xxx., 618.

6. *Practice*—*Appeal to Privy Council*—*Stay of execution.*—A judge in chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the court to the Judicial Committee of the Privy Council. *Adams & Burns v. The Bank of Montreal*, xxxi., 223.

7. *Solicitor and client*—*Territories Real Properties Act*—*Unregistered transfers*—*Charging lands*—*Levy under execution*—*Indemnity to sheriff*—*Tort*—*Pleading*—*Interpleader.*—In a suit against a sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead but may be properly joined in a defence with the execution creditor. The delivery of an execution with a requisition to the sheriff to charge and levy upon the lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution. *Taylor v. Robertson*, xxxi., 615.

8. *Order setting aside fi. fa.*—*Appellate jurisdiction*—s. 17 *Sup. and Ex. Courts Act.*

See APPEAL, 157.

9. *Stay of execution*—*Order for deposit of part of verdict*—*Security for costs.*

See PLEADING, 4.

10. *Stay of proceedings*—*Res judicata*—*Proceedings in revocation of judgment*—*Disavowal.*

See OPPOSITION, 3.

11. *Interdiction*—*Marriage laws*—*Authorization by interdicted husband*—*Dower*—*Registry laws*—*Sheriff's sale*—*Warranty*—*Succession*—*Renunciation*—*Donation.*

See TITLE TO LAND, 111.

12. *Mines and minerals*—*Construction of statute*—*Free-miner's certificate*—*Annual renewals*—*Special renewal*—*Vesting of interest in co-owners*—*Sheriff*—*Levy under execution*—*R. S. B. C. 135*, ss. 2, 3, 9, 34—62 *Vict. c. 45*, ss. 2, 3, 4—*R. S. B. C. c. 72*, ss. 12, 24.

See SHERIFF, 15.

EXECUTORS AND ADMINISTRATORS.

1. *Joint executors*—*Liability for moneys received*—*Uncollected debts*—*Débats de compte*—*Taking accounts*—*Interest*—*Prescription*—*Arts. 913, 2242 C. C.*—Respondents, representing one of the universal residuary legatees sued appellants as joint testamentary executors of W. D., sen., for an account and the balance of the estate in their hands. On a *débat de compte* the total value of the estate was proved to be \$44,525.65, and appellants, as appeared by an account rendered by them, took possession of \$14,510.33 as such executors. The remaining \$30,015.33 appeared by the books of the commercial firm of W. D. & Co., to be due to the estate of W. D., sen., by W. D., Jun., one of the executors, and to have never come into the possession of the other executors. — *Held*, Taschereau, J., dissenting, that under art. 913 C. C. appellants were jointly and severally responsible only for the amount of which they took possession in their joint capacity, and that, therefore, W. D., Jun., was alone responsible for the amount of such balance. — Testamentary executors cannot legally be charged more than a rate of six per cent. for interest on moneys collected by them, after their account has been demanded, unless there is proof that they realized a greater rate of interest by the use of such moneys.—An action against executors for an account of their administration, and moneys received, or which ought to have been collected by them in their capacity as such executors, is not prescribed otherwise than by the long prescription of 30 years. *Darling v. Brown*, ii., 26.

2. *Administrator*—*Misconduct*—*Refusal to facilitate liquidation*—*Costs.*—The plaintiff wished to administer to the estate of his brother, but was unable to give the necessary bond, until W. and J. agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock, which the defendants wished to convert into money, but plaintiff would not assist them in doing so.—In passing the accounts of the estate in the Probate Court of Westmoreland County, it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due the several claimants were settled by the court.—Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally plaintiff filed a bill to compel the defendants to pay him his portion of the estate with \$1,000, which he claimed as commission, and also to hand over to him the shares of the next of kin. A decree was made directing that the estate be disposed of by the defendants, and that they were entitled to their costs as between solicitor and client, which could be retained out of the plaintiff's share of the estate. On appeal from the master's report the Vice-Chancellor reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendants' costs, but the Court of Appeal restored the original judgment. *Held*, affirming the Court of Appeal (10 Ont. App. R. 76), that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other next of kin to bear the burden of

the costs. *O'Sullivan v. Harty* (22 C. L. J. 17), xi., 322.

3. *Testamentary appointment—Irregularities in administration—Removal of executor*—Arts. 282, 285, 917 C. C.]—Art. 282 C. C. does not apply to executors chosen by the testator, and in an action for the removal of one of several executors, the existence of a lawsuit between such executor and the estate he represents, and the evidence of irregularities in his administration but not exhibiting any incapacity or dishonesty, are not sufficient cause for his removal. *Strong, J.*, dissenting. *Mitchell v. Mitchell*, xvi., 722.

4. *Will—Legacy—Trust—Claim on assets—Priority—Registration—Charge on realty—Notice.*]—H. and his brother were partners in business; the latter died and H. became by will his executor and residuary legatee. Part of a legacy to E. H., was paid and judgment recovered against the executor for the balance. H. having incumbered both his own share and that devised to him, one of his creditors, mortgagee of the property, obtained judgment against him and the appointment of receivers of his estate. E. H. asked to have it declared that his judgment for balance of legacy was a charge upon the moneys in the receivers' hands in priority to the personal creditors of H. *Held*, affirming the Supreme Court (B. C.), that the moneys held by the receivers being personal assets of the testator, or proceeds thereof, E. H. was entitled to priority of payment though his judgment was registered after those of the other creditors. *Held*, also, that the legacy was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and the words "property" and "estate" being both sufficient to pass realty. This charge upon realty operated against the mortgagees, who were shewn to have had notice of the will. *Cameron v. Harper*, xxi., 273.

5. *Administration of estate—Powers—Hiring and service of clerk—Yearly salary—Money paid out—Prescription*—Arts. 914, 2260, 2261 C. C.]—Action against the heirs of Y. for services as clerk to his executor, in administering the estate and for money paid and laid out for estate.—Pleas: That all demands for salary were prescribed, by two years under art. 2261 C. C., and all sums advanced and paid by five years under par. 6, art. 2260 C. C. That the executor, who received \$400 per annum under the will, had no right to employ a clerk at expense of estate to do the work thereof, and R.'s work was done for executor, against whom alone he had a claim.—The Superior Court held that the only prescription for yearly salary was that of 5 years, under par. 6, art. 2260, C. C., while that of 30 years alone was applicable to the claim for moneys laid out for estate. That the general powers of an executor include the engagement of clerks to keep the books of the estate and to carry on its affairs (art. 914 C. C.); and \$1,754 was awarded to R.—These holdings of law were affirmed, but the action was dismissed in the Queen's Bench (Tessier and Cross, JJ., dissenting), on the ground that there was evidence that R. had agreed to accept \$400 per annum and had been paid that sum.—The Supreme Court reversed the judgment of the Court of Queen's Bench and varied that of the Superior Court by increasing the amount awarded R. to

\$5,607. *Rattray v. Young*, Cass. Dig. (2 ed.) 149.

6. *Removal of for waste—Fraudulent administration—Husband and wife—Will—Rejection of evidence.*]—An action to remove executrix. Appellant is the sole surviving executrix of the will of the late J. R., and the appellant and the respondent are the remaining legatees under the will. The respondent complained:—1st. Appellant had given a power of attorney to her husband to manage the estate in violation of the terms of the will; 2nd. Fraud in charging the estate with sums not legally chargeable to the estate; in charging a commission to remunerate her husband for the management of the estate, while paying one T. a commission for the same services; in taking bonuses for certain leases granted; in making a fraudulent lease to C. at a notoriously insufficient rent to the injury of the estate; in agreeing to pay \$1,200 to H. and T. for cancellation of the lease of part of the estate; 3rd. Waste in pulling down and erecting buildings on the estate.—Appellant denied waste and fraud, and maintained that she had a right to give her husband a power of attorney.—As to the first point respondent relied on these words: "And it is furthermore my will and wish, that neither of the husbands of any of said daughters nor any of my daughters' future husbands, shall have any power over, control or interference in any manner, with the foregoing devise and bequest to them, but shall be as absolutely free from such power, control or interference, as if they had remained unmarried and single."—Appellant complained that the testimony of her husband had been excluded, and that it was competent to the court to allow her husband to be examined. (Art. 252 C. C. P.; 35 Vict. c. 6, s. 9).—The Superior Court, while admitting that under the will the husband could act as his wife's attorney, removed appellant, on the grounds that the administration of the estate had been fraudulent and wasteful, that the lease to C. had been imprudent and looked fraudulent, that in the receipt of bonuses by her husband, there had been fraud, for which she was liable, and there had been other irregular transactions.—The Queen's Bench held that it was competent for the appellant under the will to appoint her husband her general attorney and agent; that the trial judge not having admitted the husband's evidence, under the circumstances it would not be the duty of the court, even if it had the power, to send back the record to allow him to be examined; that removal of an executrix, daughter of the testator, herself a legatee, ought not to be ordered on evidence of small payments, which might have been avoided; that payment of a commission to her husband for appreciable services, such as collections, would not be ground for removing the executrix selected by the testator; but affirmed the judgment on account of the transaction with C. and the taking of bonuses on several occasions without accounting for them.—On appeal, *Held*, affirming the judgment appealed from, that the transaction with C. was sufficient cause for removal and that the evidence of the husband on behalf of his wife had been properly rejected. *Ross v. Ross*, Cass. Dig. (2 ed.) 306.

7. *Building—Want of repair—Damages—Art. 1055 C. C.—Trustees—Personal liability of—Executors*—Arts. 921, 981 (a) C. C.—*Procedure.*]—The owner of property abutting on a highway is under a positive duty to keep

it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use, and management, which reasonable care can guard against.—*A. T. sued J. F. and M. W. F.*, personally as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming \$4,000 damages for the death of her husband who was killed by a window falling on him from the third story of a building, which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F., and his children, for whom the said J. F. and M. W. F. were also trustees. The judgment of the courts below held the appellants liable in their capacity of executors of the general estate and trustees under the wills. *Held*, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d'héritiers fiduciaires*) for the benefit of G. F.'s children, but were not liable as executors of the general estate.—Where parties are before the court *quâ* executors, and the same parties should also be summoned *quâ* trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary. *Ferrier v. Trépannier*, xxiv., 87.

8. *Testamentary succession—Executors—Balance due by tutor—Practice—Action for account—Provisional possession—Envoie en possession—Parties.*—The appeal was from the judgment of the Court of Queen's Bench for Lower Canada (Q. R. 6 Q. B. 34), which reversed the decision of the Superior Court, District of Quebec, and dismissed the plaintiff's action and incidental demand, and held, that on failure of testamentary executors to render an account, the heirs of the testator have no direct action against them for alleged balances in their hands; that their proper recourse would be by an action for account, which should embrace the whole of the administration of the succession of the executors, and could not be restricted to particular or isolated matters; that a demand for provisional possession (*envoie en possession*), of a testamentary succession against an executor who has had the administration thereof should implead all the heirs as plaintiffs, and that failure in the joinder of any one of them would be fatal, and the defendant could not be compelled to call them in as parties to the action, and further, that, in a case where there were several executors, such actions must be brought against them jointly, and could not be validly instituted against one of them even with the extra judicial consent of the others.—The Supreme Court of Canada affirmed the decision of the Court of Queen's Bench, and dismissed the appeal with costs. *Cream et al. v. Davidson*, 1st May, 1897, xxvii., 362.

9. *Will—Powers of executors—Promissory note—Advancing legatee's share.*—*M.*, who was a merchant, by his will gave special directions for the winding up of his business and the division of his estate among a number of his children as legatees, and gave to his executors, among other powers, the power "to make, sign, and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of thirty years the whole or any part of their share in

his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," &c. In an action against the executors to recover the amount of promissory notes given by the executors and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts. *Held*, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques-Cartier v. Gratton*, xxx., 317.

10. *Donatio mortis causâ—Ratification by will—Scizin—Payment of legacy—Sale of land—Charges—Action hypothécaire.*—On appeal the Supreme Court affirmed the judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 511), in an hypothecary action by which it was also asked that a discharge by executors should be set aside. *C.* sold land to *A. W. M.* and *C. B. M.* for \$150,000 secured by privilege of *baillieur de fonds*, of which \$50,000 was payable to respondent after vendor's death. *C.* afterwards by his will ratified the donation and delegation of payment. *A. W. M.* and *C. B. M.* being named testamentary executors. The *C. C. Co.* acquired the land assuming the obligation of paying this \$50,000. The executors discharged the debt and the hypothec by which it was secured. It was held by the court below, that even if the delegation were null on account of the *donatio mortis causâ* by *acte entre vifs*, the will validated it and the credit passed to the respondent with all its accessories including the hypothec and special privilege of *baillieur de fonds*; and further, as the executors were seized only for the execution of the will, and there was no necessity to use this credit to pay debts of the succession, they had no power to grant the discharge. *Consumers Cordage Co. v. Converse*, xxx., 618.

11. *Appeal—Jurisdiction—Matter in controversy—Removal of executors—Acquiescence in trial court judgment—Right of appeal—R. S. C. c. 135, s. 29.*—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors though, by the action, an account for over \$2,000 had been demanded and refused by the judgment at the trial against which the plaintiff had not appealed. *Noël v. Chevretils* (30 Can. S. C. R. 327) followed; *Laberge v. The Equitable Life Assurance Society* (24 Can. S. C. R. 59) distinguished. *Donohoe v. Donohue*, xxxiii., 134.

12. *R. S. N. S. (4 ser.) c. 96, s. 41—Death of party to suit—Adding administrator as party before trial—Competence of surviving party to give testimony—Evidence of agreements with deceased party.*

See EVIDENCE, 3.

13. *Execution of trusts—Insufficiency of income—Power to mortgage or sell—Annuities—Charges upon corpus.*

See WILL, 8.

14. *Hypothecary debts—Charge upon estate—Special devise—Art. 889 C. C.*

See WILL, 57.

15. *Conservatory acts—Acts of administration—Acceptance of insolvent succession—Arts. 646, 650 C. C.*

See FRAUD, 1.

16. *Powers—Unlimited discretion conferred by will—Indorsement of accommodation notes.*

See BILLS AND NOTES, 15.

17. *Aid to civil power—Payment of troops—Suit by administrator of commanding officer.*

See MILITARY LAW, 1.

18. *Will—Powers — Sale of land—Unsurveyed lot—Unknown quantity — Contract—Specific performance—Breach of trust.*

See SALE, 1.

19. *Administration of agent—Negligence—Misappropriation—Mandate.*

See TRUSTS, 9.

20. *Trust estate—Purchase at sheriff's sale—Possession — Statute of Limitations—Evidence.*

See TITLE TO LAND, 118.

21. *Appointment to carry on administration — Constructive trust — Negligence—Account—Interest—Contrainte.*

See TUTORSHIP, 2.

22. *Removal of executors by codicil — Reference to revoked will—Intention to revive.*

See WILL, 55.

23. *Trustee — Accounts — Jurisdiction of Probate Court—Res judicata.*

See TRUSTS, 14.

24. *Trustees and executors — Legacy in trust—Discretion of trustee — Vagueness or uncertainty as to beneficiaries—Poor relatives — Public Protestant charities — Charitable uses—Persona designata.*

See WILL, 46.

25. *Nova Scotia Probate Act—R. S. N. S. (5 ser.) c. 100 and 51 Vict. (N. S.) c. 26—License to sell lands—Estoppel—Res judicata.*

See RES JUDICATA, 11.

26. *Provisions of will — Deferred distribution—Premature action.*

See WILL, 20.

EXEMPTIONS.

1. *Succession duties — Property exempt—Sale under will—Duty on proceeds—Costs—Proceedings by or against the Crown.]—Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General*

claimed succession duty on the whole estate. Held, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills, JJ., dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale when passing to legatees were.—Costs will be given for or against the Crown as in other cases. Lovitt v. Atty-Gen. for Nova Scotia, xxxiii, 350.

2. *Exemptions from customs duties—Foreign built ships — Dutiable goods—Customs Tariff Act.*

See CUSTOMS DUTIES, 4.

3. *Exemptions from customs duties—Dutiable goods—Customs Tariff Act—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition — Presumption as to good faith.*

See CUSTOMS DUTIES, 5.

AND see ASSESSMENT AND TAXES — EXECUTIONS.

EXPERTISE.

Builder's privilege — Procès-verbal — Arts. 1695, 2013, 2103 C. C.—Art. 333 et seq. C. C. P.—Error in valuation.

See LIEN, 8.

AND see EXPERTS.

EXPERTS.

1. *Expert opinions — Evidence—Hearsay—Extra judicial statements — Assessor's reports.]—Where there is direct contradiction between equally credible witnesses the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra judicial statements and municipal reports. Crawford v. City of Montreal, xxx, 406.*

2. *Assessment of damages—Evidence incomplete—Record remitted for expertise.*

See SALE, 103.

3. *Evidence of experts — Opinions—Inferences.*

See EVIDENCE, 58-62.

AND see EXPERTISE.

EXPLOSION.

Condition of policy — Loss by explosion—Fire caused by explosion.

See INSURANCE, FIRE, 32.

EX POST FACTO LEGISLATION.

Special taxes — Warranty—Montreal local improvements.

See MUNICIPAL CORPORATION, 124.

EXPRESS COMPANY.

Bailees — Common carriers — Receipt for money parcel—Conditions precedent—Formal notice of claim—Pleading—Money had and received—Special pleas.

See ACTION, 21.

EXPROPRIATION OF LANDS.

1. BY THE CROWN, 1-7.
2. BY MUNICIPAL AUTHORITIES, 8-20.
3. FOR RAILWAYS, TRAMWAYS, &c., 21-32.

1. BY THE CROWN.

1. *Town plot sub-division — Valuation—Assessment of damages—Government railway—Crossings.*—The claimant contended that the land was held for sale as building lots. It had not been sub-divided prior to expropriation, and none of it had been sold for building purposes. There was, however, a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town.—The absence of a crossing prevented access to the shore, and caused claimant loss in the use and occupation of the remaining property.—The Exchequer Court (2 Ex. C. R. 21), decided that while remote probability added some value to the property, compensation should not be based on any supposed value for building purposes at the time of expropriation, and also, that claimant was entitled to compensation in respect of damage resulting from the want of a crossing.—On appeal by claimant, the Supreme Court of Canada, *Held*, that the amount of compensation awarded should be increased, on the ground that it did not appear that such compensation was assessed in view of the future damage that might result from the want of a crossing. *Kearney v. The Queen*, Cass. Dig. (2 ed.) 313.

2. *Petition of right — Public work—Injury to property — Obstruction of canal—Use of canal.*—The appellant, claiming to be owner of the Shubenacadie Canal in Nova Scotia, brought suit by petition of right to recover damages from the Crown for expropriating part of his property in construction of public works and for obstructing the use of the canal. The Exchequer Court (4 Ex. C. R. 130), without deciding as to the title of appellant, which was disputed, held that expropriation had not been proved, and refused damages for obstruction on the ground that the canal was not open for traffic. The judgment included a declaration that appellant was entitled, whenever it should be so opened and the traffic obstructed by the public work, to have the obstruction removed.—The Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the appeal with costs. *Fairbanks v. The Queen*, xxiv., 711.

3. *Expropriation of land—Damages—Valuation—Evidence.*—The Crown expropriated land of L. and had it appraised by valuers who assessed it at \$11,400, which sum was tendered to L., who refused it and brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him \$17,000. On appeal by the Crown.—*Held*, reversing the judgment appealed from,

Girouard, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuers was a very generous compensation to L. for the loss of his land and the increase by the judgment appealed from was not justified.—The court, while considering that a less sum than that fixed by the valuers should not be given in this case expressly stated that the same course would not necessarily be followed in future cases of the kind. *The King v. Likely*, xxxii., 47.

4. *Laying out and ascertaining ordnance lands—Public works—Reversion of lands not used for canal purposes.*

See RIDEAU CANAL LANDS, 2.

5. *Intercolonial Railway lands—Appellate court amending award—Speculative values.*

See ARBITRATIONS, 11.

6. *Public work — Government contractor—Entry on lands—Notice of action—44 Vict. c. 25, s. 109—Conditions precedent.*

See CROWN, 64.

7. *Tender of compensation—Award of official arbitrators—Costs—Findings of fact—Setting aside award.*

See APPEAL, 223.

AND see PUBLIC WORKS.

2. BY MUNICIPAL AUTHORITIES.

8. *Expropriation — Award of arbitrators—Interference on appeal.*—In a matter of expropriation, the decision of the majority of the arbitrators, men of more than ordinary business experience, upon a question merely of value, should not be interfered with on appeal. *Lemoine v. City of Montreal; Allan v. City of Montreal*, xxiii., 390.

9. *Municipal corporation — Expropriation proceedings — Negligence—Interference with proprietary rights—Abandonment of proceedings—Damages — Servitudes established for public utility—Arts. 406, 407, 1053 C. C.—Eminent domain.*—Where, under authority of a statute, authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault v. Gauthier et al.* (23 Can. S. C. R. 241) referred to. The Chief Justice dissented. *Hollester v. City of Montreal*, xxix., 402.

10. *Expropriation of land — Lands injuriously affected—Damages —Interest—Award.*—If in the construction of a public work land of a private owner is injuriously affected and the compensation therefor is determined by arbitration, interest cannot be allowed by the arbitrator on the amount of damages awarded. *Leak v. City of Toronto*, xxx., 321.

11. *Municipal corporation — Widening streets—Abandonment of proceedings—Réinté-grande—Measure of damages.*—The city commenced expropriation proceedings and forthwith took possession of plaintiff's land,

constructed works thereon and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lands so occupied and used.—*Held*, that the plaintiff had been illegally dispossessed of his property and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of and also to recover compensation for the illegal detention. *Held*, further, that, in the present case, the measure of damages, as representing the rents, issues and profits of the lands usurped by the city, should be the interest upon the value of the property during the period of its illegal detention. (Judgment appealed from, Q. R. 8 Q. B. 534, varied). *City of Montreal v. Hogan*, xxxi., 1.

12. *Municipal corporation — Montreal City charter — Local improvements — Expropriation for widening street — Action for indemnity — 52 Vict. c. 79 (Que.) — 54 Vict. c. 78 (Que.) — 59 Vict. c. 49 (Que.) — Assessment of damages.*—Where the City of Montreal, under the provisions of 52 Vict. c. 79, s. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected and, notwithstanding the subsequent amendment of the statute in December of that year, by 59 Vict. c. 49, s. 17, the city was bound, within a reasonable time, to apply to the court for the appointment of commissioners to fix the amount of the indemnity to be paid, to levy assessments therefor and to pay over the same to the owner, and, having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan v. City of Montreal* (31 Can. S. C. R. 1) distinguished.—The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *Grand Trunk Ry. Co. v. Coupal* (28 Can. S. C. R. 531) followed. *Fairman v. City of Montreal*, xxxi., 210.

13. *Assessment of damages—Reservation of recourse for future damages—Expropriation—Res judicata—Right of action.*—A lessee of premises used as an ice-house recovered indemnity from the city for injuries suffered in consequence of the expropriation of part of the leased premises and, in his statement of claim, had specially reserved the right of further recourse for damages resulting from the expropriation. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice-house during the unexpired term of the lease: *Held*, affirming the judgment appealed from, that the reservation in the first action did not preserve any further right of action in consequence of the expropriation and, therefore, the plaintiff's action was properly dismissed by the courts below, as, in such cases, all damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same cause. *The City of Montreal v. McGee* (30 Can. S. C. R. 582), and *The Chaudière Machine and Foundry Co. v. The Canada Atlantic Ry. Co.* (33 Can. S. C. R. 11) followed. *Anctil v. City of Quebec*, xxxiii., 347.

14. *Powers of Town of Levis — Special charter—Railway aid—Expropriation of right of way—44 & 45 Vict. c. 40, s. 2 (Que.).*

See MUNICIPAL CORPORATION, 105.

15. *Lost record—Old statute—Dedication—Presumption—User.*

See HIGHWAY, 1.

16. *Street railway—Municipal ownership—Notice—Arbitration.*

See MUNICIPAL CORPORATION, 116.

17. *Arbitration — Award by majority—Interference with on appeal.*

See ARBITRATIONS, 55.

18. *Assessments — Local improvements—Future rights—Jurisdiction.*

See APPEAL, 71.

19. *Expropriation — Widening street—Assessment—Excessive valuation.*

See MUNICIPAL CORPORATION, 8.

20. *Local improvement—Rating in proportion to benefit.*

See ASSESSMENT AND TAXES, 53.

3. FOR RAILWAYS, TRAMWAYS, &C.

21. *Land taken for railway purposes — Award—Riparian rights — Obstruction—Accès et sortie—Tort.*—In an award for land expropriated for railway purposes where there is an adequate and sufficient description, with convenient certainty of the land intended to be valued, and of the land actually valued, such award cannot afterwards be set aside on the ground that there is a variation between the description of the land in the notice of expropriation and in the award.—A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *accès et sortie*, and such obstruction without parliamentary authority is an actionable wrong: *Pion v. North Shore Ry. Co.*, (14 App. Cas. 612) followed.—*Taschereau, J.* was of opinion that the award in this case included compensation for the beach lying in front of plaintiff's property, which belongs to the Crown, and, for that reason, should be set aside. *Bigaouette v. North Shore Ry. Co.*, xvii., 363.

22. *Railway — Estimating damages — Prospective capabilities—Unity of possession — Increased advantages—Town plot—Set-off.*—In assessing damages for expropriation regard should be had to the prospective capabilities of the lands arising from situation and character, and in awarding compensation the value to the owner should be considered, not that to the authority making the expropriation.—The unity of the estate should also be considered, and if, by the severance of one of several lots so situated that the possession and control of each gives an enhanced value to them all, the remainder is depreciated in value, such depreciation is substantive ground for compensation.—Advantages to a paper town from being made the terminus of a Government railway, with station-houses and other buildings constructed within its limits, should be taken into account by way of set-off under 50 & 51 Vict. c. 16, s. 31.—

Judgment appealed from (2 Ex. C. R. 149) affirmed. *Paint v. The Queen*, xviii., 718.

23. *Railway expropriation — Award — Additional interest — Confirmation of title — Diligence — The Railway Act, 1888, ss. 126, 170, 172.*—On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited in court under s. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confirmation of title, with a view to the distribution of the money, the company pleaded that the court had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner, who had unsuccessfully appealed to the higher courts for an increased amount. *Held*, reversing the judgment of the court below, that by the terms of s. 172 of the Railway Act it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon. *Held*, further, that assuming the court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title. (*Railway Act*, s. 172). Fournier, J., dissenting. *The Atlantic and North-west Ry. Co. v. Judah*, xxiii., 231.

24. *Railway — Expropriation of land — Title to land — Tenants in common — Propriétaires par indivis — Construction of agreement — Misdescription — Plans and books of reference — Satisfaction of condition as to indemnity — Registry laws — Estoppel — R. S. Q. arts. 5163, 5164 — Art. 1590 C. C.*—In matters of expropriation where the railway company has complied with the directions and conditions of arts. 5163 and 5164, Revised Statutes of Quebec, as to deposit of plans and books of reference, notice and settlement of indemnity with the owners, or with at least one-third of the owners *par indivis*, of lands taken for railway purposes, the title to the lands passes forthwith to the company for the whole of the property by mere operation of the statute, even without the consent of the other owners *par indivis*, and without the necessity of formal conveyance by deed or compliance with the formalities prescribed by the Civil Code as to registration of real rights. *The Quebec, Montmorency and Charlevoix Ry. Co. v. Gibsone; Gibsone v. The Quebec, Montmorency and Charlevoix Ry. Co.*, xxix., 340.

25. *Railways — Construction of statute — Tramway for transportation of materials — Expropriation — 51 Vict. c. 29, s. 114 (D.) — 2 Edw. VII. c. 29 (D.)*—The place where materials are found referred to in the one hundred and fourteenth section of "The Railway Act" means the spot where the stone, gravel, earth, sand or water required for the construction or maintenance of railways are naturally situated and not any other place to which they have been subsequently transported.—*Per Taschereau and Girouard, JJ.* The provisions of the one hundred and fourteenth section of "The Railway Act" confer upon railway companies a servitude consisting merely in the right of passage and do not confer any right to expropriate lands required for laying the tracks of a tramway for the

transportation of materials to be used for the purposes of construction. *Quebec Bridge Co. v. Roy*, xxxii., 572.

26. *Railway — Objection to award — Description of lands — 43 & 44 Vict. c. 43, s. 9 (Que.)*.

See ARBITRATIONS, 42.

27. *Railway lands — Increase of award — Appellate court receiving additional testimony — Appreciation of evidence*.

See APPEAL, 12.

28. *Gravel pit — Estimating compensation — Farm crossings*.

See RAILWAYS, 26.

29. *Severance of land by railway — Farm crossings — Compensation*.

See RAILWAYS, 27.

30. *Land required for railway extension — Deviation from line — Completion of railway — Filing plans — Condition precedent*.

See RAILWAYS, 28.

31. *Prohibition — Railways — Expropriation — Arbitration — Death of arbitrator pending award — 51 Vict. c. 20, ss. 156, 157 — Lapse of time for making award — Construction of statute — Art. 12 C. C. — Appeal — Jurisdiction — 54 & 55 Vict. c. 25, s. 2*.

See ARBITRATIONS, 5.

32. *Construction of railway — Crossing and using highways — Compensation to municipality — Terminus "at or near" point named*.

See RAILWAY, 152.

EXTRADITION.

Appeal — Habeas corpus — Necessity to quash.—By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135, s. 31), "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal. *Held*, that the matter was *coram non judice* and there was no necessity for a motion to quash. *In re Lazier*, xxix., 630.

AND see CRIMINAL LAW.

FACTORS.

Mandate — Agency — Pledge — Notice — Arts. 1739, 1740, 1742, 1975 C. C.

See PARTNERSHIP, 43.

AND see BROKER.

FACTUMS.

See PRACTICE OF SUPREME COURT.

FAITS ET ARTICLES.

Negative averments — Perjury — Evidence.

See CRIMINAL LAW, 4.

AND see INTERROGATORIES.

FALSE ARREST.

See MALICIOUS PROSECUTION.

FALSE BIDDING, RESALE FOR.

Sale by sheriff — Folle enchère — Resale for false bidding—Art. 690 et seq. C. C. P.—Questions of practice — Appeal — Art. 688 C. C. P.—Privileges and hypothecs—Sheriff's deed—Registration of—Absolute nullity—Rectification of slight errors in judgment — Duty of appellate court.

See APPEAL, 394.

AND see SHERIFF.

FAULT.

See NEGLIGENCE.

FEAR.

See DURESS.

FELONY.

See CRIMINAL LAW.

FELLOW-WORKMAN.

See MASTER AND SERVANT—NEGLIGENCE.

FENCES.

1. *Cattle straying on highway — Railway fencing — Protection at watercourses — Culvert—Injury by train—Negligence.*

See RAILWAYS, 45.

2. *Location of railway—Laying out boundaries—Construction of deed—Estoppel by conduct — Riparian rights — Possession — Prescription—Title to land.*

See RAILWAYS, 153.

FERRIES.

1. *License — Construction — Disturbance — Long user — Establishment of limits.]—The Crown granted a license to the Town of Belleville (in 1858), to ferry "between the Town of Belleville to Ameliasburg," Held, a sufficient grant of a right of ferriage to and from the two places named.—Under this license the Town of Belleville leased to the plaintiff granting the franchise "to ferry to and from the Town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side, and a ferry was established within the limits of Belleville on the one side, to a point across the Bay of Quinté, in Ameliasburg, within an extension*

of the east and west limits of Belleville. The defendants established another ferry across another part of the Bay of Quinté, between Ameliasburg and a place in the Township of Sidney, which adjoins Belleville, the termini being on the one side two miles from the western limits of Belleville, and on the Ameliasburg shore about two miles west from the landing place of the plaintiff's ferry. Held, reversing the judgment appealed from (7 Ont. App. R. 341), that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the ferry, and that the defendants' ferry was no infringement of the plaintiffs' right. *Anderson v. Jellett*, ix., 1.

2. *Ferry license—Interference — Tortious breach of contract — Bridges within ferry limits.—R. S. C. c. 97.]—On appeal the Supreme Court affirmed the judgment of the Exchequer Court of Canada (6 Ex. C. R. 414), which held that the granting of leases and other privileges by the Crown of land for the purpose of building and utilizing railway bridges and the extension of railway tracks to connect with railways across the Ottawa River, did not constitute a breach of the contract on the part of the Crown arising out of the grant of a ferry license, including within its limits the localities in question, between the City of Ottawa and the City of Hull, and that the construction of the bridges, with approaches and track extensions, did not constitute an interference with the ferry rights of the suppliant which would entitle him to recover damages against the Crown. *Brigham v. The Queen*, xxx., 620.*

3. *Municipal tax—Legislative powers—39 Vict. c. 52 (Que.)—Navigation — Montreal harbour — Jurisdiction of commissioners — Double tax.*

See CONSTITUTIONAL LAW, 53.

4. *Bridge—Franchise — Future rights — Interference—Damages.*

See TOLLS, 1.

5. *Constitutional law — Municipal corporation — Powers of Legislature — License — Monopoly — Highways and ferries — Navigable streams — By-laws and resolutions — Intermunicipal ferry — Tolls — Disturbance of licensee — North-West Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act (1867) s. 92, ss. 8, 10 and 16—Rev. Ord. N. W. Ter. (1888) c. 28—Ord. N. W. T. No. 7 of 1891-92, s. 4—Companies, club associations and partnerships.*

See CONSTITUTIONAL LAW, 27.

FIDEI-COMMISSAIRE.

See TRUSTS.

FINDINGS OF FACT.

1. *Reversal on appeal—Manner of hearing evidence in court below—Appreciation of evidence—Interference by appellate court.]—Where the trial judge has seen and heard the witnesses and there is evidence to support his findings they will not be interfered with upon appeal. *Queens Election Case*, vii., 247; *Russell v. Lafrancois*, viii., 335; *Montcalm Election Case*, ix., 93; *Megantic Election**

Case, ix., 279; *Parker v. Montreal City Pas. Ry. Co.*, Cass. Dig. (2 ed.) 731; *Cassels v. Burns*, xiv., 256; *Kyle v. The Canada Co.*, xv., 188; *Hislop v. Town of McGillivray*, xv., 188; *The Queen v. Charland*, xvi., 721; *Schwervenski v. Vineberg*, xix., 243; *Bickford v. Hawkins*, xix., 362; *Bowker v. Laumeister*, xx., 175; *SS. Santanderino v. Vanvert*, xxiii., 145; *Headford v. McClary Mfg. Co.*, xxiv., 291; *North British and Mercantile Ins. Co. v. Tourville*, xxv., 177; *Lake Erie & D. R. Ry. Co. v. Sales*, xxvi., 663; *Montreal Gas Co. v. St. Laurent*, xxvi., 176; *City of St. Henri v. St. Laurent*, xxvi., 176; *Malzard v. Hart*, xxvii., 510; *Demers v. Montreal Steam Laundry Co.*, xxvii., 537; *Lefeunteum v. Beaudoin*, xxviii., 89; *Paradis v. Municipality of Limoilou*, xxx., 405; *Village of Granby v. Ménard*, xxxi., 14; *Dominion Cartridge Co. v. McArthur*, xxxi., 392; *Dominion Coal Co. v. SS. Lake Ontario*, xxxii., 507; *D'Avignon v. Jones*, xxxii., 650; *McKelvey v. Le Roi Mining Co.*, xxxii., 664.

AND see APPEAL, 202-273.

2. *Jury trial — Questions of fact*—*Verdict*.] — When questions of fact have been properly left to a jury their findings thereon must be accepted by a court of appeal. *Balch & Peppard v. Kombough*, 12th June, 1900.

3. *Verdict of jury — Duress*.

See JURY. 46.

FIRE INSURANCE.

See INSURANCE. FIRE.

FISHERIES.

1. *Canadian waters—Three-mile limit — Territorial jurisdiction—Bay of Chaleurs — The Fisheries Act*, 31 Vict. c. 60 (D.)—14 & 15 Vict. c. 63 (Imp.)—*Seizure—Fishery officer — "On view."*—Under the statute 14 & 15 Vict. c. 63 (Imp.) defining the boundary between Canada and New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of Quebec and New Brunswick, within the Dominion of Canada and subject to The Fisheries Act, 31 Vict. c. 60 (D.) and, therefore, drifting for salmon in the Bay of Chaleurs, although more than three miles from either provincial shore, is a drifting in Canadian waters and within the prohibition of the last mentioned Act and the regulations made in virtue thereof.—2. The term "on view" in s. 4 of s. 16 of the Fisheries Act. is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act. Judgment of the Supreme Court of New Brunswick (3 P. & B. 252) reversed. *Mowatt v. McFee*, v., 66.

2. *Regulation and protection*—31 Vict. c. 60 (D.)—B. N. A. Act, 1867, ss. 91, 92, 109.—*License to fish—Riparian proprietors—Ungranted lands—Right of fishing—Navigable stream.*]—On January 1st, 1874, the Minister of Marine and Fisheries under s. 2. c. 60. 31 Vict., executed to the suppliant a lease of fishery, whereby Her Majesty leased for 9 s. c. D.—20

years a portion of the South-west Miramichi River, N. B., for fly-fishing for salmon therein, the *locus in quo* being thus described in the special case:—"Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places, on the bars, very shallow."—Some persons who had conveyances of a portion of the river, and claimed the exclusive right of fishing in such portion, interrupted suppliant in the enjoyment of his fishing under the lease, and put him to expenses in endeavouring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease.—The Supreme Court of New Brunswick decided adversely to his exclusive right to fish in virtue of the lease, and he filed a petition of right, and claimed compensation for loss of fishing privileges and expenses incurred. The Exchequer Court *Held, inter alia*, that an exclusive right of fishing existed in the persons who held the conveyances, and that the minister consequently had no power to grant a lease or license under s. 2 of the Fisheries Act of the portion of the river in question, and in answer to the question, "Where the lands (above tide water) through which the said river passes are ungranted, could the Minister of M. and F. lawfully issue a lease of that portion of the river?" *Held*, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river.—On an appeal on the main question, whether or not an exclusive right of fishing did so exist; *Held*, affirming the judgment of the Exchequer Court, 1. That the general power of regulating and protecting the fisheries under the B. N. A. Act, 1867, s. 91, is in the Parliament of Canada, but that the license granted by the Minister of the *locus in quo* was void, because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.—2. That although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down, and a right of passage up and down, wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing nor with the right of the owners of property opposite their respective lands *ad medium filum aquæ*.—3. That the rights of fishing in a river, such as in that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made, there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such license.—*Per Ritchie, C.J.*, and Strong, Fournier and Henry, J.J., reversing the judgment of the Exchequer Court on the question submitted, that the ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license

by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal. *The Queen v. Robertson*, vi., 52.

3. *Riparian ownership—Fishery officer—Trespass*—31 Vict. c. 60, ss. 2, 19 (D.)—*Notice—Exclusive damages—New trial*.—Three actions for trespass and assault were brought by riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V., for forcibly seizing and taking away their fishing-rods and lines, while they were fly-fishing for salmon in front of their respective lots. V. was a fishery officer, under 31 Vict. c. 60 (D.) and justified seizure on the ground that plaintiffs were fishing without licenses in violation of an order-in-council of 11th June, 1879, in pursuance of s. 19 of the Act, prohibiting "fishing for salmon, except under licenses from the Department of Marine and Fisheries." V. was armed and in company with a sufficient number to have enforced the seizure if resistance had been made. There was no actual injury, but damages were recovered for \$1,500, \$1,200 and \$1,000 respectively by the plaintiffs. (See 22 N. B. Rep. 639). *Held*, that ss. 2 and 19 of the Fisheries Act, and the order-in-council did not authorize V., as inspector of fisheries, to interfere with the exclusive rights of the riparian proprietors to fish at the *locus in quo*; but that the damages were in all the cases excessive, and therefore new trials should be granted. *Held*, also, Gwynne, J., dissenting, that when V. committed the trespasses complained of, he was acting as a Dominion officer, under the instructions of the Department of Marine and Fisheries, and was not entitled to notice of action under C. S. N. B. c. 89, s. 1. or c. 90, s. 8. *Venning v. Steadman, Hanson and Spurr*, ix., 206.

4. *Maritime law—Foreign vessel within British waters—Fishing within three mile limit—License—Forfeiture—R. S. C. c. 94, s. 3—Evidence—Onus probandi*.—Section 3 of the "Act respecting Fishing by Foreign Vessels" (R. S. C. c. 94), prohibits fishing by foreign vessels in British waters within three marine miles of the coasts of Canada, without a license from the Governor-in-Council, on pain of forfeiture. In an action *in rem* in the Nova Scotia Admiralty District, the local judge (McDonald, C.J.), of the Exchequer Court of Canada, Admiralty Side, adjudged the condemnation and forfeiture of the vessel in question, her furniture and cargo, with costs (4 Ex. C. R. 419), and held, that where the Crown alleged in the petition in an action *in rem* for condemnation and forfeiture, that a certain vessel had violated the provisions of the above mentioned Act by fishing in prohibited waters without the necessary license, but offered no evidence in support of such allegation, the burden of proving the license to fish was upon the defendant. On appeal to the Supreme Court of Canada, the decision of the Exchequer Court was affirmed and the appeal dismissed with costs. *The "Henry L. Phillips" v. The Queen*, 18th February, 1895; xxv., 691.

5. *Canadian waters—Property in beds—Public harbours—Erections in navigable waters—Interference with navigation—Right of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. arts. 1375 to 1378*.—Riparian proprietors be-

fore confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown. *Robertson v. The Queen* (6 Can. S. C. R. 52) followed.—The rule that riparian proprietors own *ad medium flum aque* does not apply to the great lakes or navigable rivers. — Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide.—Where the provisions of Magna Charta are not in force, as in the Province of Quebec, the Crown, in right of the province, may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in other public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Gwynne, J., dissenting. — *Per Strong, C.J., and King and Girouard, J.J.* The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various Provincial Legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation.—The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters, the beds and banks of which are assigned to the provinces under the British North America Act. The legislative authority of Parliament under s. 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal conferring qualification, and gave no exclusive right to fish in a particular locality.—Section 4 and other portions of c. 95, Revised Statutes of Canada, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne, J., *contra*.—*Per Gwynne, J.* Provincial Legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, s. 91, item 12, including the grant of leases or licenses for exclusive fishing.—*Per Strong, C.J., Taschereau, King and Girouard, J.J.* R. S. O. c. 24, s. 47, and ss. 5 to 13 inclusive of the Ontario Act of 1892, are *intra vires*, but may be superseded by Dominion legislation.—R. S. Q. arts. 1375 to 1378 inclusive, are *intra vires*.—*Per Gwynne, J.* R. S. O. c. 24, s. 47 is *ultra vires* so far as it assumes to authorize the land covered with water within public harbours.—The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government, for protection against interference with navigation. The Act of 1892, and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not, they are *ultra vires*. *In re Jurisdiction over Provincial Fisheries*, xxvi., 444.

Varied on appeal by the Privy Council, [1898] A. C. 700.

6. *Constitutional law—Convention of 1818—Construction of treaty—Construction of statute—Three mile limit—Foreign fishing vessels—"Fishing"—59 Geo. III., c. 38 (Imp.)—R. S. C. c. 94 & 95*.—Where fish had been enclosed in a seine more than three

marine miles from the coast of Nova Scotia, and the seine pursued up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew then being engaged in the act of baling the fish out of the seine:—*Held*, Strong, C.J., and Gwynne, J., dissenting, affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America, and of the Imperial Act, 59 Geo. III., c. 38, and the Revised Statutes of Canada, c. 94, and consequently liable with her cargo, tackle, rigging, apparel, furniture, and stores to be condemned and forfeited. *Ship "Frederick Gerring, Jr." v. The Queen*, xxvii., 271.

FIXTURES.

1. *Mortgage—Mining machinery—Registration—Interpretation of terms—Bill of sale—Personal chattels—Delivery.*

See MORTGAGE, 43.

2. *Property, real and personal — Immoveables by destination — Moveables incorporated with the freehold — Severance from realty — Contract resolatory condition — Conditional sale — Arts. 379, 2017, 2083, 2085, 2089 C. C.—Hypothecary creditor — Unpaid vendor.*

See CONTRACT, 66.

AND see IMMOVEABLE PROPERTY.

FLOATABLE WATERS.

See FISHERIES — RIVERS AND STREAMS — WATERCOURSES.

FOLLE ENCHERE.

Sheriff's sale—Re-sale against co-adjudicataires—Petition by adjudicataires participating in default—Security for amount of adjudication.

See SALE, 67.

AND see FALSE BIDDING—SHERIFF.

FORCE.

See DURESS.

FORECLOSURE.

1. *Mortgage by testator—Decree for sale—Conveyance by purchaser.*

See TITLE TO LAND, 56.

2. *Devise of mortgaged lands—Release by mortgagee—Action to eject purchaser—Statutory title.*

See TITLE TO LANDS, 56.

FORFEITURE.

Mines and minerals—Lease of mining areas—Rental agreement—Payment of rent—Con-

struction of statute—Assignment of lease—Insolvency.

See LEASE, 7, 19.

AND see ESCHEAT.

FOREIGN CORPORATIONS.

*Constitutional law—Winding-up Act—R. S. C. c. 129, s. 3.]—Section 3 of "The Winding-up Act" (R. S. C. c. 129) which provides that the Act applies to incorporated trading companies doing business in Canada wheresoever incorporated is *intra vires* of the Parliament of Canada. Judgment appealed from (16 Q. L. R. 79) affirmed. *Allen v. Hanson; In re Scottish Canadian Asbestos Co.*, xviii., 667.*

AND see COMITY—COMPANY LAW.

FOREIGN JUDGMENT.

*Bar to action — Estoppel—Res judicata—Judgment obtained after action begun—R. S. N. S. (5 ser.) c. 104, s. 12, s.s. 7; orders 24 and 70; rule 2; order 35, rule 38.]—A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.—Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393) distinguished. — The combined effect of orders 24 and 70, rule 2, and s. 12, s.s. 7 of c. 104, R. S. N. S. (5 ser.), will permit this to be done in Nova Scotia.—The provision of R. S. N. S. (5 ser.), c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not, in an action on such judgment in Nova Scotia, be conclusive of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against the plaintiff. *Law v. Hansen*, xxv., 69.*

FOREIGN LAW.

*Presumption — Forum having jurisdiction *ex contractu*.*

See CONTRACT, 165.

AND see COMITY.

FORESHORE.

44 Vict. c. 1, s. 18 — *Powers of Canadian Pacific Railway Company to take and use foreshore* — 49 Vict. c. 32 (B.C.) — *City of Vancouver — Right to extend streets to deep water—Crossing of railway—Jus publicum—Implied extinction by statute—Injunction.* — By 44 Vict. c. 1, s. 18, the Canadian Pacific Railway Company "have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of

the Minister of Railways." By 50 & 51 Vict. c. 56, s. 5, the location of the company's line of railway between Port Moody and the City of Westminster, including the foreclosure of Burrard Inlet at the foot of Gore Avenue, Vancouver City, was ratified and confirmed. The Act of Incorporation of the City of Vancouver, 49 Vict. c. 82 s. 213, (B.C.), vests in the city all streets, highways &c., and in 1892 the city began the construction of works extending from the foot of Gore Avenue, with the avowed object to cross the railroad track at a level, and obtain access to the harbour at deep water.—On an application by the railway company for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway:—*Held*, affirming the judgment of the court below, that as the foreshore forms part of the land required by the railway company, as shewn on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore Avenue is subordinate to the rights given to the railway company by the statute, 44 Vict. c. 1, s. 18 (a), on the said foreshore, and therefore the injunction was properly granted. *City of Vancouver v. Canadian Pacific Ry. Co.*, xliii., 1.

FORGERY.

Fraud—Breach of trust—Ratification—Estoppel.

See **BILLS AND NOTES**, 19.

And see **CRIMINAL LAW**.

FRANCHISE.

Controverted election—Preliminary objections—Status of petitioner—Dominion franchise—"Quebec Elections Act"—Construction of statute—Right to vote.

See **ELECTION LAW**, 98.

FRAUD.

1. *Artifice to secure acceptance of insolvent succession—Acts of administration—Conservatory acts—Notary—Arts. 646, 650 C. C.—[Illiteracy].—A., who had a claim against an insolvent estate, purchased a right of redemption which the insolvent had at the time of his death and in order that his children might, by assuming to act as heirs, be deemed to have accepted the insolvent succession he caused to be prepared by a notary a deed of assignment of this right of redemption to B. *et al.*, who, a few days after the death of their father, had been induced for a sum of \$50 to consent to redeem. The notary prepared the deed without the knowledge of B. *et al.*, but returned it to A., not wishing to receive the deed because he believed that in signing it B. *et al.* would make themselves heirs, and he believed that if they knew that in signing the deed they accepted the succession and responsibility for the debts, they would not sign. Another notary residing at a distance was sent for by A., to whom he gave the deed as prepared, and the notary then went to the residence of B. *et al.*, read the deed to the parties, and without any explanation whatever passed and executed it. On being informed of the legal effect of their signatures,*

B. *et al.* formally renounced the succession. There was evidence that B. *et al.* had done some conservatory acts and acts of administration for their mother, but it was not proved that in any of these transactions they had taken the quality of heirs. *Held*, affirming the judgment appealed from (3 Dor. Q. B. 123), that when an acceptance of an insolvent succession is the result of artifices practised by an interested party, it is null and without effect; that in this case, as A. had obtained the signatures to the deed in question by deceit and artifice, the defendants did not thereby become burthened with the debts of their insolvent father. *Held*, also, that it is the duty of a notary when executing a deed to explain to an illiterate grantor the legal and equitable obligations imposed by the deed, and consequent on its execution. (Henry, J., dissented.) *Ayotte v. Boucher*, ix., 460.

2. *Rescission of contract—Title to land—Evidence of deceit.*—A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit. *Bell v. Macklin*, xv., 576.

3. *Preferences—Badge of fraud—Authority.*—In an assignment for benefit of creditors authority to the assignee not only to prefer parties to accommodation paper but also to pay all "costs, charges, and expenses to arise in consequence" of such paper is a badge of fraud. *Kirk v. Chisholm*, xxvi., 111.

4. *Donation—Insolvency—Revocation—Arts. 803, 1034 C. C.*

See **DONATION**, 1.

5. *Prospectus—Misrepresentation—Concealment—Promotion of joint stock company—Bonâ fide statements—Subscriptions for shares—Rescission—Waiver.*

See **COMPANY LAW**, 11.

6. *Agreement to give hire receipt—including goods subsequently acquired.*

See **CHATTEL MORTGAGE**, 17.

7. *Promissory note made in fraud of partners—Notice to indorsee—Inquiry.*

See **PARTNERSHIP**, 36.

8. *Award—Concealment of evidence—Reconsideration—Reference back to arbitrators.*

See **ARBITRATIONS**, 51.

9. *Ratification—Breach of trust—Forgery.*

See **BILLS AND NOTES**, 19.

10. *Removal of executrix—Questionable transaction.*

See **EXECUTORS AND ADMINISTRATORS**, 6.

11. *Simulated hypothec—Scheme to obtain credit—Inadequate security.*

See **SALE**, 32.

12. *Misrepresentation—Sale of land—Rescission of deed—Recovery of price.*

See **SALE**, 75.

13. *Misrepresentation—Executed contract—Rescission—Evidence.*

See **CONTRACT**, 119.

14. *Requête civile* — Nullity — Bond to sheriff—Opposition—Revocation of judgment.
See SHERIFF, 10.

15. *Partnership* — Simulated dissolution—*Fraud* — Husband and wife — Benefit conferred during marriage.
See PARTNERSHIP, 39.

16. *Sale of goods by insolvent*—*Bona fides* —*Estoppel*.
See INSOLVENCY, 22.

17. *Fraudulent statement* — *Proof of fraud* —*Presumption*—*Assignment of policy*—*Fraud by assignor*—*Reversal on question of fact*.
See INSURANCE, FIRE, 67.

18. *Trustees and administrators* — *Fraudulent conversion*—*Past due bonds*—*Negotiable security* — *Commercial paper* — *Debentures transferable by delivery*—*Equity of previous holders* — *Estoppel* — *Brokers and factors*—*Pledge*—*Implied notice*—*Innocent holders for value*—*Principal and agent*.
See PLEDGE, 7.

19. *Debtor and creditor*—*Composition and discharge*—*Acquiescence*—*New agreement of terms of settlement*—*Waiver of time clause* —*Principal and agent*—*Deed of discharge*—*Notice of withdrawal from agreement* — *Fraudulent preferences*.
See DEBTOR AND CREDITOR, 6.

20. *Conveyance of land in name of trustee* —*Debtor and creditor* — *Parties in pari delicto*.
See TRUSTS, 20.

21. *Misrepresentations* — *Artifice* — *Consideration of contract*—*Rescission*—*Laches*.
See VENDOR AND PURCHASER, 26.

22. *Bills and notes* — *Conditional indorsement*—*Principal and agent* — *Knowledge by agent*—*Constructive notice* — *Deceit by bank manager*.
See BILLS AND NOTES, 26.

23. *Infringement of trade-mark* — *Use of corporate name*—*Fraud and deceit*—*Evidence*.
See TRADE-MARKS, 6.

FRAUDULENT CONVEYANCES.

1. *Insolvency* — *Assignment for benefit of creditors*—*R. S. O. (1887) c. 124, s. 2*—*Preference*—*Intent* — *Pressure*—*Criminal liability*.]—*R. S. O. (1887) c. 124, s. 2* makes void any conveyance of property by a person in insolvent circumstances made "with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect." *Held*, affirming the judgment appealed from (16 Ont. App. R. 323), (Fournier and Patterson, JJ., dissenting), that the words "or which has such effect" in this section apply only to the case of "giving any one or more of (his creditors) a preference over his other creditors or over any one or more of them."—Further, that the preference provided against in the statute is a voluntary preference and a conveyance obtained by pressure from the grantee would not be within its terms.—*W.* having become insolvent, and wishing to secure of an estate of which he was an executor

monies which he had used for his own purposes gave his co-executors a mortgage on his property for the purpose, and proceedings were taken by a creditor to set aside this mortgage under the above section. *Held*, Fournier and Patterson, JJ., dissenting, that the mortgage was not void under the statute.—*Per Strong, Taschereau and Gwynne, JJ.*, that there was no preference under the statute as the persons for whose benefit the security was given were not creditors of the grantor, but they stood in the relation of trustee and *cestui que trust*.—*Per Strong and Taschereau, JJ.*, that the grantor being criminally responsible for misappropriating the money of the estate of which he was executor, the fear of penal consequences was sufficient pressure on him to take from the mortgage the character of a voluntary preference. *Molsons Bank v. Halter*, xviii., 88.
See No. 2, *infra*.

2. *Debtor and creditor*—*Insolvency*—*Preference* — *Pressure* — 49 Vict. c. 45, s. 2 (Man.)] — By 49 Vict. c. 45, s. 2 (Man.), "Every gift, conveyance, &c., of goods, chattels or effects . . . made by a person at a time when he is in insolvent circumstances . . . with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void." *Held*, reversing the judgment appealed from (6 M. L. R. 496), Patterson, J., dissenting, that the word "preference" in the Act imports a voluntary preference, and does not apply to a case where the transfer has been induced by pressure; and further, that a mere demand by the creditor without even a threat of legal proceedings, is sufficient pressure to rebut presumption of preference.—The words "or which has such effect" in the Act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute.—The preference mentioned in the Act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank v. Halter* (18 Can. S. C. R. 88) approved and followed.—*Held*, *per Patterson, J.*, that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute whether or not it is the voluntary act of the debtor or given as the result of pressure. *Stephens v. McArthur*, xix., 446.

3. *Composition*—*Loan to effect payment*—*Default*—*Secret agreement*—*Mortgage*—*Limitation of action* — *Arts. 1082, 1039 & 1040, C. C.*]—On 20th December, 1883, the creditors of L. resolved to accept a composition payable by his promissory notes at 4, 8, and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), which did not sign the composition in \$14,000. *B. et al.* the appellants, were at that time accommodation indorsers for \$7,415 of that amount, but held as security a mortgage dated 5th September, 1881, on L.'s real estate. The bank having agreed to accept \$8,000 cash for its claim *B. et al.* on 8th January, 1884, advanced \$3,000 to L. and took his promissory notes and a new mortgage registered on 13th January for the amount, having discharged and released on the same day the previous mortgage of 5th September, 1881. This new transaction was not made known to *D. et al.*, the

respondents, who on 14th January, 1884, advanced \$3,000 to L. to enable him to pay off the Exchange Bank and for which they accepted L.'s promissory notes. L., having failed to pay the second instalment of his notes, *D. et al.*, who were not original parties to the deed of composition, brought an action to have the transaction between L. and appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors. *Held*, reversing the Court of Queen's Bench, Ritchie, C.J., and Taschereau, J., dissenting, that the agreement by the debtor with appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition.—*Per Fournier, J.* The mortgage having been registered on 13th January, 1884, the respondent's right of action to set aside the mortgage was prescribed by one year from that date. *Brossard v. Dupras*, xix., 531.

4. *Insolvency—Debtor and creditor—Simulated sale.*—Action instituted in 1883, by L. to annul a deed of sale made by G., one of the defendants to R., the other defendant, of all real estate belonging to G., in the City of Quebec, for \$54,000, on 23rd February, 1878. G. had been for several years previous to the action carrying on business at Quebec in partnership with the uncle and tutor of L. who lent money belonging to his ward to the firm of G. L. & Co., of which he was a member, and credit in the books of that firm was given to L. for the loan.—In April, 1883, G. L. & Co. became insolvent whilst owing L. \$26,759.75, for which he recovered judgment. L. contended that in February, 1878, when the sale by G. to R. was made, the firm was hopelessly insolvent, that R. was aware of this insolvency and that the sale to him, though nominally for \$54,000 in cash, was in reality collusively made for the purpose of covering the debt of the firm to R. Appellant pleaded that the firm was represented to him at the time of the sale to be solvent, that he had reason to believe that this statement was true, that he *bonâ fide* paid the price in notes, which he afterwards took up, and that the whole transaction was in good faith and caused no loss to the creditors of G. or to the firm. After a long and contradictory *enquête*, the action was, on 7th June, 1886, maintained and the deed set aside as a collusive transaction for the purpose of giving a preference to a creditor. The judgment was affirmed by the Queen's Bench, Church, J., dissenting.—On appeal, the Supreme Court of Canada (Ritchie, C.J., dissenting), took the view of the evidence adopted by Church, J., in the Queen's Bench, that there was not sufficient evidence to establish that the sale was simulated, nor that it was intended illegally and fraudulently to give R. an advantage over the other creditors of G. L. & Co., nor that R. knew on 23rd February, 1878, of the insolvency of the firm; and the appeal was allowed and the action dismissed with costs. *Ross v. Laird*, Cass. Dig. (2 ed.) 351.

5. *Estoppel — Conveyance by married woman—Agreement—Recital—Bona fides.*—B., a married woman, in order to carry out an agreement between her husband and his creditors consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on it and of indemnity against her personal liability on a mortgage against said farm. The convey-

ance, agreement and bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels but giving the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor. *Held*, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife, and that the Court of Appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage. *Boulton v. Boulton*, xxviii., 592.

6. *Voluntary conveyance of land—13 Eliz. c. 5 (Imp.) — Solvent vendor — Action by mortgagee.*—A voluntary conveyance of land is void under 13 Eliz. c. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made if it results in denuding him of all his property and so rendering him insolvent thereafter.—A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security.—Judgment appealed from (7 B. C. Rep. 189) reversed, Gwynne, J., dissenting. *Sun Life Ass. Co. v. Elliott*, xxxi., 91.

7. *Annulling deed — Action by assignee—Pleading.*

See ASSIGNMENTS, 2.

8. *Purchase by fiduciary agent — Conflict with public use—Maintenance.*

See RIDEAU CANAL LANDS, 2.

9. *Registration of assignment — Defective jurat—Evidence.*

See BILL OF SALE, 1.

10. *Insolvent assigning property — Charge to jury—Misdirection.*

See NEW TRIAL, 74.

11. *Banks and banking — Advances on security — Chattel mortgage—Insolvent debtor — Bank Act, s. 74—Conversion.*

See BANKS AND BANKING, 21.

FRAUDULENT PREFERENCE.

1. *Judgment in default of appearance—Facilitating recovery—R. S. O. (1877) c. 118—Premature execution—Irregularity—Nullity — Ontario Judicature Act, 1883.*—On the 28th March, 1882, a writ was issued by C. against M. for \$32,155.33, indorsed, in accordance with the Judicature Act, with particulars of claim on account stated and settled between C. and M., such amount being arrived at by allowing to M. a discount of 5 per cent. for an unexpired balance of the term of credit on purchase of goods. No appearance was entered, and on the 8th April judgment was recovered for the amount, and writs of execution issued. The appellants, creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day

writs of execution were issued.—The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to C., the highest bidder.—On an interpleader issue to try whether or not appellants' execution was entitled to priority over that of C., and whether or not C.'s judgment was void for fraud, and as being a preference; and whether or not C.'s executions were void as against appellants, on account of having issued before the expiration of eight days from the last day for appearance, Armour, J., directed judgment to be entered in favour of the appellants. That judgment was reversed by the Queen's Bench Division, whose judgment was affirmed by the Court of Appeal for Ontario (10 Ont. App. R. 92). *Held*, affirming the judgment appealed from, that what the debtor did in this case did not constitute a fraudulent preference prohibited by R. S. O. c. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity. *Macdonald v. Crombie*, xi., 107.

2. *Security for debt — Simulation—Insolvent company—Chattel mortgage—Preference over other creditors—R. S. O. (1877) c. 118—Bona fides — Pressure.*—The Hamilton Knitting Co. being indebted to L., and believing that their charter did not permit them to give a mortgage to secure an overdue debt, gave a chattel mortgage in consideration of an advance by L. of more than the debt, the actual amount being returned to the mortgagees, and the balance of the amount advanced on the mortgage, after paying the debt, was put into the business of the company.—At the time this was done the company believed that by getting time from these creditors they would be able to carry on their business and avoid failure. This hope was not realized, however, and they shortly after stopped payment, and in consequence, certain of their creditors, the respondents, obtained judgments and issued executions. The property secured by the chattel mortgage was seized under these executions, and an interpleader issue brought to test the title.—The chancellor gave judgment for the execution creditors, holding the mortgage void under the statute relating to fraudulent preferences, R. S. O. (1877) c. 118, and the Court of Appeal affirmed this judgment by an equal division. *Held*, reversing the judgment appealed from (12 Ont. App. R. 137), that as the company *bona fide* believed that by getting an extension of time from L. they would be able to continue their business, it could not have been given with a view of preferring the appellants and of defrauding the other creditors, and therefore the appellants were entitled to judgment. *Long v. Hancock*, xii., 532.

3. *Chattel mortgage — Security for debt—Insolvency — Suit by creditors to set aside mortgage — Parties plaintiffs—Trust deed not attacked.*—Where a trader who was in insolvent circumstances had given a chattel mortgage on his stock-in-trade to secure a debt, and shortly after executed an assignment in trust for the benefit of his creditors.—*Held*, affirming the judgment appealed from (12 Ont. App. R. 593), that the mortgage was void under the statute, and that certain simple contract creditors of such trader could maintain a suit, on behalf of themselves and all other creditors except the mortgagees, to set aside the mortgage without including the mortgagees as plaintiffs, and without attack-

ing the assignment in trust. *McCall v. McDonald*, xiii., 247.

4. *Capias — Petition for discharge—Final judgment—Judicial proceeding — Appeal, R. S. C. c. 135, s. 28—Arts. 819-821 C. C. P.—Secretion — Art. 798 C. C. P. — Promissory note discounted — Arts. 1036, 1953 C. C. — Remedy by indorser.*—A writ of *capias* having been issued against M. under art. 798 C. C. P. he petitioned to be discharged under art. 819 C. C. P., and issue having been joined on the pleadings under art. 820 C. C. P., the petition was dismissed by the Superior Court, that judgment being affirmed by the Queen's Bench (15 R. L. 34). *Held*, that the judgment was a final judgment in a judicial proceeding within the meaning of R. S. C. c. 135, s. 28, and therefore appealable.—Taschereau, J., dissenting. *Stanton v. Canada Atlantic Ry. Co.* (Cass. Dig. 2 ed. 37) reviewed. On the merits it was:—*Held*, per Ritchie, C. J., Fournier and Taschereau, JJ., that a fraudulent preference to one or more creditors is a secretion within the meaning of art. 798 C. C. P. Also, that an indorser of a note discounted by a bank has the right under art. 1953, C. C. to avail himself of the remedy provided by art. 798, C. C. P. if the maker fraudulently disposes of his property. Strong, Henry, and Gwynne, JJ., *contra*.—The court being equally divided the appeal stood dismissed without costs. *Mackinnon v. Keroack*, xv., 111.

5. *Insolvent debtor—Assignment for benefit of creditors—Book debts—R. S. O. 1877, c. 113 — 48 Vict. c. 26, s. 2 (O.)*—N. owed defendants money which he was unable to pay in full, and assigned to them all his book debts and accounts, providing that the book debts should be placed in the hands of financial agents for collection, who should account to the defendants for the proceeds less the commission, and whatever remained in defendants' hands after their debts were paid should be paid over to N. Plaintiffs, judgment creditors of N., brought action to set aside this assignment as having the effect of hindering, delaying and defeating them in the recovery of their claim and giving defendants a preference over other creditors, and so being void under R. S. O. 1877, c. 113 as amended by 48 Vict. c. 26, s. 2 (Ont.). *Held*, affirming the judgment appealed from (15 Ont. App. R. 324), Gwynne, J., dissenting, that N. being unable to meet the demands of his creditors for payment must be deemed insolvent within the meaning of the said Act; that book debts are a species of property included in the provisions of 48 Vict. c. 26, s. 2 (Ont.), and that the assignment by N. to the defendants was void under that section. *Klæpfer v. Warnock*, xviii., 701.

6. *Debtor and creditor — Insolvency — Mortgage — Pressure — R. S. O. (1887) c. 124, s. 2.*—A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors if given as a result of pressure and of a *bona fide* debt and if the mortgagee is not aware of the debtor being in insolvent circumstances. *Molsons Bank v. Halter* (18 Can. S. C. R. 88) and *Stephens v. McArthur* (19 Can. S. C. R. 446) followed. Judgment appealed from (18 Ont. App. R. 159) affirmed. *Gibbons v. McDonald*, xx., 587.

7. *Mortgage by insolvent — Bonâ fide advance—Consideration partly bad—Effect on whole instrument—R. S. O. 1887, c. 124, s. 2—Statute of Eliz.*—R. being in insolvent circumstances applied to P., his uncle, for a loan of \$5,000, which he received, P. mortgaging his house for part of the amount and giving his note for the balance which R. had discounted. The security for this loan was a chattel mortgage on R.'s stock of goods in his store. The money was applied by R. chiefly in taking up notes made by him and indorsed by his relatives. P. knew when he advanced the loan that R. was insolvent, but it was not shewn that he knew how the money was to be applied.—R. gave another chattel mortgage to M. for another loan of money applied in the same way, but it was shewn that part of the loan was R.'s own money though alleged to have been advanced by his wife.—An action was brought on behalf of R.'s creditors to have these mortgages set aside as being void under R. S. O. (1887) c. 124, s. 2, and both were set aside. The Court of Appeal reversed the decision setting aside the mortgage to P., and affirmed that setting aside the mortgage to M., holding as to the latter, following *Commercial Bank v. Wilson* (3 E. & A. Rep. 257), that the mortgage being void in part for illegal consideration the whole instrument was void. *Held*, affirming *Campbell v. Patterson* (18 Ont. App. R. 646, *sub nom.* *Campbell v. Roche*), that the mortgage to P. being given for an actual *bonâ fide* advance the provisions of R. S. O. (1887) c. 124, s. 2, did not apply to it especially as P. was not shewn to have knowledge of R.'s motive in procuring the loan. *Held*, also, overruling *Mader v. McKinnon* (18 Ont. App. R. 646, *sub nom.* *McKinnon v. Roche*), in so far as *Commercial Bank v. Wilson* was followed, that that case was decided under the Statute of Eliz. and is not now law under the Ontario statute, and a mortgage may be set aside as to part and maintained as to the remainder, but affirming the judgment of the Court of Appeal on the ground that the evidence shewed the whole of the consideration for M.'s mortgage to be illegal and bad. Appeals dismissed with costs. *Campbell v. Patterson; Mader v. McKinnon*, Cass. Dig. (2 ed.) 122.

8. *Sheriff — Trespass — Sale of goods by insolvent — Bona fides — Judgment of inferior tribunal — Estoppel — Bar to action — Res judicata — Pleading.*—K. was a trader, and in insolvent circumstances when he sold the whole of his stock-in-trade to D. At the time of this sale D. was aware that two of D.'s creditors had recovered judgments against him. The sheriff afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court, and the judgment was affirmed by the Supreme Court of British Columbia *en banc*.—In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict, which was, however, set aside by the court *en banc*, a majority of the judges holding that the County Court judgment was a complete bar to the action.—On appeal to the Supreme Court of Canada: *Held*, reversing

the judgment of the Supreme Court of British Columbia, that as the evidence shewed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. *Taschereau, J.*, dissented. *Davies v. McMillan*, 1st May, 1893. *Appeal to Privy Council dismissed from - pro.*

9. *Assignment for benefit of creditors — Preferences — R. S. N. S. c. 92, ss. 4, 5, 10 — Chattel mortgage — Statute of Eliz.*—An assignment is void under the Statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on the claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he previously had, though no one of these provisions taken by itself would have such effect.—A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee unless there be gross negligence or fraud on his part" will also avoid the assignment under the Statute of Elizabeth. *Kirk v. Chisholm*, xxvi., 111.

10. *Insolvency — Pressure — Assignment of expected profits—Statute of Elizabeth—Assets exigible in execution.*—The appeal was from the judgment of the Court of Appeal for Ontario, affirming the judgment of Street, J., in the High Court of Justice, which dismissed the action of the plaintiff with costs. The action was brought to set aside an assignment, by way of security, to the defendant of an interest in the profits expected to be earned under a contract for the performance of work, on the ground that it was made to defeat, hinder, defraud, delay and prejudice the creditors of the assignor, (who was insolvent), and to give the assignee an unjust preference. In the trial court the decision in favour of the defendant was based on the ground that the assignment had been made under pressure, and was therefore valid. The Court of Appeal affirmed this judgment, but upon other grounds, holding that as the subject of the assignment did not consist of assets which could be reached by creditors at the time when it was made, the assignment did not come within the Act Respecting Assignments and Preferences (24 Ont. App. R. 153).—The Supreme Court of Canada dismissed the appeal with costs, adopting the reasoning of the judges in the Court of Appeal for Ontario. *Blakely v. Gould*, xxvii., 682.

11. *Insolvency — Assignment — Preference — Payment in money — Cheque of third party—R. S. O. c. 124, s. 3.*—Appeal from a judgment of the Court of Appeal for Ontario (23 Ont. App. R. 439), which held that indorsing and giving a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor within the meaning of the third section of

chapter 124 of the Revised Statutes of Ontario (1887), and overruling *Armstrong v. Hemstreet* (22 O. R. 366). — The Supreme Court of Canada affirmed the decision of the Court of Appeal and dismissed the appeal with costs. *Fraser v. Davidson & Hay*, xxviii., 272.

12. *Debtor and creditor — Insolvency — Fraudulent preferences — Chattel mortgage — Advances of money — Solicitor's knowledge of circumstances*—*R. S. O. (1887) c. 124—54 Vict. c. 20 (Ont.)—58 Vict. c. 23 (Ont.)* —In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock-in-trade in favour of a money-lender by whom a loan was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the Acts respecting Assignments and Preferences and to bring the case within the ruling in *Gibbons v. Wilson* (17 Ont. App. R. 1). *Held*, that all the circumstances, necessarily known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a *bona fide* payment of money within the meaning of the statutory exceptions. *Burns & Lewis v. Wilson*, xxviii., 207.

13. *Assignment for benefit of creditors — Preferred creditors — Money paid under voidable assignment — Levy and sale under execution—Statute of Elizabeth.*—Where an assignment has been held void as against the statute, 13 Eliz., c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon by him under his execution, such creditor has no legal right and no equity to an account or to follow moneys received by the assignee or paid by him under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible. *Cummings & Sons v. Taylor*, xxviii., 337.

14. *Debtor and creditor — Transfer of property — Delaying or defeating creditors — 13 Eliz. c. 5.*—A transfer of property to a creditor for valuable consideration, even with intent to prevent it being seized under execution at the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz., c. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefit-

ing the transferror. *Mulcahy v. Archibald*, xxviii., 523.

15. *Assignment for benefit of creditors — Fraudulent preference — Bribery — Promissory note — Illegal consideration—Nullity — Costs.*—A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantage given to a particular unsecured creditor is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business. A promissory note given to secure the amount of the preference payable under such an arrangement is wholly void. *Brigham v. Banque Jacques-Cartier*, xxx., 429.

16. *Money paid — Voluntary payment — Insolvency of debtor — Action by assignee—Status.*—S., a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim, and took from S. notes aggregating in amount \$708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for benefit of his creditors when the arrangement between him and V. first became known and the assignee and other creditors brought an action to recover the said sum of \$708 from V. as part of the insolvent estate. *Held*, affirming the judgment of the Court of Appeal (3 Ont. L. R. 5), and that at the trial (32 O. R. 216), that S. having paid the notes voluntarily without oppression or coercion could not himself have recovered back the amount and his assignee was in no better position.—*Held*, per Taschereau, J. As anything recovered by the assignee would be for the benefit of his co-plaintiffs only who would thus receive what would have been an unjust preference if stipulated for by the agreement for extension the plaintiffs had no *locus standi in curia*. *Langle v. VanAllen*, xxxii., 174.

17. *Debtor and creditor—Collusion—Pressure—R. S. B. C. cc. 86, 87—The Bank Act, s. 80—Company law—Mortgage by directors —Ratification—B. C. Companies Acts, 1890, 1892, 1894.*—The action was to set aside a mortgage by an incorporated company to the bank, an assignment of book debts and judgment by the bank against the company on grounds: (1) that the mortgage was voluntary, fraudulent and void under the Statute of Eliz.; (2) void as a fraudulent preference; (3) not executed in accordance with the Companies Act; (4) that the assignment was void for same reasons and contrary to the Bank Act; and (5) the judgment voluntary, fraudulent and void under the Statute of Elizabeth. It was contended that moneys received by the bank were exigible under plaintiffs' executions and an order asked accordingly. The judgment appealed from (8 B. C. Rep. 314) affirmed the trial judgment and held that there was good consideration for the mortgage, that it was given under pressure and should not be set aside although comprising the whole of the debtor's property and given under insolvent circumstances to the knowledge of the mortgagee and deprived the other creditors of their remedy; also, that the mortgage given by the company's direct-

ors without proper authority had been legally ratified by subsequent resolution of the shareholders. The Supreme Court affirmed the judgment appealed from, Gwynne, J., taking no part in the decision, and subsequently the Privy Council refused leave for an appeal (8 B. C. Rep. 337). *Adams & Burns v. The Bank of Montreal* xxxii., 719.

18. Acts in contemplation of bankruptcy—Onus of proof—*Insolvent Act of 1875*.

See MORTGAGE, 9.

19. Security for indorsement — Deposit to credit of indorser—Acts in contemplation of insolvency.

See PLEDGE, 1.

20. Assignment — Power to sell on credit—*R. S. O. (1877) c. 118, s. 2*.

See ASSIGNMENTS, 1.

21. Mortgage in contemplation of insolvency — *Insolvent Act of 1875, s. 133—Conflict of statutes — Merchants' Shipping Act, 1854 (Imp.)*

See INSOLVENCY, 21.

22. Assignment for benefit of creditors — Preferences — *Statute of Elizabeth — Unreasonable conditions—Resulting trusts*.

See ASSIGNMENTS, 3.

23. Advances to insolvent railway—Pledge of property—Registration—Priority.

See LIEN, 7.

24. Hire receipt—Including after acquired goods.

See CHATTEL MORTGAGE, 17.

25. Insolvency — Preferential mortgage—Prejudice of creditors—*Art. 2023, C. C.*

See MORTGAGE, 13.

26. Insolvency — Transfer of insolvent's property to creditor — *Knowledge of creditor — Arts. 1035, 1036, 1169, C. C.*

See DEBTOR AND CREDITOR, 25.

27. Assignment for the benefit of creditors — Preferred creditors — Money paid under voidable assignment — Liability of assignee—*Statute of Elizabeth—Hindering and delaying creditors*.

See ASSIGNMENTS, 6.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FUTURE RIGHTS.

1. Charge on land — Instalments of church rates—Appellate jurisdiction.

See APPEAL, 21.

2. Appeal — Expropriation of lands — Assessments—Local improvements—*R. S. C. c. 135, s. 29 (b)—56 Vict. c. 29, s. 1 (D.)*

See APPEAL, 71.

3. Action en bornage — Title to lands—*R. S. C. c. 135, s. 29 (b)—54 & 55 Vict. c. 25, s. 3 (D.)—56 Vict. c. 29, s. 1 (D.)*.

See APPEAL, 72.

4. Appeal — Jurisdiction — Appealable amount — Future rights — Alimentary allowance—"Other matters and things"—*R. S. C. c. 135, s. 29 (b)—56 Vict. c. 29 (D.)*.

See APPEAL, 74.

GAME LAWS.

*Province of Quebec—Game killed out of season—Seizure of furs—Search warrant—Justice of the peace—Jurisdiction—Writ of prohibition—R. S. Q. arts. 1405, 1409.]—Under art. 1405 read in connection with art. 1409 R. S. Q., a game keeper is authorized to seize furs on view on board a schooner, without a search warrant, and to have them brought before a justice of the peace for examination. —A writ of prohibition will not lie against a magistrate acting under arts. 1405-1409 R. S. Q. in examination of the furs so seized where he clearly has jurisdiction, and the only complaint is irregularity in the seizure. *Company of Adventurers of England v. Joannette*, xxiii., 415.*

GAMING.

*Criminal Code, s. 575 —Persona designata —Officers de facto and de jure—Chief constable—Common gaming house—Confiscation of gaming instruments, moneys, &c.—Evidence —The Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.] — Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. *Girouard, J.*, dissenting.—The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*.—In an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the Province of Quebec.—*Per Strong, C.J.* A judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication. *O'Neil v. Attorney-General of Canada*, xxvi., 122.*

GAOLS.

Removal from shire town — *R. S. N. S. (5 ser.) c. 20, s. 1*.

See MUNICIPAL CORPORATIONS, 81.

GARNISHMENT.

1. *Common Law Procedure Act, (P. E. I.)*—*Promissory note overdue in hands of payee*—*Payment by garnishee*—*Discharge of maker.*—An overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor under the *Common Law Procedure Act, (P. E. I.)*, and payment by the garnishee of the amount to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge. *Roblee v. Rankin*, xi., 137.

2. *Representation of indebtedness*—*Equitable assignment.*

See *ESTOPPEL*, 8.

3. *Husband and wife*—*Purchase of land by wife*—*Re-sale*—*Garnishee of purchase money on*—*Debt of husband*—*Statute of Elizabeth*—*Hindering or delaying creditors.*
See *PRACTICE*, 60.

GAS COMPANY.

Construction of contract—*Construction of statute*—12 Vict. c. 183, s. 20—*Notice to cancel contract*—*Gas supply shut off for non-payment of gas bill on other premises*—*Mandamus.*—An agreement to furnish gas contained an express provision that either of the contracting parties should have the right to cancel the contract by giving twenty-four hours' notice in writing. Notices were sent in writing to the consumer that his gas would be shut off, at a certain number on a street named, unless he paid arrears of gas bills due upon another property. *Held*, that such notices could not be considered as notices given under the contract for the purpose of cancelling it.—The Act to amend the Act incorporating the New City Gas Company of Montreal and to extend its powers (12 Vict. c. 181), provides:—"That if any person or persons, company or companies, or body corporate supplied with gas by the company, should neglect to pay any rate, rent or charge due to the said New City Gas Company, at any of the times fixed for the payment thereof, it shall be lawful for the company or any person acting under their authority, on giving twenty-four hours' previous notice, to stop the gas from entering the premises, service pipes, or lamps of any such person, company or body, by cutting off the service pipe or pipes, or by such other means as the said company shall see fit, and to recover the said rent or charge due up to such time, together with the expenses of cutting off the gas, in any competent court, notwithstanding any contract to furnish for a longer time, and in all cases where it shall be lawful for the said company to cut off and take away the supply of gas from any house, building or premises, under the provisions of this Act, it shall be lawful for the company, their agents and workmen, upon giving twenty-four hours previous notice to the occupier or person in charge, to enter into any such house, building or premises, between the hours of nine o'clock in the forenoon and four in the afternoon, making as little disturbance and inconvenience as possible, and to remove, take and carry away any pipe, meter, cock, branch, lamp, fittings or apparatus, the property of and belonging to the said company." *Held*, *Tascheureau, J.*, dissenting, that the powers given by

the clause quoted are exorbitant and must be construed strictly; that the company has not been thereby vested with power to shut off gas from the buildings and premises of the same proprietor or occupant, when he becomes in default for the payment of bills for gas consumed in one of them only; and that the provision that the notice to cut off must be given "to the occupier or person in charge," indicates that only premises so occupied and in default should suffer. *Cadiou v. Montreal Gas Co.*, xxviii., 382.

[The Privy Council reversed this judgment; (1898) A. C. 718; (1899) A. C. 589.]

GAZETTE.

Mining law—*Dominion Lands Act*—*Publication of regulations*—*Renewal of license*—*Payment of royalties*—*Voluntary payment*—*R. S. C. c. 54, ss. 90, 91.*

See *MINES AND MINERALS*, 13.

GIFT.

1. *Gift*—*Confidential relations*—*Evidence*—*Parent and child*—*Public policy*—*Principal and agent.*—The principle that where confidential relations exist between donor and donee the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by shewing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for benefit of the latter's children, when said son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later and by voluntarily paying it before he died, such presumption does not arise. — Judgment of the Court of Appeal (2 Ont. L. R. 251) reversing that of the Divisional Court (31 O. R. 414) affirmed, *Sedgewick and Davies, J.J.*, dissenting. *Trusts and Guarantee Co. v. Hart*, xxxii., 553.

2. *Donatio mortis causa*—*Deposit receipts*—*Cheques and orders*—*Delivery for beneficiaries*—*Corroboration*—*Construction of statute.*—*McD.*, being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for \$6,000 which he then handed to his brother telling him that he wanted the money equally divided among his wife, brother and sister. The brother then, on his own suggestion or that of *McD.*, drew out three cheques or orders for \$2,000 each payable out of the deposit receipt to the respective beneficiaries which *McD.* signed and returned to his brother who handed to *McD.*'s wife the one payable to her and the receipt, and she placed them in the trunk from which she had taken the receipt. *McD.* died eight days afterwards. *Held*, affirming the judgment appealed against (35 N. S. Rep. 205), *Sedgewick and Armour, J.J.*, dissenting, that this was a valid *donatio mortis causa* of the deposit receipt and the sum it referred to notwithstanding there was a small amount for

interest not specified in the gift.—By R. S. N. S. [1900] c. 163, s. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife or both unless it is corroborated by other material evidence. *Held*, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. *McDonald v. McDonald*, xxxiii., 145.

3. *Marriage covenant — Universal community—Don mutuel—Registry laws — Arts. 807, 819, 1411 C. C. — Construction of contract.*—A marriage contract contained the following clause:—"Les futurs époux se sont faits et se font par ces présentes au survivant d'eux ce acceptant, donation viagère, mutuelle, égale et réciproque de tous les biens meubles et immeubles, acquêts, conquêts, prepres et autres biens généralement quelconques qui se trouveront être et appartenir au premier mourant au jour de son décès de quelque nature qu'ils soient, et à quelque lieu qu'ils soient situés, pour par le dit survivant en jouir en usufruit sa vie durant à sa caution juratoire et gardant vuidité." It was admitted that the only thing affected consisted of property belonging to the community. *Held*, affirming the judgment appealed from, that the donation was one within the provisions of art. 1411 C. C. and, as such, did not require registration as the clause is divisible and the stipulation in question as to universal community merely a simple marriage covenant and not subject to the rules and formalities applicable to gifts. *Huot v. Bienvenu*, xxxiii., 370.

AND see DONATION—DON MUTUEL—WILL.

GOODWILL.

Dissolution of firm—Misconduct of partner—Expulsion—Notice—Waiver—Forfeiture.

See PARTNERSHIP, 23.

GREAT SEAL OF NOVA SCOTIA.

See CONSTITUTIONAL LAW, 64.

GROSSES REPARATIONS.

Title to land—Life estate—Construction of statute — Preferred claim — Improvements made on lands grévé de substitution—Charge on lands.

See SUBSTITUTION, 8.

GUARANTEE.

1. *Construction of agreement—Guarantee.*—A., a wholesale merchant, had been supplying goods to C. & Co. when, becoming doubtful as to their credit, he insisted on their account being reduced to \$5,000, and security for further credit. W., who had indorsed to secure a part of the existing debt, thereupon gave A. a guarantee in the form of a letter, as follows:—"I understand that you are prepared

to furnish C. & Co. with stock to the extent of \$5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars including your own credit of five thousand, unless sanctioned by a future guarantee." . . . A. then continued to supply C. & Co., with goods, and in an action by him on this guarantee:—*Held*, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there could be no liability on this guarantee unless the indebtedness of C. & Co. to A. should exceed the sum of \$5,000, and at the time of action brought such indebtedness, having been reduced by payments from C. & Co. and dividends from their insolvent estate to less than such sum, A. had no cause of action. *Alexander v. Watson*, xxiii., 670.

2. *Patent of invention—Business agreement to manufacture under—Letter of guarantee—Failure of scheme—Liability of guarantor.*—The chief object of an agreement between A. and B. was the profitable manufacture and sale of wares under a patent of invention issued to A., and in consideration of advances by B. to an amount not exceeding \$6,000, C. by a letter of guarantee agreed "to become a surety to B. for the repayment of the \$6,000 within 12 months from the date of the agreement if it should transpire that, for the reasons incorporated in said agreement, it should not be carried out."—On action brought by B. against C. for \$6,000 it was proved at the trial that the manufacturing scheme broke down through defects of the invention. *Held*, affirming the judgment of the court below, that C. was liable for the amount guaranteed by his letter. *Angus v. Union Gas and Oil Stove Co.*, xxiv., 104.

3. *Principal and surety—Guarantee bond—Default of principal — Non-disclosure by creditor.*—W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash, but at the end of each season he was in arrear in his remittances, which he attributed to slow collections, and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the company discovered that W. had collected moneys of which he had made no return and brought an action to recover the same from the sureties. *Held*, reversing the decision of the Court of Appeal, that each year there was an employment of W. distinct from, and independent of, those of preceding years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment, nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed. *Niagara District Fruit Growers' Stock Co. v. Walker*, xxvi., 629.

4. *Guarantee of honesty of employee—Guarantee policy—Notice of defalcation.*

See SURETYSHIP, 7.

5. *Insolvency — Assignment for benefit of creditors—Sale of assets to wife of insolvent—Guarantee by creditor and inspector—Trustee—Action for account of profits.*

See INSOLVENCY, 48.

6. *Loan to promoter of company—Personal liability.*

See COMPANY LAW, 23.

7. *Statutory prohibition — Penal statute—Wholesale purchase — Validity of contract—Forfeiture—Nova Scotia Liquor License Act—Practice.*

See CONTRACT, 166.

8. *Contract — Drainage — Inter-municipal works—Continuing liability.*

See DAMAGES, 13.

9. *Garantie simple — Contract — Sub-contract—Connexité.*

See CONTRACT, 147.

AND see SURETYSHIP.

HABEAS CORPUS.

1. *Questions of fact—Conviction by J. P.—Arrest on warrant—Inquiry as to evidence—Jurisdiction—Certiorari — Supreme and Exchequer Courts Act, s. 49 — Supreme Court Amendment Act, 1876, s. 34—R. S. O. (1877) c. 70.]—The Chief Justice, in chambers, dismissed an application on behalf of a person arrested on a warrant issued on conviction by a magistrate, for a writ of *habeas corpus* and for *certiorari* to bring up the proceedings based on lack of evidence to warrant the conviction.—On appeal, *Held*, Henry, J., dissenting, that the conviction having been regular, and made by a court in exercise of its authority, and within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion which he arrived at as to the guilt of the prisoner, the Supreme Court could not go behind the conviction, and inquire into the merits of the case by the use of a writ of *habeas corpus* and thus constitute itself a court of appeal from the magistrate's decision.—The only appellate power conferred on the court in criminal cases, is by s. 49 of the Supreme and Exchequer Courts Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose upon the court the duty of revision in matters of fact of summary convictions by magistrates. — Section 34 of the Supreme Court Amendment Act, 1876, does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus*, granted by a judge of the Supreme Court in chambers; and, as the proceedings before the full court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of such judge in chambers, that section does not authorize the court to issue a writ of *certiorari* in such proceedings; to do so, would be to assume appellate jurisdiction over the inferior court.—*Semble*, per Ritchie, C.J., that R. S. O. (1877) c. 70, relating to *habeas corpus*,*

does not apply to the Supreme Court of Canada. *In re Trepanier*, xii., 111.

2. *Conviction for murder—Appeal—Special session—Judge in chambers — Supreme and Exchequer Courts Act, s. 51 — Ultra vires—Writ improvidently issued — Appropriate remedy—Jurisdiction to quash — Control of court over its own process—Crimes at common law—Civil matters—Supreme Court of B. C. — Constitution — Commission to judge presiding — Trial of prisoner — Change of venue — Provision for increased expenses—Practice — Absence of prisoner—Evidence—Return to writ.]—Section 51, Supreme and Exchequer Courts Act, does not interfere with the inherent right which the Supreme Court of Canada has, in common with every superior court incident to its jurisdiction, to inquire into and judge of the regularity or abuse of its process, and to quash a writ of *habeas corpus* and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued.—That section does not constitute the individual judges of the Supreme Court of Canada separate and independent courts, nor confer on the judges a jurisdiction outside of and independent of the court, and obedience to a writ issued under said section cannot be enforced by the judge but by the court, which alone can issue an attachment for contempt in not obeying its process. (Fournier and Henry, J.J., dissenting).—*Per* Strong, J. The words of s. 51 expressly giving an appeal when the writ of *habeas corpus* has been refused or the prisoner remanded, must be attributed to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to deprive the court of the right to entertain appeals from, and revise, rescind and vary orders made under this section.—The right to issue a writ of *habeas corpus* being limited by s. 51 to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case at common law. (Fournier and Henry, J.J., dissenting). — *Per* Fournier and Henry, J.J. The restriction imposed by s. 51 to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," is merely intended to exclude inquiry into the cause of commitment for the infraction of some provincial law; and the words "in any criminal case" were inserted to exclude the *habeas corpus* in civil matters; it is sufficient to give jurisdiction if the commitment be in virtue of an Act of the Parliament of Canada.—*Quere*. Is s. 51, Supreme and Exchequer Courts Act, *ultra vires*?—*Semble*, That when a judge in a province has the right to issue a writ of *habeas corpus* returnable in term as well as in vacation, a judge of the Supreme Court might make the writ he authorizes returnable in said court in term as well as immediately (Fournier and Henry, J.J., dissenting).—An application to the court to quash a writ of *habeas corpus* as improvidently issued may be entertained in the absence of the prisoner (Henry, J., dissenting).—After a conviction for a felony by a court having general jurisdiction over the offence charged, a writ of *habeas corpus* is an inappropriate remedy.—If the record of a superior court, produced on an application for a writ of *habeas corpus*, contains the recital of facts requisite to confer jurisdiction, it is conclusive and cannot be contradicted by extrinsic evidence (Henry, J., dissenting).—A*

return by the sheriff to the writ setting out such conviction and sentence, and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff (Henry, J., dissenting.) — The Supreme Court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, in the province; it has powers as full and ample as those known to the common law and possessed by the superior courts of England.—The various statutes of British Columbia providing for the holding of courts of oyer and terminer and general gaol delivery render unnecessary a commission to the presiding judge. — *Per Strong, J.* The power of issuing a commission, if necessary, belonged to the Lieutenant-Governor of the province (Henry, J., *contra*). — An order made pursuant to Dominion statute 32 and 33 Vict. c. 29, s. 11, directing a change of venue, would be sufficient, although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection and, even in a court of error, there could be no valid objection to a conviction founded on such order. — Even if a writ of *habeas corpus* in this case had been rightly issued, the prisoner was not entitled to his discharge on the materials before the judge, but should have been remanded. *In re Sproule*, xii., 140.

See No. 5 *infra*.

3. *Appeal — Procedure — Time for filing case.*—In *habeas corpus* appeals the first step is the filing of the case with the registrar.—This must be done within 60 days from the pronouncing of judgment appealed from. *In re Smart*, xvi., 396.

4. *Appeals—Criminal matters—Section 51, Supreme Court Act—Jurisdiction—Court of Appeal for Ontario—Presence of prisoner—Short notice of hearing—32 & 33 Vict. c. 32, s. 19—38 Vict. c. 47—Legislative jurisdiction—Summary trial by police magistrate.*—On the 16th January, 1879, the prisoner was charged for that he did “unlawfully and maliciously cut and wound one Mary Kelly with intent then and there to do her the said Mary Kelly grievous bodily harm,” and being tried summarily before the police magistrate at Ottawa was found guilty, and sentenced to the central prison at Toronto, at hard labour for one year. On being brought before the Court of Queen’s Bench for Ontario upon a writ of *habeas corpus* issued from that court, the prisoner was remanded; whereupon he appealed to the Court of Appeal for Ontario; which dismissed his appeal. (8 Ont. Pr. R. 20.) Notice was given of appeal from this judgment to the Supreme Court of Canada, and the case in appeal was received too late to be set down for hearing at the May sessions, whereupon application was made to Fournier, J., for leave to bring the appeal on for hearing and to give short notice of hearing, which was refused, on the ground that no appeal would lie in such a case to the Supreme Court of Canada. An application was then made for a writ of *habeas corpus* to Gwynne, J., who held that the application should be refused for two reasons: 1st. The applicant was convicted of an offence, being a misdemeanour as stated sufficiently in the conviction, which could not be avoided for matter of form; the misdemeanour of which

he was so convicted was an offence cognizable by the Court of General Sessions of the Peace, and for such offence the statute of 1875 authorized a punishment to be inflicted such as the Court of General Sessions could award for the like offence, and the punishment awarded was such as the Court of General Sessions might have awarded. 2ndly. The decision of the Court of Appeal should be considered conclusive, and should not be interfered with by a single judge of any court sitting in chambers, but the applicant must be left to any recourse he might have against the adjudication of the Court of Appeal for Ontario (19th June, 1879.) On 23rd June an application for a writ of *habeas corpus* was made to Henry, J., who granted an order for a writ, returnable before the Chief Justice or any judge of the Supreme Court in chambers, such order providing that, counsel for the prisoner consenting, the actual presence of the prisoner should be dispensed with, and providing also for service of the order on the Attorney-General of the Province, or his deputy, or his agent at Ottawa. The writ was returned before Ritchie C.J., in chambers on 5th July, 1879. The Chief Justice held that he could not deal with the matter without the prisoner being brought before him according to the exigency of the writ, but was also of opinion that the prisoner should not be discharged on *habeas corpus*; and he therefore refused the application for his discharge. On 18th September, 1879, another application was made to Henry, J., in chambers, who granted an order for the writ, returnable before himself in chambers, dispensing with the actual presence of the prisoner on the return of the writ (counsel for the prisoner consenting), and providing for service of the order on the Attorney-General of the Province. On 1st October, 1879, upon the return of the writ, after hearing counsel for the prisoner and the Attorney-General, Henry, J., held, 1st. That the police magistrate derived his power to try the prisoner as he did from 38 Vict. c. 47, but reference to 32 & 33 Vict. c. 32 was necessary to decide upon the nature of the charge and the conviction. In the information the prisoner was charged in the very words of the first clause of s. 19 of 32 & 33 Vict. c. 32, and the punishment awarded was that warranted by the terms of the enactment, and the additional words as to the intent should be considered nothing more than surplusage. 2ndly. That 38 Vict. c. 47, giving power to police and stipendiary magistrates to try in a summary manner felonies and misdemeanours, was *intra vires* of the Dominion Parliament. 3rdly. That it was necessary to consider the point whether the prisoner should be brought before him according to the exigency of the writ, no objection having been taken, and his judgment being unfavourable to the prisoner on the other grounds. Application to discharge the prisoner refused. Application was then made to Fournier, J., in chambers, for leave to bring the appeal on for hearing at the next session of the Supreme Court of Canada, and to serve short notice of hearing, but it was refused because sufficient grounds were not shewn to take the case out of the regular course of procedure. — On 10th November, 1879, application was renewed before the full court, but being made *ex parte* and without notice the court refused to hear it.— On 15th November, 1879, application was again made to the full court, when the Attorney-General of Ontario shewed cause, and it was *Held*, that no appeal could lie in such a case to the Supreme Court of Canada, but

even if it did, under all the circumstances and delays that had occurred, the court should not go out of its way to exercise any discretion as to granting leave.—*Per Ritchie, C.J.* As regards *habeas corpus* in criminal matters, the court has only a concurrent jurisdiction with the judges of the Superior Courts of the various provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any judge or court, or any appellate court, because the prisoner can come direct to any judge of the Supreme Court individually and, upon that judge refusing the writ or remanding the prisoner, he could take his appeal from that judgment to the full court. Application refused. *In re Boucher*, Cass. Dig. (2 ed.) 325; Cass. S. C. Prac. (2 ed.) 54.

5. *Murder—Crimes at common law—Statutory offences.*—In a case of commitment by a coroner for murder, application was made to Strong, J., for a writ of *habeas corpus*. *Held*, that under the Supreme and Exchequer Courts Act, s. 51, the writ is to be issued for the purpose of an inquiry into a commitment only "in any criminal case under any Act of the Parliament of Canada," and the Act of the Parliament of Canada (1869) does not create the offence of murder, but only defines the punishment which may be awarded for such offence. Writ refused. *In re Poitvin*, Cass. Dig. (2 ed.) 327; Cass. S. C. Prac. (2 ed.) 54.

See No. 2, ante.

6. *Application for writ—Imprisonment of execution debtor—Discharge—R. S. N. S. (5 ser.) s. 118—Examination of debtor—Fraud—Remand for six months—Order dated on Sunday—New order—Costs on appeal.*—J. was in custody on execution for debt, and applied to a County Court judge under R. S. N. S. (5 ser.) c. 118 to be examined as to his affairs with a view to obtaining his discharge. The examination was held by the judge, who, on 23rd January, 1886, made an order to the effect that J. was adjudged guilty of fraud in respect to the delay of payment of his debt to the execution creditors, and in regard to the disposal of his property, and by such order remanded J. to jail, without privilege of jail limits, for a further period of six months from date of remand. When the order was drawn up it was dated 24th January, 1886, which was Sunday, and directed that J. be confined in the county jail for six months from that date.—J. was taken back to jail, the order dated on Sunday being delivered to the jailer, and counsel for the execution creditors on Monday, 25th January, procured from the judge another order dated the 25th, ordering J. to be imprisoned for six months from 23rd January.—An application to the Supreme Court (N. S.) for discharge on *habeas corpus*, was refused, the majority of the court holding that he was rightly held in custody, if not on the order of the County Court judge, then on the original cause of his detention, the writ of execution.—An appeal to the Supreme Court of Canada was dismissed without costs. *In re Johnson*, Cass. Dig. (2 ed.) 329.

7. *Jurisdiction—Form of commitment—Territorial division—Judicial notice—Jurisdiction in matters of habeas corpus—R. S. C. c. 135, s. 32.*—A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the

County of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the County of Pictou." The County of Pictou appeared to be of a greater extent than the municipality of the County of Pictou,—there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the County of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. c. 3, s. 8), contains a schedule which mentions Hopewell as a polling district in Pictou County entitled to return two councillors to the county council. *Held*, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial limits of the police division. *Held*, also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte Macdonald*, xxvii., 683.

8. *Appeal—Change of position of parties.*—Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of *habeas corpus* for the possession of Quai Sing, a Chinese female under age), counsel for the respondent produced to the court an order of the Supreme Court of British Columbia, dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in question, whereupon the Chief Justice intimated that, under the circumstances, it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant.—The appeal was consequently dismissed with costs. *Seid Sing Kaw v. Bowes*, 17th May, 1898.

9. *Appeal—Habeas corpus—Extradition—Necessity to quash.*—By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135, s. 31), "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal. *Held*, that the matter was *coram non judice* and there was no necessity for a motion to quash. *In re Lazier*, xxix., 630.

10. *Practice—Habeas corpus—Binding effect of judgment in provincial court.*—An application for a writ of *habeas corpus* was referred by the judge to the Supreme Court of the province and, after hearing, the application was refused. On application subsequently made to a judge of the Supreme Court of Canada, in chambers:—*Held*, that under the circumstances it would be improper to interfere with the decision of the provincial court. *In re White*, xxxi., 383.

11. *Certiorari—Jurisdiction of Supreme Court of Canada or judge thereof—Issue of writ.*

See CERTIORARI, 2.

12. *Appeal on mere question of costs — Prisoner at large.*

See COSTS, 1—PRACTICE OF SUPREME COURT, 66, and No. 6, ante.

“HANSARD.”

1. *Civil service — Officials of House of Commons — Extra salary — Additional remuneration — Permanent employees — 51 Vict. c. 12, s. 51.*

See STATUTES, 63.

2. *Canada Evidence Act, 1893 — Construction of statute—Method of interpretation — Reference to debates in House of Commons.*

See CRIMINAL LAW, 25.

HARBOURS.

1. *Canadian waters — Grant under great seal of P. E. I.—Foreshore in public harbour —B. N. A. Act, 1867, s. 108—25 Vict. c. 19 (P. E. I.) —Title to land.] — Under s. 108, B. N. A. Act, 1867, the soil and bed of the foreshore in the harbour of Summerside, P. E. I., belongs to the Crown, as representing the Dominion of Canada, as it is comprised in and forms part of a public harbour and, therefore, a grant of foreshore lands between high and low water mark therein made by the Province of Prince Edward Island is void and inoperative. *Holman v. Green*, vi., 707.*

[NOTE.—Followed in *Re Provincial Fisheries* (26 Can. S. C. R. 444.)]

2. *Canadian waters — Property in beds — Public harbours — Erections in navigable waters — Interference with navigation — Right of fishing — Power to grant — Riparian proprietors — Great lakes and navigable rivers — Operation of Magna Charta—Provincial legislation — R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. arts. 1375 to 1378.]—The beds of public harbours not granted before confederation are the property of the Dominion of Canada. *Holman v. Green* (6 Can. S. C. R. 707) followed. The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.—*Per Gwynne, J.* The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada, under the British North America Act, s. 92, item 10, and for the administration of the fisheries.—*R. S. C. c. 92, “An Act respecting certain works constructed in or over navigable rivers” is intra vires of the Dominion Parliament.—The Dominion Parliament has power to declare what shall be deemed an interference with navigation and to require its sanction to any work in navigable waters.—A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R. S. C. c. 92.—Where the provisions of Magna Charta are not in force, as in Quebec, the Crown in right of the province may grant**

exclusive rights of fishing in tidal waters, except in tidal public harbours, in which, as in other public harbours, the Crown in right of the Dominion, may grant the beds and fishing rights. Gwynne, J., dissenting.—Per Gwynne, J. R. S. O. c. 24, s. 47, is ultra vires so far as it assumes to authorize the sale of land covered with water within public harbours.—The margins of navigable rivers may be sold if there is an understanding with the Dominion Government for protection against interference with navigation.—The Act of 1892 and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are ultra vires. In re Jurisdiction over Provincial Fisheries, xxvi., 444.

Varied on appeal by Privy Council; [1898] A. C. 700.

3. *Obstructions — Title to land — Unauthorized grant — Trespass — Low water mark — Nuisance.*

See NAVIGATION, 1.

4. *Provincial grant of foreshore—B. N. A. Act, 1867—Act confirming title—Pleading—Estoppel.*

See TITLE TO LAND, 132.

HARBOUR COMMISSIONERS.

*Jurisdiction — Montreal harbour — Municipal by-law—Tax on ferry boats—Navigation.]—The jurisdiction of the Montreal Harbour Commissioners does not exclude the right of the City of Montreal to tax or control ferries, within its limits. *Longueuil Navigation Co. v. City of Montreal*, xv., 566.*

HEIRS.

1. *Construction of will — “Own right heirs” — Limiting testamentary powers of devise — Conditional limitations — Appeal — Acquiescence by appellants in judgment appealed from—Costs—Vesting of estate.]—Under a devise to the testator’s “own right heirs” the beneficiaries would be those who would have taken in the case of intestacy unless a contrary intention appears, and where there was a devise to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention, and the daughter inherited as the right heir of the testator. *In re Ferguson, Turner v. Bennett; Carson v. Coatsworth*, xxviii., 38.*

2. *Construction of statute — Estates tail—Executory devise over — “Dying without issue” — “Lawful heirs” — “Heirs of the body” — Estate in remainder expectant—Statutory title — Title by will — Conveyance by tenant in tail.*

See WILL, 18.

3. *Will — Construction of — Words of faculty — Life estate — Joint lives — Time for ascertainment of class — Survivor dying without issue — “Lawful heir.”*

See WILL, 34.

4. "Heir"—Will — Codicil — Testamentary succession — Arts. 596, 597, 831, 840, 864 C. C. 14 Geo. III. c. 83, s. 10 (Imp.)—41 Geo. III., c. 4 (L.C.).

See WILL, 19.

AND see SUCCESSIONS—WILLS.

HIGHWAYS.

1. DEDICATION, 1-5.
2. FERRY LICENSE, 6.
3. FRANCHISES, 7-9.
4. LOCAL IMPROVEMENTS, 10, 11.
5. NEGLIGENCE, 12-25.
6. OPENING ROADS, 26, 27.
7. RAILWAYS AND TRAMWAYS, 28-31.
8. REPAIRS, 32.
9. TITLE TO WAY, 33-35.
10. TOLLS, 36, 37.

1. DEDICATION.

1. *Lost record — Dedication — Public highway — Expropriation — Presumption — User.*—K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality, which would contain the proceedings on such expropriation if any had been taken, were lost. *Held*, reversing the judgment appealed from (20 N. S. Rep. 95), that in the absence of any evidence of dedication of the road it must be presumed that the proceedings under the statute were rightly taken and K. could not recover. *Dickson v. Kearney*, xiv., 743.

2. *Public highway — Registered plan—Dedication — User—Statute, construction of—Retrospective statute 46 Vict. c. 18 (O.)—Estoppel.*—The right vested in a municipal corporation by 46 Vict. c. 18 (O.) to convert into a public highway a road laid out by a private person on his property can only be exercised in respect to private roads to the use of which the owners of property abutting thereon were entitled. *Gooderham v. City of Toronto*, xxv., 246.

3. *Municipal corporation — Highways — Old trails in Rupert's Land — Substituted roadway — R. S. C. c. 50, s. 108 — Reservation in Crown grant — Dedication — User—Estoppel — Assessment of lands claimed as highway—Evidence.*—The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government survey thereof, does not give rise to the presumption that the lands over which they passed were dedicated as public highways.—The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N. W. T., had been closed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor, as shewn upon registered plans of subdivision and laid out upon the ground, had been adopted as a boundary in the description of lands abutting thereon in s. c. D.—21.

the grants thereof by letters patent from the Crown. *Held*, reversing the decision of the Supreme Court, N. W. T., that under the circumstances there could be no presumption of dedication of the lands over which the old trail passed as a public highway either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government survey of the Edmonton Settlement. *Heiminck v. Town of Edmonton*, xxviii., 501.

See No. 4, *infra*.

4. *Old trails in Rupert's Land — Crown grant — Squatter's plan of subdivision—Substitution of new way — Dedication — Highway — Adopting new street as a boundary.*—A squatter in possession of public lands near the old Hudson Bay Trading Post at Edmonton, who afterwards became patentee of the greater part of the lands he occupied, had made a plan of subdivision thereof into town lots which shewed a new roadway or street laid down in the place of the old travelled trail across said lands leading to the trading post, and subsequently, the Crown, in making grants, described several parcels of the lands in the patents as being bounded and abutting upon the said street or roadway, so laid down on the plan. *Held*, affirming the judgment appealed from (1 N. W. T. Rep. pt. 4, p. 39), that the space as shewn upon the plan, as laid out for a street, had been adopted and dedicated by the Crown as and for a public street and highway in substitution of the old travelled trail or roadway across said lands. *Brown v. Town of Edmonton* (24th May, 1894), xxviii., 510.

See No. 3, *ante*.

5. *Dedication — User — Evidence.*—In order to establish the existence of a public highway by dedication it must appear that there was not only the intention on the part of the owner to dedicate the land for the purposes of a highway but also that the public accepted such dedication by user thereof as a public highway.—In a case where the evidence as to user was conflicting and the jury found that there had been no public user of the way in question, the trial judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full court. *Held*, that as such decision did not take into account the necessity of establishing public user of the *locus*, it could not stand. Judgment of the Supreme Court (N. B.) reversed. *Moore v. Woodstock Woolen Mills Co.*, xxix., 627.

2. FERRY LICENSE.

6. *Constitutional law — Municipal corporation—Powers of legislature—License—Monopoly — Highways and ferries — Navigable streams — By-laws and resolutions — Inter-municipal ferry — Tolls — Disturbance of licensee—North-West Territories Act—Companies, club associations and partnerships.*

See MUNICIPAL CORPORATION, 170.

3. FRANCHISES.

7. *Waterworks — Repairs — Injunction—R. S. Q. art. 4485.*

See INJUNCTION, 4.

8. *Title to portion of highway—Legislative grant of soil — Gas pipes — Easements—Assessment—Exemptions—11 Vict. c. 14 (Can.)—55 Vict. c. 48 (O.)—“Ontario Assessment Act, 1892.”*

See ASSESSMENT AND TAXES, 13.

9. *Constitutional law — Administration of Yukon — Franchise over Dominion lands — Tolls.*

See CONSTITUTIONAL LAW, 78.

4. LOCAL IMPROVEMENTS.

10. *Repair of streets — Pavements — Assessment on property owner—Double taxation—24 Vict. c. 39 (N. S.)—53 Vict. c. 60, s. 14 (N. S.)—By s. 14 of the Nova Scotia Statute, 53 Vict. c. 60, the City Council of Halifax was authorized to borrow money for paving the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done, and to be a first lien on such properties. A concrete sidewalk was laid under authority of this statute, in front of L.'s property, and he refused to pay half the cost on the ground that his predecessor in title had in 1867, under the Act 24 Vict. c. 39, furnished the material to construct a brick sidewalk in front of the same property, and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well. Held, reversing the judgment appealed from (28 N. S. Rep. 268), that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous. City of Halifax v. Lithgow, xxvi., 336.*

11. *Municipal corporation — Expropriation—Widening streets—Assessments—Excessive valuation—52 Vict. c. 79, s. 228 (Que.).*

See MUNICIPAL CORPORATION, 8.

5. NEGLIGENCE.

12. *Obstruction on highway — Repair of municipal streets — Negligence.—The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 291), which held that permitting a mound of earth about eight inches in height to remain at a filling over a trench dug to lay a pipe across a public street was not a serious or unusual obstruction due to negligence on the part of the municipality and holding the plaintiff guilty of want of proper care in approaching during the darkness the dangerous place which he had previously seen by daylight in the same condition. Messenger v. Town of Bridgetown, xxxi., 379.*

13. *Lawful use of street — Defective sidewalk — Damages — Contributory negligence—New trial.*

See NEGLIGENCE, 39.

14. *Sidewalk — Crossing—Elevation above street level—Negligence.*

See NEGLIGENCE, 185.

15. *Control of streets — Altering grades—34 Vict. c. 11 (N. B.)—45 Vict. c. 61 (N. B.).*

See NEGLIGENCE, 186.

16. *Construction of railway crossings — Level of highway — Negligence — Impairing condition of highway.*

See RAILWAYS, 16.

17. *Lowering grades — Negligence — Injury to lands — Statutory damages — Right of action — 51 Vict. c. 42, s. 190 (B. C.).*

See MUNICIPAL CORPORATION, 162.

18. *Obstruction — Toll gate — Lessee of tolls — Liability of road company.*

See NEGLIGENCE, 187.

19. *Control of streets — Repairs — Negligence—Notice of action — 34 Vict. c. 11 (N. B.)—Pleading.*

See MUNICIPAL CORPORATION, 141.

20. *Municipal damage — Flooding of roads — Recovery of damages—Mandamus.*

See DRAINAGE, 3.

21. *Repairs of streets — Liability for non-feasance.*

See MUNICIPAL CORPORATION, 143.

22. *Negligence — Obstruction of street — Assessment of damages—Questions of fact—Action of warranty.*

See APPEAL, 232.

23. *Municipal corporation — Highway — Encroachment upon street — Negligence — Nuisance — Obstruction of show-window — Municipal officers — Misfeasance during prior ownership—Non-feasance — Statutable duty — Damages.*

See MUNICIPAL CORPORATION, 171.

24. *Placing telephone polls on streets — Proximate cause of injury.*

See NEGLIGENCE, 192.

25. *Municipal corporation—Obstruction on highway — Contributory negligence.*

See NEGLIGENCE, 194.

6. OPENING ROADS.

26. *Road allowances — Opening substituted way — Jurisdiction of Ontario courts.*

See MUNICIPAL CORPORATION, 160.

27. *Annulment of procès-verbal — Matter in controversy—Jurisdiction.*

See APPEAL, 292.

7. RAILWAYS AND TRAMWAYS.

28. *Railway charter — Highway crossing—Compensation to municipality — Terminus “at or near” point named.—Authority to a company to construct a railway empowers*

them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road.—A charter authorized construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the counties of Vaudreuil, Prescott and Russell. *Held*, that if it were necessary, the railway could pass through Carleton County (in which the City of Ottawa is situated), though it was not named.—*Held*, also, that in this Act the words "at or near the City of Ottawa" meant in or near the said city. Judgment appealed from (4 Ont. L. R. 56, 2 Ont. L. R. 336) affirmed. *City of Ottawa v. Canada Atlantic Ry. Co.*; *City of Ottawa v. Montreal & Ottawa Ry. Co.*, xxxiii., 376.

29. *North Shore Railway — Use of public street — Nuisance — Damages — Right of action.*

See RAILWAYS, 71.

30. *Operation of tramway — Care at street crossings — Speed of cars — Negligence.*

See TRAMWAY, 4.

31. *Operation of tramway — Municipal regulations — Powers — By-law or resolution — Construction of statute — Use of streets — Crossings.*

See TRAMWAY, 6.

AND see RAILWAYS—TRAMWAYS.

8. REPAIRS.

32. *Road repairs — Municipal by-law — "Future rights" — Jurisdiction.*

See APPEAL, 43.

9. TITLE TO WAY.

33. *Substituted way — Vesting of title to road allowance — 50 Geo. III. c. 1—4 Geo. IV. c. 10—20 Vict. c. 69, ss. 5, 6, 7—22 Vict. c. 99, ss. 305, 318—C. S. U. C. c. 54, s. 318—29—30 Vict. c. 5, ss. 320, 334—36 Vict. (Ont.) c. 48, ss. 422, 426 — Municipal Acts — Obstruction of highway.] — The plaintiff claimed in right of his wife under deed to her, dated 1st October, 1867, of S. ½ lot 9, 5th concession, Haldimand, the original allowance for road between lots 8 and 9 by reason of the justices of the Quarter Sessions having in 1837, under 50 Geo. III. c. 1, and 4 Geo. IV. c. 10, laid out a road across this south half in lieu of the original allowance; and he sued defendant for having destroyed a fence which plaintiff had recently erected across the original allowance for road at its point of intersection with the cross-roads.—*Held*, affirming the judgment appealed from (3 Ont. App. R. 175), that from 36 Vict. (Ont.) c. 48, and the preceding Municipal Acts, it is apparent that where the original allowance in lieu of which a new road had been opened, lay between lands owned by different persons, as the road in question does, the owner of the land appropriated for the new road had no claim whatever to the original allowance further than to receive a conveyance from the municipality of a part only, and that only in case the municipality, in its*

discretion, should be of opinion that the original allowance was useless to the public, in which case the municipality would have to express that opinion by a by-law passed for closing the original allowance. The plaintiff, therefore, must fail, for there never was any person entitled to call for a conveyance of the road in question, and the municipality had never pronounced it to be useless to the public.—2. The road in question lay along the whole length of the defendant's lot, and therefore came within s. 422 of 36 Vict. c. 48 (Ont.), and the municipality could not close it or deprive the defendant of the peculiar benefit he might derive from it as a highway adjoining his lands within that section, and perhaps, also, s. 373, which provides for compensation for any damage to owners of property injuriously affected.—3. Further, the proper conclusion from the evidence was that the road established under the authority of the Quarter Sessions was not a road laid out in lieu of the original road allowance, but a wholly independent road. *Cameron v. Wait*, 7th May, 1879; Cass. Dig. (2 ed.) 332.

34. *Title to land — Middle of roadway — Quebec North Shore Turnpike Road trustees — Petitory action — Possession by trustees — User by public — Eminent domain — 36 Geo. III. c. 9—4 Vict. c. 17—18 Vict. c. 100, s. 41 (Q.)*—The trustees of a turnpike road, from Quebec to Saut-a-la-Puce, instituted the suit to rectify an encroachment upon the road, alleging: "that in June, 1880, or about that time, defendant illegally and without any right whatsoever, unjustly took possession of a part of the property belonging to plaintiffs, to wit: of a part of the road, about 20 feet by 6 feet in depth, situate in the parish of Château Richer on the north side of said road, opposite a lot of land belonging to and possessed by defendant. . . . That defendant dug deeply in and under the road and erected and built on the said piece of land a building or cellar, and committed other acts and encroachments, which he had no right to commit, thereby decreasing the legal width of the road by at least 5 feet."—The time limited for action *en démolition* being expired, plaintiffs asked to be declared proprietors in possession of said road and to have the said building or cellar removed in the ordinary course of law.—Pleas:—(1) general issue, (2) peremptory exception that the part of the said road which ran through his land was a portion of said land; that he acquired said land at sheriff's sale; that he was owner of the land on each side of the road, which in the said place was bounded on the north by a ditch and on the south by a fence, and that the building of the said cellar in no way encroached upon the road in question.—The road was put under control of the trustees by 16 Vict. c. 235, s. 5, s.s. 9, in 1853. The width of main roads or the King's highways was regulated then by 36 Geo. III. c. 9, s. 2, at 30 feet (French measure) between 2 ditches, each 3 feet wide, and of sufficient depth to drain off the water, and where the said highways were not already 30 feet wide, the *Grand Voyer*, if he thought it necessary and practicable, should cause them to be widened by the person bound to repair the same.—The trust ordinance, 4 Vict. c. 17, s. 3, vested the trustees with all powers which were vested in *Grand Voyers* or municipal councils by 36 Geo. III. c. 9, and by ordinance, 4 Vict. c. 4, ss. 37 and 45; 8 Vict. c. 40, ss. 28 and 30; 10 & 11 Vict. c. 7, ss. 33 and 39, and enacted that the trustees, in the manner

which they deem fit, might cause the said roads, and the bridges thereupon, to be improved and widened, repaired and made anew, and might, for the purposes aforesaid, or any of them, by themselves, their agents and servants, go into and enter upon, and take any land or real property.—In support of their contention that the road should be 36 feet wide (French measure) the ditches forming part of the road, appellants cited 18 Vict. c. 100, s. 41, as to the width of highways, and argued that this Act must have been based on the general custom which had existed up to that time of making all front roads 36 feet wide (French measure).—In 1854 appellants macadamized the road and made the ditch on the north side, thereby fixing, themselves, the limit of the road; and the evidence shewed they placed it there because there is on the north side of the road a hill which terminates at the ditch, and at the distance of one foot, and one foot nine inches from the edge of the ditch, in front of the cellar, the ground is four feet some inches higher than the level of the road, therefore it was not possible to pass there, or to make a ditch to drain the road.—The appellants made the ditch at the foot of the hill, the only place where it was practicable to make it; and they thereby left beyond the ditch and consequently beyond the road the ground they claimed as forming part of the road. The south side of the road was bounded by a fence, and between the fence and the north-east side of the ditch there was a width of 30 feet, and from the edge of the north-east side of the ditch to that of the corner of the cellar, there was a width of one foot nine inches; at the north corner the width was nine inches less.—The action was maintained in the Superior Court and the Queen's Bench reversed the judgment (3 Dor. Q. B. 65).—On appeal the trustees claimed that: 1st. They had a right to bring the action; 2ndly. The road in question should be 38 feet 3 inches (equal to 36 feet French measure) wide at least; and 3rdly. Respondent had decreased the legal width of the road by at least 5 feet, which he was bound to restore to the appellants.—*Held, per Ritchie, C.J., and Fournier and Henry, JJ.*, that the road was an ancient road which was not of the width of 30 feet (French measure) when the appellants received control of it; that the law clearly recognized such roads, and contemplated that the *Grand Voyer*, if he should think it necessary and practicable, should cause such roads to be widened, and this he had never done as regards this road; that the appellants, in 1854, appear to have taken the road in the state it then was, and never to have exercised the power of widening it given them by 4 Vict. c. 17, upon paying an indemnity to the proprietor; and that whether or not the road was the legal width the appellants had no right to any ground beyond what formed part of the road, and served as such for the use of the public and for the ditches, if any, and therefore could not claim the ground beyond the ditch on the north side of the road which could not be, and never was, used by the public, and never formed part of the road.—*Per Strong and Henry, JJ.*, that the property of the road was vested in the Crown, and the effect of the statutes was not to take the property out of the Crown and vest it in the trustees, but to make them custodians of the road and the tolls for the benefit of the bondholders and the public. The appellants failed to shew either title or possession, and the action therefore failed.—Appeal dismissed with costs. (Gwynne, J.,

dissenting.) *Quebec North Shore Turnpike Road Trustees v. Vezina*, 8th March, 1884; Cass. Dig. (2 ed.) 758.

35. *Title to land — Legal warranty—Prescription — Plan of subdivision — Change in street line — Accession—Troubles de droit—Eviction.*

See WARRANTY, 7.

AND see Nos. 28-31, ante.

10. TOLLS.

36. *Road Companies Act—Special charter —Maintenance of road—Collection of tolls—Injunction.*

See TOLLS, 3.

37. *Constitutional law — Administration of Yukon—Franchise over Dominion lands.*

See CONSTITUTIONAL LAW, 78.

HIRE OF PERSONAL SERVICES.

Appointment of officers.—Summary dismissal—Libellous resolution—52 Vict. c. 79, s. 79 (Q.)

See MASTER AND SERVANT, 10.

HIRE RECEIPT.

1. *Prior agreement—Subsequently acquired goods—Fraud on creditors.*

See CHATTEL MORTGAGE, 17.

2. *Real and personal property—Immoveables by destination — Moveables incorporated with freehold—Severance from realty—Contract—Resolatory condition—Conditional sale—Hypothecary creditor — Unpaid vendor — Arts. 379, 2017, 2083, 2085, 2089 C. C.*

See CONTRACT, 66.

HOMESTEAD.

See TITLE TO LAND.

HOUSE OF COMMONS.

Constitutional law—Construction of B. N. A. Acts—Representation of provinces in House of Commons — Aggregate population of Canada.—In determining the number of representatives to which Ontario, Nova Scotia, and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in s.-s. 4 of s. 51 of the B. N. A. Act, 1867, mean the whole population of Canada including that of provinces which have been admitted subsequently to the passing of that Act. The special terms on which the Province of Prince Edward Island was admitted into the Dominion do not except that province from the general operation of the clauses of the B. N. A. Act, 1867, as to representation in the House of Commons as above stated. *In re Representation in the*

House of Commons of Canada, xxxiii., 475; In re Representation of P. E. Island in House of Commons of Canada, xxxiii., 594. Leave to appeal to Privy Council granted November, 1903
AND see ELECTION LAW—HANSARD.

HUSBAND AND WIFE.

1. *Community—Assets—Second community—Transfer to descendants—Edit de secondes noces, 1560—Arts. 279, 282 and 283 C. de P.—Arts. 1760, 1265 and 774 C. C.—Costs—Clerical error—Amendment after hearing.*—On the 17th February, 1841, C. and wife (son-in-law and daughter of S. N. and P.), acknowledged by deed that they were indebted to S. N., widow of P., in \$140, due to her late husband, and also in an annual life-rent, in consideration of real estate given to them previously by P. and S. N., by deed of gift, 16th February, 1830. On 19th February, 1841, the widow married J. B. L. On the 21st January, 1870, J. B. L. and his wife, S. N., transferred to P. L. (grandson of J. B. L.), all the arrears of life-rent due by C. and his wife as well as the \$140 obligation.—In an action by P. L. against C. and his wife, to recover 26 years of life-rent, and the amount of the obligation.—*Held*, 1. Affirming the judgment appealed from, that the arrears of the life-rent which accrued during the second marriage of S. N. belonged to the community between her and her second husband; that the husband, as head of the community, could legally dispose of his share, viz., one-half of said arrears, in favour of his grandson, but the transfer, as to the other half belonging to his wife, was null, as S. N. could not transfer to any of her husband's descendants, who are, in such a case, interposed to secure directly to the husband a benefit which cannot be conferred upon him directly.—*Held*, reversing the judgment appealed from, that although the \$140 formed part of the first community, yet the half belonging to S. N. at the time of her second marriage formed part of the second community, and her husband, J. B. L., could legally dispose of his share, viz., \$35 in favour of his grandson, the transfer of the balance, \$105, being null and void.—In this case the parties took separate appeals to the Supreme Court, and the respondents having succeeded in getting the judgment reversed on one point and confirmed on another, were allowed costs of a cross-appeal.—Plaintiff's declaration alleged that the arrears of rent claimed were due in virtue of a deed of cession, dated 16th February, 1828. In the Superior Court, after hearing, a motion was made by plaintiff to discharge the *délibéré* as it was discovered at the argument that a clerical error, serious to the interests of the plaintiff, had inadvertently occurred in an authentic document, invoked in support of his action, as to the date of a donation upon which it was mainly based; and as such error could not easily be remedied by referring to the notarial minute, this motion was granted. A second motion was made by the plaintiff *en reprise d'instance*, to amend the declaration by adding: "That the date of the constitution of the rent above mentioned was erroneously mentioned in the deed of transfer above related as being made by and in virtue of the contract of marriage of the said A. C., dated the 7th February, 1828. —" That the said constituted rent is made by a deed of the 16th February, 1830, as it appears from an authentic copy of said deed

forming part of exhibit number one of the plaintiff in this cause, and that the intention of the parties to the said deed of transfer at the time of the execution thereof was to transfer the arrears of rent constituted by the said defendant on the 16th February, 1830. The said rent being the only one due by the said A. C., to the said S. N." *Held*, affirming the judgments of the courts below, that the error in the transfer, as to the date of the deed under which the life-rent was due, was a mere clerical error; that there was no other life-rent to which the transfer could apply but the one in question, and that the claim was sufficiently identified by the description of the deeds and the date of their registration, under the special allegations of the plaintiff and the evidence adduced. *Pilon v. Brunet*, v., 318.

2. *Practice in Nova Scotia—Improper joinder—Abatement—Amendment of record.*—Under the practice in Nova Scotia, where the wife is improperly joined as co-plaintiff with the husband, the suit does not abate, but the wife's name must be struck out of the record. *Caldwell v. Stadacona Fire and Life Ins. Co.*, 12th January, 1883; xi., 212.

3. *Wife's separate estate—Sale by wife to secure debt due by husband—Simulated deeds—Art. 1301 C. C.*—Where the sale of real estate by the wife, separate as to property, to her husband's creditor is shewn to have been intended to operate as a security only for the payment of her husband's debts, such sale will be set aside as a contravention of art. 1301 C. C.—*Per Strong, J.*, dissenting. The trial judge's finding in the present suit that the deeds of sale were not simulated, should be affirmed. *Klock v. Chamberlain*, xv., 325.

4. 26 Geo. III., c. 11 (N. B.)—*Statute of Distributions—Statute of Frauds—Restoration of former law—Intestate estate—Feme covert—Husband's right to residue—Next of kin.*—26 Geo. III. c. 11, ss. 14, 17 (N. B.), re-enacted 22 & 23 Car. II. c. 10 (Statute of Distributions) as explained by 29 Car. II. c. 3, s. 25 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estates as theretofore.—When the statutes were revised in 1854 the Act 26 Geo. III. c. 11, was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme covert* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission. *Held*, that the personal property passed to the husband and not to the next of kin of the wife.—*Per Strong, J.* The repeal by R. S. N. B. of 26 Geo. III. c. 11, passed in the affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law of New Brunswick.—*Per Gwynne, J.* When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and a *fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. III. c. 11 (N. B.), it was not necessary to enact the interpreting section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act. *Held, per Ritchie, C.J., Fournier, Gwynne and Patterson, JJ.*, that the Married Woman's Property Act (C. S. N. B. c. 72), which exempts separate property of a married woman

from liability for her husband's debts and prohibits any dealing with it without her consent, only suspends the husband's right in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed.—The Supreme Court (N.B.) while deciding against the next of kin on his claim to the residue of the estate of a *feme covert*, directed that his costs should be paid out of the estate. On appeal the decree was varied by striking out such direction. *Lamb v. Cleveland*, xix., 78.

5. *Married woman—Community—Personal injuries—Right of action—Pleading—Exception à la forme—Arts. 14, 116, 119 C. C. P. (Old Text.)—Appeal—Questions of procedure.*—The right of action for damages for personal injuries sustained by a married woman, *commune en biens*, belongs exclusively to her husband and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband.—Where it appears upon the face of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that objection should be taken by *exception à la forme*. Absolute want of legal right of action may be invoked by a defendant at any stage of a suit. Judgment of the Court of Queen's Bench, 3 Q. P. R. 1, overruled on the *motifs*, but affirmed in its result. *McFarren v. Montreal Park and Island Ry. Co.*, xxx., 410.

6. *Community—Continuation of community—Inventory—Procès-verbal de carence—Tripartite community.*—At the time of the dissolution of community by the death of one of the consorts in 1845, the common assets consisted of bare necessities of small value and exempt from seizure. There was no inventory or *procès-verbal de carence* made and subsequently the survivor contracted a second marriage. In an action by a child of the first marriage claiming a share in continuation of community:—*Held*, that there was no necessity for an inventory of property of such insignificant value and that failure to make an inventory or *procès-verbal de carence* did not, under the circumstances, effect a continuation of community. *King v. McHendry*, xxx., 450.

7. *Husband and wife—Separate property of wife—Married Woman's Property Acts (N. S.)—Action by wife against husband.*—Under the Married Woman's Property Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband. *Michaels v. Michaels*, xxx., 547.

Judgment appealed from (33 N. S. Rep. 1) reversed.

8. *Husband and wife—Judicial separation as to property—Debts incurred by husband before dissolution of community—Obligation by wife—Art. 1301 C. C.—Nullity—Public policy.*—On appeal the Supreme Court affirmed the judgment of the Court of Review, at Montreal (6 Rev. de Jur. 13), by which the female defendant was relieved from liability under a deed to which she had become a party for the purpose of guaranteeing claims against her husband. The question at issue was the validity of a deed of *dation en paiement* to which both husband and wife were parties, executed after dissolution of the community and acceptance of the same by the wife. *Bastien v. Filiatrault*, xxxi., 129.

9. *Sale of land to married woman—Authorization of husband—Propre de communauté—Action pétitoire—Prescription—Art. 2254 C. C.]—Quere*, Is a deed of sale of lands in Quebec to a married woman without the authorization of her husband, sufficient to support a petitory action, or to serve as the ground for a prescription by 10 years' possession? Would it be null for defect of form? *Chalifour v. Parent*, xxxi., 224.

10. *Opposition to seizure of real estate—Renunciation of community—Possession of lands.*

See TITLE TO LAND, 75.

11. *Community—Succession of deceased wife—Liquidation of husband's estate—Deposits in bank—Right of action.*

See PRINCIPAL AND AGENT, 20.

12. *Insurable interest in wife's property—Tenant for life—Tenancy by the courtesy—Practice in Nova Scotia—Striking out name of wife joined as co-plaintiff.*

See INSURANCE, LIFE, 82.

13. *Declaration in acte de mariage—Residence—Separate estate—Community.*

See DOMICILE, 1.

14. *Transfer of policy—Authorization of husband—Art. 183 C. C.*

See INSURANCE, LIFE, 3.

15. *Power of attorney—Prohibitory provisions of will—Evidence—Commission for services.*

See EXECUTORS AND ADMINISTRATORS, 6.

16. *Married woman's property—Separate estate—Contract by married woman—Separate property exigible—C. S. U. C. c. 73—35 Vict. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 Vict. c. 19 (O.)*

See DEBTOR AND CREDITOR, 54.

17. *Deed to wife by husband—Assent—Es-toppel.*

See TITLE TO LAND, 83.

18. *Partnership—Dissolution—Married woman—Benefit conferred on wife during marriage—Contestation—Priority of claims.*

See PARTNERSHIP, 39.

19. *Don mutuel—Property excluded—Acquisition after marriage—Resiliation for value—Right of wife to possession.*

See MARRIED WOMAN, 2.

20. *Government of Quebec—Retired official—Interest of wife in pension—Commutation.*

See PENSION DE RETRAITE.

21. *Purchase of land by wife—Re-sale garnishee of purchase money on—Debt of husband—Statute of Elizabeth—Hindering or delaying creditors.*

See PRACTICE AND PROCEDURE, 60.

22. *Constitutional law—Marital rights—Married woman—Separate estate—Jurisdiction of N. W. Territorial Legislature—Statute—Interpretation of 40 Vict. c. 7, s. 3 and amendments—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.*

See MARRIED WOMAN, 3.

23. *Title to goods—Execution against husband—Replevin—Justification by writ.*

See SHERIFF, 7.

24. *Immoral contract — Trust — Lien for costs—Evidence—Husband and wife.*

See CONTRACT, 162.

25. *Action—Séparation de corps — Money demand—Supreme Court Act—Jurisdiction.*

See APPEAL, 90.

26. *Criminal law — Procedure at trial — Canada Evidence Act, 1893 — Husband and wife as competent witnesses — “Communications” — Privilege—Construction of statute—Directions given by legal adviser.*

See CRIMINAL LAW, 25.

AND see MARRIED WOMAN.

HYPOTHEC.

Church notes—Charge on lands—Appellate jurisdiction.

See APPEAL, 21.

AND see LIEN—MORTGAGE—PRIVILEGES AND HYPOTHECS.

ICE.

1. *Negligence — Accumulation of ice—Repair of street—Defective sidewalk.*

See MUNICIPAL CORPORATION, 142.

2. *Negligence—Snow and ice on sidewalk—By-law—Construction of statute.*

See MUNICIPAL CORPORATION, 144.

3. *Negligence—Maintenance of streets—Accumulation of ice and snow.*

See MUNICIPAL CORPORATION, 145.

4. *Navigable waters — Harvesting ice—Trespass on water lots.*

See RIVERS AND STREAMS, 5.

IMMOVEABLE PROPERTY.

1. *Vendor and purchaser—Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination — Hypothecary charges—Arts. 375 et seq. C. C.]—A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor, is a valid condition—In order to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveables with the immoveables should be, at the time, owner both of the moveables and of the real property with which they are so incorporated. *Lainé v. Béland* (26 Can. S. C. R. 419), and *Filiatrault v. Goldie* (Q. R. 2 Q. B. 368), distinguished.—Decision appealed from (Q. R. 5 Q. B. 125) affirmed, *Girouard, J.*, dissenting. *Banque d'Hochelaga v. Waterous Engine Works Co.*, xxvii., 406.*

2. *Mortgage, construction of — Trade fixtures — Chattels — Tools and machinery of a “going concern”—Constructive annexation—Mortgagor and mortgagee.]—The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of moveable articles in permanent structures with a view of ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed but in a manner appropriate to their use and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became part of the realty. *Haggart v. Town of Brampton*, xxviii., 174.*

3. *Sale of moveables — Destination—Railway stock — Priority of mortgage — Unpaid vendor.*

See LIEN, 3.

4. *Property, real and personal—Immoveables by destination—Moveables incorporated with freehold—Severance from realty—Contract—Resolutive condition—Conditional sale—Hypothecary creditor — Unpaid vendor — Arts. 379, 2017, 2083, 2085, 2089, C. C.*

See CONTRACT, 66.

5. *Gas pipes—Title to portion of highway—Fixtures—Legislative grant.*

See ASSESSMENT AND TAXES, 13.

INCIDENTAL DEMAND.

Evidence — Defendant's books — Supplemental demand—Reference of accounts.

See CONTRACT, 11.

INDIAN AFFAIRS.

*Treaties with Indians — Contingent annuities—B. N. A. Act (1867) s. 112—Debts of late Province of Canada—Res judicata.]—The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibway Indians for arrears of augmented annuities with interest, from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently should be taken into account and included in the debt of the late Province of Canada mentioned in s. 112 of the British North America Act, 1867. *Held*, affirming the decision of the arbitrators, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of *Attorney-General of Canada v. Attorney-General of Ontario* ([1897] A. C. 199), and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec v. Dominion of Canada; In re Indian Claims*, xxx., 151.*

INDIAN LANDS.

1. *Treaty No. 3—North-West Angle—Vesting of title—Occupancy—Lands reserved for Indians—B. N. A. Act, s. 91, s.s. 24—s. 92, s.s. 5—ss. 109, 117.*—The lands within the boundary of Ontario in which the claims or rights of occupancy of the Indians were surrendered or became extinguished by the Dominion Treaty of 1873, known as the North-West Angle Treaty, No. 3, form part of the public domain of Ontario and are public lands belonging to Ontario by virtue of the provisions of the British North America Act, 1867. —Only lands specifically set apart and reserved for the use of the Indians are "lands reserved for Indians" within the meaning of s. 91, item 24 of the British North America Act (1867), *Strong and Gwynne, JJ.*, dissenting. *St. Catharines Milling and Lumber Co. v. The Queen*, xiii., 577.

[Judgment affirmed by the Privy Council (14 App. Cases 46.)]—See also *Church v. Fenton* (5 Can. S. C. R. 239; 28 U. C. C. P. 384; 4 Ont. App. R. 159. Col. 157, ante.)

2. *Surrender — Crown lands — Sale and grant by letters patent—Taxation—Sale for taxes.*

See ASSESSMENT AND TAXES, 37.

3. *Constitutional question — Legislative jurisdiction—Appeal per saltum.*

See APPEAL, 330.

4. *Treaties with Indians—Surrender of Indian rights — Mines and minerals — Crown grant — Constitutional law — 43 Vict. c. 28 (D.)*

See TITLE TO LANDS, 141.

INDIAN TREATIES.

Constitutional law—Province of Canada—Surrender of Indian lands — Annuity to Indians—Revenue from Indian lands—Increase of annuity — Charge upon lands — British North America Act, 1867, s. 109.

See CONSTITUTIONAL LAW, 4.

INDICTMENT.

See CRIMINAL LAW.

INFANT.

Negligence of servant—Contributory negligence.—The doctrine of contributory negligence does not apply to an infant of tender age. *Gardner v. Grace* (1 F. & F. 359) followed.—Judgment appealed from (33 N. B. Rep. 91) affirmed. *Mcritt v. Hopenstal*, xxv., 150.

AND see MINORITY—TUTORSHIP.

INJUNCTION.

1. *Illegal assessment — Remedy against levy.*—Injunction is a proper remedy against an attempt to levy an illegal tax. *Central Vermont Ry. Co. v. Town of St. Johns*, xiv., 288.

2. *41 Vict. c. 14, s. 4 (Que.)—Damages—Probable cause—Extra expenses.*—Where a registered shareholder of a company, finding the annual reports of the company misleading, applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ; and consequently, the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction. *Montreal St. Ry. Co. v. Ritchie*, xvi., 622.

3. *Ex parte order — Interim injunction—Order dissolving — Appeal—Trespass—Decision on merits.*—In an action of trespass and for an injunction to restrain the defendants from proceeding with the digging of trenches and laying of pipes, an *ex parte* restraining order was granted without notice to the defendant, on the affidavit of the plaintiff alone. On motion to set aside this order, an order passed dissolving the injunction which was affirmed by the Supreme Court of Nova Scotia *in banco*.—On appeal to the Supreme Court of Canada, *Held*, on the merits, that the order of the Supreme Court of Nova Scotia should not be interfered with.—Appeal dismissed with costs. *Kearney v. Dickson*, Cass Dig. (2 ed.) 431; Cass. S. C. Prac. (2 ed.) 31.

4. *Municipal corporation — Waterworks—Extension of works—Repairs—By-law—Resolution—Agreement in writing—Highways and streets — R. S. Q. art. 4485 — Art. 1033 (a) C. C. P.*—By a resolution of the council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi, at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks, and had it in operation within the time prescribed, but the system proving insufficient, a company was formed in 1895 under the provisions of R. S. Q. art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes, without receiving any further authority from the council. *Held*, (Gwynne, J., dissenting), reversing the judgment appealed from (Q. K. 5 Q. B. 542), that these were not merely necessary repairs, but new works, actually part of the system required to be completed during the 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town. *Held*, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of art. 1033 (a) of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. *Ville de Chicoutimi v. Légaré*, xxvii., 329.

5. *Trade-mark—Infringement—Use of corporate name—Fraud and deceit—Evidence.*—The plaintiffs, incorporated in the United States of America, have done business there and in Canada manufacturing and dealing in india rubber boots and shoes under the name of "The Boston Rubber Shoe Company," having a trade line of their manufactures marked with the impression of their corporate name, used as a trade-mark, known as "Bostons," which had acquired a favourable reputation. This trade-mark was registered in Canada, in 1897. The defendants were incorporated in Canada, in 1896, by the name of "The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods to those manufactured and sold by the plaintiffs, on one grade of which was impressed the defendants' corporate name, these goods being referred to in their price lists, catalogues and advertisements as "Bostons," and the company's name frequently mentioned therein as the "Boston Rubber Company" without the addition "Montreal." In an action to restrain defendants from the use of such mark or any similar mark on the goods in question, as an infringement on the plaintiffs' registered trade-mark; *Held*, reversing the judgment appealed from (7 Ex. C. R. 187), that under the circumstances, defendants' use of their corporate name in the manner described was a fraudulent infringement of plaintiffs' registered trade-mark calculated to deceive the public and so to obtain sales of their own goods as if they were plaintiffs' manufactures, and, consequently, that the plaintiffs were entitled to an injunction restraining the defendants from using their corporate name as a mark on their goods manufactured in Canada. *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal*, xxxii, 315.

6 *Assessment roll—Sale of lands for taxes—Appropriate remedy—Art. 1031 C. O. P.—Prohibition.*

See ASSESSMENT AND TAXES, 19.

7. *Pollution of stream — Tannery — Long user.*

See NUISANCE, 1.

8. *Ejectment—Waste—Bill in chancery—Jurisdiction—R. S. O. (1877) c. 40, s. 87—33 Vict. c. 23 (Ont.).*

See TITLE TO LAND, 99.

9. *Matter in controversy—Bornage—Jurisdiction.*

See APPEAL, 46.

10. *Toll-bridge franchise — Interference—Free bridge.*

See TOLLS, 2.

11. *Collection of tolls — Road company — Maintenance of road—R. S. O. (1887) c. 159—53 Vict. c. 42 (Ont.).*

See TOLLS, 3.

12. *Malice — Injunction abandoned — Action for damages—Demurrer.*

See PLEADING, 3.

13. *Order of Court of Appeal — Quashing interim injunction — Final judgment — Appellate jurisdiction of Supreme Court.*

See APPEAL, 188.

14. *Appeals from Ontario — Jurisdiction—Ditches and watercourses — Title to land—60 & 61 Vict. c. 34, s. 1 (a) (D.).*

See APPEAL, 85.

15. *Patent of invention — Combination of known devices—Novelty—New result — Infringement.*

See PATENT OF INVENTION, 13.

INLAND REVENUE.

Illegal distilleries — Penalties — Vice-Admiralty Courts—Jurisdiction.

See CONSTITUTIONAL LAW, 18.

AND see DUTIES—LIQUOR LAWS.

INSOLVENCY.

1. APPEALS, 1-3.
2. ASSIGNMENTS, 4-8.
3. COMPOSITION AND DISCHARGE, 9-10.
4. FRAUDULENT CONVEYANCES, 11-20.
5. FRAUDULENT PREFERENCES, 21-36.
6. LEGISLATIVE JURISDICTION, 37-40.
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8. NOTICE TO CREDITORS, 43.
9. PRIORITY AND PRIVILEGES, 44-47.
10. SALE OF ASSETS, 48-51.
11. SHAREHOLDER'S LIABILITY, 52.

1. APPEALS.

1. *Claim under Insolvent Act of 1875 — Final judgment — Right of appeal — 40 Vict. c. 41, s. 23 (D.).*

See APPEAL, 281.

2. *Report of collocation—Contestation—Appeal — Amount in controversy — Pecuniary interest of appellant—Arts. 746, 747, C. C. P.*

See APPEAL, 68.

3. *Appeal — Jurisdiction — Sequestration — Contrainte par corps.*

See APPEAL, 95.

2. ASSIGNMENTS.

4. *Assignment by non-trader — Action by assignee — Pleading — Insolvent Act of 1875 — Onus of proof.*—In an action by an assignee as the assignee of an insolvent under the Insolvent Act of 1875 it is upon the plaintiff to prove the issue raised by a plea traversing his allegation of his capacity as assignee under the Act, and to shew that the assignor was a trader within the meaning of the statute entitled to make an assignment under the provisions thereof. (See 2 Russ. & Geld. 90.) *Creighton v. Chittick*, vii., 348.

5. *Fraudulent preference—Assignment for benefit of creditors — Power to sell on credit — R. S. O. c. 118, s. 2.]—An assignment for benefit of creditors provided that the assignee*

could sell, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he should deem best or suitable, all the property thereby assigned to him. No fraudulent intention of defeating or delaying creditors was shewn. *Held*, affirming the judgment appealed from (8 Ont. App. R. 402), that the authority to sell upon credit did not, *per se*, invalidate the deed nor could it on that account be impeached as a fraudulent preference within the Act, R. S. O. c. 118, s. 2. *Slater v. Badenach*, x., 296.

6. *Defaulting assignee — Insolvent Act of 1875, ss. 28, 29, 30—Sureties.*—Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee. *Letourneau v. Dansereau*, xii., 307.

7. *Assignment for benefit of creditors—Accidental omission from schedule—R. S. O. (1877), c. 118, s. 2.*—An insolvent made an assignment for the benefit of his creditors, for the purpose of satisfying, without preference or priority, all creditors, and the trust declared was: 1. To pay in full the debts of the several persons or firms named in a schedule to said deed, or, if not sufficient to pay the same in full, to divide the assets of the insolvent estate *pro rata* among such scheduled creditors, and: 2. To pay the surplus, if any, to the said insolvent. It appeared that there was a small creditor of the insolvent whose name was not on said schedule.—*Held*, *per Ritchie, C.J.*, and *Fournier and Taschereau, J.J.*, reversing the judgment appealed from (10 Ont. App. R. 405), *Henry, J.*, dissenting, that the consideration for the deed, as expressed on its face was that there should be a distribution of the estate of the insolvent among all his creditors, and the assignee was not bound to confine such distribution to the creditors named in the schedule.—*Per Strong, J.* That the assignee was confined to the schedule but effect must be given to the word "intent" in the statute, and as the evidence shewed that a *bona fide* effort was made to ascertain the names of all the creditors before the execution of the deed it did not appear that the insolvent intended to prefer the scheduled creditors, and the deed, therefore, was not void under R. S. O. (1877) c. 118, s. 2.—*Semble*, *per Strong, J.* That the word "preference" in R. S. O. (1877) c. 118, s. 2, imports a "voluntary preference" and is not applicable to the case of a deed obtained by a creditor or creditors, who to obtain it have brought pressure to bear on the debtor. *McLean v. Garland*, xiii., 366.

8. *Practice — Incomplete assignment for benefit of creditors—Seizure of immovables—Stay of execution—Art. 772 C. C. P. (old text).*

See EXECUTION, 5.

3. COMPOSITION AND DISCHARGE.

9. *Pleading — Puis darrein continuance—Composition and discharge pending suit —*

Discharge not pleaded—Judgment after confirmation — Execution — Estoppel — Appeal — Supreme Court Act, s. 17.—W. sued B., who assigned in June, 1873, under the Insolvent Act of 1869. In August, B. secured a deed of composition, and in October pleaded, *puis darrein continuance*, that since action commenced he assigned under the Act, and by deed of composition and discharge was discharged of all liability. In November the Insolvent Court confirmed the deed of composition and discharge, but B. neglected to plead this confirmation. Judgment was given in favour of W. in January, 1874, and in May, 1876, execution issued. In June, 1876, a rule *nisi* to set aside judgment and execution was obtained and made absolute. *Held*, reversing the judgment appealed from (2 R. & C. 419), that B., having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution. (*Strong, J.*, dissented on the ground that the rule or order of the court below was not one from which an appeal could be brought under the Supreme and Exchequer Court Act; *Sir W. B. Richards, C.J.*, was absent when judgment was rendered.) *Wallace v. Bossom*, ii., 488.

10. *Partnership — Assignment for benefit of creditors — Composition and discharge — Release of debtor.*

See DEBTOR AND CREDITOR, 7.

4. FRAUDULENT CONVEYANCES.

11. *Sale of bulk of estate — Contrivance to defeat creditors — Evidence — Fraud — Preference — Insolvent Act, 1875, s. 13, s.s. 1, 3—Insolvent Act, 1869, ss. 86 and 88—Arts. 993, 1033, 1035, 1040, 1981, 1982 C. C.]—F.* being largely indebted, sold to B., his principal creditor, on the 13th January, 1875, the bulk of his estate, comprising a hotel and furniture, for \$15,409.50, the hotel, assessed at \$22,000, being put down for \$10,000. The sale was subject to redemption by F., on reimbursing, within three years, the \$15,409.50, and interest at 8 per cent; and provided that, in case of insolvency or default of payment, this right should cease. No delivery took place, F. remained in possession under a lease from B. of same date as the sale, and 10 months later F. became bankrupt. In the meantime B., with F.'s consent, had leased the furniture to T. & J., in whose hands it was when F.'s assignee revindicated it as part of the insolvent estate. T. & J. did not defend, but B. intervened and claimed the effects under the deed of sale. The assignee contested and the intervention was dismissed, and the deed declared to have been made in fraud of creditors. On appeal from the Queen's Bench judgment, reversing this decision, *Held*, reversing the judgment appealed from (3 Q. L. R. 214), that as there was sufficient evidence to prove that the object of the transactions was to defeat F.'s creditors generally, and therefore the deeds of sale and lease of the 19th January, 1875, were null and void under arts. 993, 1033, 1035 & 1040, C. C.; ss. 86 & 88, Insolvent Act of 1869, and s. 3, s.s. 13, Insolvent Act of 1875. *Rickaby v. Bell*, ii., 560.

12. *Donation — Contract of Marriage — Proof of déconfiture—Arts. 803, 1034 C. C. —Revocation—Fraud.*

See DONATION, 1.

13. *Unregistered mortgage—Legal title of assignee — Equitable rights — Priority.*

See CHATTEL MORTGAGE, 15.

14. *Preference — Assignment under pressure — Intent — Criminal liability — R. S. O. (1887) c. 124, s. 2.*

See FRAUDULENT CONVEYANCES, 1.

15. *Preferential assignment — Pressure — 49 Vict. c. 45 (Man.)*

See FRAUDULENT CONVEYANCES, 2

16. *Fraudulent conveyance — Action by creditor—Setting aside deed of land—Amount in controversy.*

See APPEAL, 42.

17. *Conveyance in fraud of creditors generally—Simulated sale.*

See FRAUDULENT CONVEYANCES, 4.

18. *Insolvent Act of 1875—Fraudulent conveyance—Control of insolvent estate—Sale by assignee.*

See TITLE TO LAND, 133.

19. *Voluntary conveyance of land—Solvent vendor—Action by mortgagee—13 Eliz. c. 5.*

See FRAUDULENT CONVEYANCES, 6.

20. *Money paid — Voluntary payment — Preference of particular creditor—Action by assignee—Status.*

See FRAUDULENT PREFERENCE, 16.

5. FRAUDULENT PREFERENCES.

21. *Insolvent Act of 1875, s. 133—Mortgage—Contemplation of insolvency — Fraudulent preference — Merchant Shipping Act, 1854—Conflicting statutes.]—F., a ship-owner in Yarmouth, N. S., employed as his agents in Liverpool, J. & Co., the defendant J. being a member of this firm, and, as agents in New York, the firm of S. P. B., of which the defendant S. was a member. In course of dealings with these agents he became indebted to both firms for acceptances by them of drafts made when he was in want of money, towards payment of which they received the freights of his vessels and remittances in money. On one occasion he said that he would give to the Liverpool firm a mortgage on the "Tsernogora," or the "Magnolia," when they should require it, and, in a subsequent conversation with a member of the firm, he agreed to give such mortgage on conditions which were not carried out. He promised to give the New York firm security "in case anything happened," and mentioned as such security a mortgage on the "Tsernogora." According to F.'s own statement, he had sufficient property to pay his liabilities when these conversations took place. A few weeks after these conversations F. executed a mortgage of 20 shares of the "Tsernogora," in favour of the defendants J. & S., and had the same recorded, and within 30 days thereafter attachment in insolvency issued against him. Plaintiff, assignee of F.'s estate, filed a bill to have the mortgage set aside. J. did not answer. The other defendants denied that the mortgage was made in contemplation of insolvency, and that, as it was made under "The Merchant Shipping Act," (Imp.) it*

was not affected by the "Insolvent Act of 1875." The trial judge made a decree in favour of plaintiff and ordered the mortgage to be set aside. The Supreme Court (N. S.) dismissed an appeal from that judgment (5 Russ. & Geld, 244). *Held*, affirming the judgment appealed from, Henry, J., dissenting, that the promise to give security "in case anything should happen" could only mean "in case the party should go into insolvency," and that the transfer was void under s. 133 of the Insolvent Act of 1875. *Held*, also, that the provisions of the Merchant Shipping Act did not prevent the property in the ship passing to the assignee under the Insolvent Act. *Jones v. Kinney*, xi., 708.

22. *Sheriff — Trespass — Sale of goods by insolvent — Bona fides — Judgment of inferior tribunal — Estoppel — Bar to action—Fraudulent preferences—Pleading — Res judicata.]—K., who was a trader in insolvent circumstances, sold the whole of his stock-in-trade to D., at a time when two of his creditors had, to D.'s knowledge, recovered judgment against him. The sheriff afterwards seized the goods under executions issued upon judgments subsequently obtained, and, upon an interpleader issue tried in the County Court, the jury found that K. had sold the goods with intent to prefer the creditors holding the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court, and this judgment was affirmed by the Supreme Court *en banc*. In an action afterwards brought by D. against the sheriff for trespass in seizing the goods, he obtained a verdict, which was, however, set aside by the court *en banc*, a majority of the judges holding that the County Court judgment was a complete bar to the action. — On appeal to the Supreme Court of Canada: *Held*, reversing the judgment of the Supreme Court of British Columbia, that as the evidence shewed that the goods had been purchased by D. in good faith for his own benefit, the sale was not void under the statute respecting fraudulent preferences. *Held*, also, that the County Court judgment, being a decision of an inferior court of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court beyond the jurisdiction of the County Court. *Held*, further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel by a plea setting up in detail all the facts necessary to constitute an estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established.—*Tasche-reau, J.*, dissented. (See 3 B. C. Rep. 35, 72.) *Davies v. McMillan*, 1st May, 1893.*

[NOTE.—An appeal to the Privy Council was dismissed for non-pros.]

23. *Assignment — Preference — Payment in money — Cheque of third party — R. S. O. c. 124, s. 3.]—Appeal from a judgment of the Court of Appeal for Ontario (23 Ont. App. R. 439), which held that indorsing and giving a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor within the meaning of the third section of chapter 124 of the Revised Statutes of Ontario (1887) and overruling *Armstrong v. Hemstreet* (22 O. R. 366). The Supreme Court of Canada affirmed the decision of the Court of Appeal*

and dismissed the appeal with costs. *Fraser v. Davidson & Hay*, xxviii., 272.

24. *Pressure — Assignment of expected profits — Fraudulent preferences — Statute of Elizabeth—Assets exigible in execution.*—The appeal was from the judgment of the Court of Appeal for Ontario, affirming the judgment of Street, J., in the High Court of Justice, which dismissed the action of the plaintiffs with costs. The action was brought to set aside an assignment, by way of security, to the defendant of an interest in the profits expected to be earned under a contract for the performance of work, on the ground that it was made to defeat, hinder, defraud, delay and prejudice the creditors of the assignor (who was insolvent), and to give the assignee an unjust preference. In the trial court the decision in favour of the defendant was based on the ground that the assignment had been made under pressure, and was therefore valid. The Court of Appeal affirmed this judgment, but upon other grounds, holding that as the subject of the assignment did not consist of assets which could be reached by creditors at the time when it was made, the assignment did not come within the Act Respecting Assignments and Preferences. (24 Ont. App. R. 153.) — The Supreme Court of Canada dismissed the appeal with costs, for the reasons given by the judges in the Court of Appeal for Ontario. *Blakely v. Gould*, xxvii., 682.

25. *Assignment for benefit of creditors — Fraudulent preference — Bribery—Promissory note — Illegal consideration—Nullity—Costs.*—A secret arrangement whereby the provisions of the Code of Civil Procedure respecting equal distribution of the assets of insolvents are defeated and advantages given to a particular unsecured creditor, is a fraud upon the general body of creditors notwithstanding that the agreement for the additional payment may be made by a third person who has no direct interest in the insolvent's business. A promissory note given to secure the amount of the preference payable under such an arrangement is wholly void.—An agreement for a payment to an inspector of an insolvent estate to influence his consent to an arrangement which is not for the general benefit of the creditors is a bribe which is, in itself, sufficient reason to adjudge the transaction, to induce which it was given, corrupt, fraudulent and void. (Q. R. 16 S. C. 113, reversed.) *Brigham v. Banque Jacques-Cartier*, xxx., 429.

26. *Acts in contemplation of bankruptcy—Fraudulent preference—Act of 1875.*

See MORTGAGE, 9.

27. *Acts in contemplation of bankruptcy—Deposit to credit of indorser—Preferences—Arts. 1966, 1069, 1070 C. C.*

See PLEDGE, 1.

28. *Action to set aside chattel mortgage — Parties — Attacking trust deed.*

See FRAUDULENT PREFERENCE, 3.

29. *Pawning of chattels — Notorious bankruptcy — Rights of creditors — Arts. 1968-1970 C. C.*

See PLEDGE, 2.

30. *Pressure — Mortgage — R. S. O. (1887) c. 124, s. 2.*

See FRAUDULENT PREFERENCE, 6.

31. *Advances to insolvent railway company — Pledge—Fraudulent preference.*

See LIEN, 7.

32. *Bonâ fide advances—Conveyance in fraud of creditors — Consideration partly bad — Statute of Elizabeth—R. S. O. (1887) c. 124, s. 2.*

See FRAUDULENT PREFERENCE, 7.

33. *Preferential mortgage — Prejudice of creditors—Art. 2023 C. C.*

See MORTGAGE, 13.

34. *Transfer of property by insolvent — Knowledge of creditor — Fraudulent preference — Arts. 1035, 1036, 1169 C. C.*

See DEBTOR AND CREDITOR, 25.

35. *Debtor and creditor—Fraudulent preferences — Chattel mortgage — Advances of money — Solicitor's knowledge of circumstances—R. S. O. (1887) c. 124—54 Vict c. 20 (Ont.)—58 Vict. c. 23 (Ont.).*

See DEBTOR AND CREDITOR, 28.

36. *Assignment for benefit of creditors — Preferred creditors — Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth.*

See DEBTOR AND CREDITOR, 29.

6. LEGISLATIVE JURISDICTION.

37. *Foreign Bankruptcy Act — Assignment thereunder — Lands in Canada — Lex loci.*—D., who owned lands in Canada, resided and carried on business in partnership with H. & S., in New York. In November, 1873, the firm of D. H. & S. became insolvent, and in February, 1874, under the United States Bankruptcy Act, they executed a deed purporting to "convey, transfer and deliver all their and each of their estate and effects" to a trustee for the creditors. In September, 1874, an execution against D.'s lands in Canada was filed by the respondents, who had in the meantime recovered judgment against him. Subsequently D., by way of further assurance, and in pursuance of the deed of February, 1874, granted to the trustee his lands in Canada, specifying the parcels. A bill was filed for a declaration that the lands were not affected by the writ. *Held*, affirming the judgment appealed from (24 Gr. 356), that an assignment made under the provisions of a foreign bankruptcy Act did not transfer immoveable property in Canada. *Held*, also, that the deed of February, 1874, was not effectual, either as a deed of bargain and sale, or a deed of grant to pass any legal title or interest in the lands of D. in Canada. *Macdonald v. Georgian Bay Lumber Co.*, ii., 364.

38. *Debt incurred abroad—Fraud — Purchasers on credit — Constitutional law—Demurrer—38 Vict. c. 16, s. 3—Pleading—Insolvent Act, 1875, ss. 136, 137—Confession and avoidance—Costs.*—The plaintiffs, carrying on business in England, sued on the common counts, and to bring defendants within s. 136

of the Insolvent Act of 1875 alleged that purchases of goods were made at times when the defendants had cause for believing themselves unable to meet their engagements and they concealed the fact from plaintiffs, their creditors, with intent to defraud. Defendants pleaded that the contract out of which cause of action arose was made in England and not in Canada, and to this plea plaintiffs demurred. The pleadings were treated as alleging that defendants were traders and British subjects resident and domiciled in Canada at the time of the purchase of the goods in question and subsequently became insolvent under the Insolvent Act of 1875 and amendments thereto. *Held*, Taschereau and Gwynne, JJ., dissenting, that although the judgment appealed from was a decision on a demurrer to part of the action only, it was a final judgment in a judicial proceeding within the meaning of the Supreme Court Amendment Act of 1879, and that an appeal would lie. *Per* Ritchie, C.J., and Fournier, J. That s. 136 of the Insolvent Act of 1875 is *intra vires* of the Parliament of Canada.—That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency, over which subject matter the Parliament of Canada has power to legislate.—Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions of s. 136 of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed.—*Per* Gwynne, J. The demurrer does not raise the question whether s. 136 of the Insolvent Act of 1875 is or is not *ultra vires* of the Dominion Parliament, for whether it be or be not the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore if the appeal is entertained it must be dismissed.—*Per* Strong, Henry and Taschereau, JJ. There being nothing either in the language or object of s. 136 of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant, stated in the second count of the declaration. In this view it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed.—The court being equally divided the appeal was dismissed without costs. *Shields v. Peak*, viii., 579.

39. *Foreign trading corporations — The Winding-up Act — Powers of Parliament — Obiter dictum—Conflict of laws.*

See COMPANY LAW, 18.

40. *Bank of Upper Canada — Crown trust — Winding-up—Legislative jurisdiction.*

See CONSTITUTIONAL LAW, 21.

7. MALICIOUS PROCEEDINGS.

41. *Malicious proceedings — Action for damages — Writ of attachment—Trespass—Devastavit.*

See PLEADING, 4.

42. *Demand of assignment—Probable cause—Evidence.*

See MALICE, 3.

8. NOTICE TO CREDITORS.

43. *Notice to creditors — Winding-up order—45 Vict. c. 23, s. 24.*

See WINDING-UP ACT, 2.

9. PRIORITY AND PRIVILEGES.

44. *Claim against insolvent—Collateral security—Pledge — Collocation — Joint and several liability.*—A creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of goods and promissory notes indorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realized upon the goods. Judgment appealed from (M. L. R. 5 Q. B. 425; 17 R. L. 173) affirmed, Fournier, J., dissenting, on the ground that the notes having been indorsed over to the creditor, as additional security, all the parties thereto became jointly and severally liable, and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of his co-debtors for the full amount of his claim until he has been paid in full without being obliged to deduct therefrom any sum received from the estates of the co-debtors jointly and severally liable therefor, and Gwynne, J., dissenting, on the ground that there being no insolvency law in force the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment, to collocate the appellants upon the whole of their claim as secured by the deed. *Benning v. Thibaudeau*, xx., 110.

45. *Winding-up Act — Joint and several debtors—Insolvency—Distribution of assets—Privilege — R. S. C. c. 129, s. 62—Deposit with bank after suspension.*—*Per* Ritchie, C.J., and Taschereau, J., affirming the judgment appealed from (M. L. R. 5 Q. B. 407), Strong and Fournier, JJ., *contra*, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.—*Per* Gwynne and Patterson, JJ., that a person who has realized a portion of his debt upon the insolvent estate of one of his co-debtors, cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his co-debtor.—*Held*, also, affirming the judgment appealed from, that a person who makes a deposit with a bank after its suspension, consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit. *Ontario Bank v. Chaplin*, xx., 152.

46. *Banks and banking—Advances on security — Chattel mortgage—Insolvent debtor—Bank Act, s. 74—Conversion.*

See CHATTEL MORTGAGE, 19.

47. *Covenant in lease—Assignee of leased premises — Forfeiture — Payment of accelerated rent—Payment of rent to mortgagee —Waiver.*

See LANDLORD AND TENANT, 3.

10. SALE OF ASSETS.

48. *Assignment in trust for creditors—Sale of estate to insolvent's wife—Guarantee by creditor and inspector—Trustee—Account for profits.*—The plaintiffs were creditors of the insolvent estate of J., who assigned under the Act relating to Assignments and Preferences to Creditors. The defendant A. was also a creditor, and the defendant L., an inspector of the estate. The assets were offered for sale by tender and purchased by the insolvent's wife, who gave, as security for payment, notes indorsed by defendant A. After the tender of the purchaser had been approved by the inspectors, A. induced the defendant L. to join him in securing themselves. The estate paid a small dividend on the stock so purchased to protect themselves. The estate paid a small dividend, and the plaintiffs brought an action to have defendants account for any profit they may have made out of the sale of the stock. On the trial, judgment was given for the plaintiff, and a reference ordered to ascertain what profit the defendants had received. The Divisional Court varied this judgment (23 O. R. 573), by declaring that plaintiffs should receive the difference between their claims against the estate and what they would have received in common with the other creditors by way of dividend, with liberty to apply to the court if the amount could not be agreed upon. The Court of Appeal for Ontario reversed the decision of the Divisional Court and dismissed the action, holding that no loss to the estate had been proved. (21 Ont. App. R. 242).—The Supreme Court of Canada allowed an appeal and restored the judgment of the trial judge, (Taschereau, J., dissenting), holding that the defendant L., as inspector, could not obtain an advantage for himself from his position, and that the creditors were entitled to a reference to ascertain what profit, if any, he had derived from the transaction. *Segsworth v. Anderson*, xxiv., 699.

49. *Purchase of insolvent estate—Refusal to complete — Action by curator — Completion of purchase after judgment — Subsequent action for special damages—Res judicata.*—A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery.—*Held*, reversing the judgment of the Court of Appeal for Ontario, that under the law of Quebec, by which the case was governed, the curator was entitled to recover the expenses and disbursements which, as a prudent administrator, he was obliged to make for the safe-keeping of the property.—*Held*, also, that these special damages, most of which could not be ascertained until after the purchase

was completed, could not have been included in the action brought in the Quebec courts, and the right to recover them was not *res judicata* by the judgment in that action, *Hyde v. Lindsay*, xxix., 595.

50. *Purchase by inspector — Mandate — Trusts — Arts. 1584, 1706 C. C.—Art. 748 C. P. Q.*—An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto and he cannot be allowed to become purchaser, on his own account, of any part of the estate of the insolvent. *Davis v. Kerr*, (17 Can. S. C. R. 235) followed. *Gastonguay v. Savoie*, xxix., 615.

51. *Right of succession—Insolvency of one heir—Sale by curator before partition—Art. 710 C. C.*

See RETRAIT SUCCESSORAL.

11. SHAREHOLDER'S LIABILITY.

52. *Insolvent bank—Winding-up—Increased capital—Double liability.*

See BANKS AND BANKING, 41.

INSURANCE, ACCIDENT.

1. *Condition — Voluntary exposure to unnecessary danger—Contributory negligence.*—A policy had a condition that:—"No claim shall be made under this policy when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure." Deceased was killed by a railway train coming against the vehicle in which he was driving alone on a dark night in a network of tracks in the station yard at Toronto, at a place where there was no roadway for carriages. *Held*, affirming the judgment appealed from (7 Ont. App. R. 570), that the deceased came to his death in consequence of voluntary exposure to unnecessary danger, and the defendant was therefore entitled to a nonsuit. *Neill v. Travellers' Ins. Co.*, xii., 55.

2. *Condition precedent — Immediate notice — Waiver—External injuries producing erysipelas—Proximate or sole cause of death — Expected risks.*—An accident policy payable in case "the bodily injuries alone shall have occasioned death within 90 days from the happening thereof, and provided that the insurance should not extend to hernia, &c., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death," also provided that in the event of any accident or injury for which claim might be made, immediate notice should be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of insured, with full particulars of the accident and injury; and failure to give such immediate written notice should invalidate all

claims under the policy. — On 21st March, 1886, insured was accidentally wounded in the leg by falling from a verandah, and within 4 or 5 days the wound which appeared at first to be slight was complicated by erysipelas, from which death ensued on 13th April following.—The local agent of the company at Simcoe, Ont., received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on 29th April and received at Montreal 1st May. The manager acknowledged receipt of proofs of death which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability.—There was conflicting evidence as to whether the erysipelas resulted solely from the wound, but the court found on the facts that the erysipelas followed as a direct result from the external injury. *Held*, reversing the judgment appealed from (which had affirmed the Superior Court judgment (M. L. R. 6 S. C. 4), Fournier and Patterson, J.J., dissenting), that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard.—*Per Strong, Fournier and Patterson, J.J.*, that the external injury was the proximate or sole cause of death within the meaning of the policy. *Accident Ins. Co. of North America v. Young*, xx., 280.

3. *Renewal of policy—Payment of premium—Promissory note — Instructions to agent—Agent's authority — Finding of jury.* — A policy in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition was that it was not to take effect unless the premium was paid prior to any accident on account of which claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. was killed in an accident and payment was refused on the ground that the policy had expired and not been renewed. In an action by the widow for the insurance it was shewn that the local agent of the company had requested P. to renew and had received from him a note for \$15 (the premium being \$16), which the father of assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt, and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt, and was paid no cash. Some four years before this all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid, but remained in possession of the agent, the agent knowing nothing about it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash, the note given and accepted as payment of balance of premium, and that the paper given to P. by the agent was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company. *Held*, affirming the Su-

preme Court (N.S.), Gwynne, J., dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia. *Held*, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium, and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have supposed that the plaintiff would seek to shew that such receipt had been obtained and were not taken by surprise. *Manufacturers' Accident Ins. Co. v. Pudsey*, xxvii., 374.

4. *Condition in policy — Notice—Condition precedent.* — A condition in a policy of insurance against accidents required that in the event of an accident thereunder, written notice, containing the full name and address of the insured, with full particulars of the accident, should be given within thirty days of its occurrence to the manager for the United States or the local agent. — *Held*, reversing the Supreme Court (N.B.), Gwynne, J., dissenting, that the giving of such notice was a condition precedent to the right to bring an action on the policy. *Employers' Liability Ass. Corporation v. Taylor*, xxix., 104.

5. *Conditions in policy—Hazardous occupation—Voluntary exposure to unnecessary danger—Baggage-man on railway.* — An accident policy issued to M., who was insured as a baggage-man on the C. P. Ry., contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company). "This insurance does not cover . . . death resulting from . . . voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakeman, whose occupation was classed by the company as more hazardous than that of a baggage-man. *Held*, (Davies, J., dissenting), affirming the judgment of the Court of Appeal (2 Ont. L. R. 521), which sustained the verdict for plaintiff at the trial (32 O. R. 284), that as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions. *Held*, also, that as the evidence shewed that insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous, there was no "voluntary exposure to unnecessary danger"

within the meaning of the second condition. *Canadian Accident Ins. Co. v. McNevin*, xxxii., 194.

6. *Insurance—Application—Beneficiary not named in policy—Right to proceeds—Accident policy—Act for benefit of wives and children.*]—Where through error and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy he is, nevertheless, entitled to the benefit of the insurance.—Judgment appealed from reversed, *Davies and Mills, J.J.*, dissenting.—*Per Sedgewick, J.* The New Brunswick Act (58 Vict. c. 25) for securing to wives and children the benefit of life insurance applies to accident insurance as well as to straight life insurance. *Cornwall v. Halifax Banking Co.*, xxxii., 442.

7. *Accident insurance — Proof of loss — Waiver—Finding of jury—Verdict.*]—The proofs of loss were furnished within the time limited by the policy without objection as to their sufficiency, but payment was refused on the ground that the circumstances came within the clause against liability where death occurred through suicide, &c. Objection to sufficiency of proofs was taken for the first time in the statement of defence delivered a couple of years afterwards. The judgment appealed from (4 Ont. L. R. 146), was affirmed, holding that the proofs were sufficient and the right to object had been waived.—The body was found lying on a railway track, having been run over by a train; it was seen by the engineer before it was struck; shots had been heard shortly before and a pistol was found near by; two holes, which might have been caused by pistol bullets, were found in the cap of deceased. The policy was for death by accidental bodily injury through violent external means; R. S. O. (1897) c. 203, s. 152, to read with the policy, defines "accident" as bodily injury by external force happening without intent of the person injured, or as the result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The evidence did not satisfy the jury that deceased came to his death by his own hand, but by "death by external injury" unknown to them. *Held*, affirming the judgment appealed from, that the finding was too vague to be construed as a finding of accidental death. *Ocean Accident and Guarantee Corporation v. Foulke*, xxxiii., 253.

INSURANCE COMPANY.

Employment of agent — Agent acting for rival companies—Dismissal.

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INSURANCE, FIRE.

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1. ACTS OF AGENTS AND OFFICERS.

1. *Contract—Lex loci—Lex fori—Fire insurance — Principal and agent—Payment of premium — Interim receipt—Repudiation of acts of sub-agent.*]—The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different.—The appointment of a local agent of a fire insurance company is one in the nature of *delectus personæ*, and he cannot delegate his authority or bind his principal through the medium of a sub-agent. *Summers v. The Commercial Union Assurance Company* (6 Can. S. C. R. 19) followed.—The local agent of a fire insurance company was authorized to effect interim insurances by issuing receipts countersigned by him on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt which he countersigned as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium. *Held*, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority. *Held*, further, that even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurance. *Canadian Fire Ins. Co. v. Robinson*, xxxi., 488.

2. *Fire insurance — Condition of policy—Proof of loss—Waiver — Acts of officials.*]—An insurance company cannot be presumed to have waived a condition precedent to action on a policy on account of unauthorized acts of its officers.—Judgment appealed from reversed, *Girouard, J.*, dissenting. *Hyde v. Lefavre*, xxxii., 474.

3. *Interim receipt—Application—Variation in policy—Authority of agent — Construction of contract—Survey.*

See No. 75, *infra*.

4. *Survey of premises by agent — Misdescription—Diagram.*

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8. *Termination of policy—Surrender—Waiver—Estoppel—Husband and wife—Insurable interest—Tenant for life—Damages—Practice—Parties.*

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See No. 20, *infra*.

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12. *Breach of condition—Waiver—Recognition of existing risk after breach—Authority of agent.*

See No. 26, *infra*.

13. *Time limit for proofs of loss—Condition precedent—Waiver—Authority of agent.*

See No. 35, *infra*.

14. *Construction of contract—"Until"—Condition precedent—Waiver—Estoppel—Authority of agent.*

See No. 42, *infra*.

2. ASSIGNMENT OF POLICY.

15. *Transfer of rights under policy—Signification of assignment—Art. 1571 C. C.]—In the Province of Quebec, an assignment of rights under a policy of insurance is ineffectual unless signification thereof has been made in compliance with the provisions of art. 1571. (See Q. R. 5 Q. B. 434). *Guerin v. Manchester Fire Assur. Co.*, xxix., 139.*

16. *Mortgagee—Insurable interest—Assignment of policy—Acceptance of premiums—Notice.*

See No. 83, *infra*.

3. BREACH OF CONDITIONS.

17. *Trust assignment—Conditions of policy—Notice to agent—Ratification—Loss payable to creditors—Right of action—Contract.]—Appellant applied to the company's agents for insurance, \$2,000 for three months, "loss, if any, to be payable to his creditors of whom G. McK. is one and McM. & Co. are second." An interim receipt issued, dated 19th November, 1877, which stated the insurance to be subject to conditions of policy in use, one of which was, that if the property insured should be assigned without written permission indorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void. On 28th November appellant transferred the insured property to G. McK., in trust for his creditors, balance, s. c. d.—22.*

if any, payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire on 15th January, 1878. By the policy, dated 12th December, 1877, but not delivered until after the fire, loss was "payable to G. McK. and McM. & Co. and others as creditors, as their interests may appear." The inspector of the company wrote twice to McK., calling for proof of loss. *Held*, reversing the judgment appealed from (4 Ont. App. R. 289), that the notice of the trust assignment to the company's agent was sufficient; that the company must be considered as having assented to the assignment and executed the policy with full knowledge of it, and that such an assignment was not one contemplated by the condition requiring indorsement on the policy.—2. That the words "loss payable, if any, to G. McK., &c.," operated to enable respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and respondents' covenant was made, the action for a breach of that covenant was properly brought by him alone. *McQueen v. Phoenix Mutual Fire Ins. Co.*, iv., 660.

18. *Condition of policy—Further insurance—Existing policy lapsing—Substitution of new policy.]—By the policy it appeared that there was "further insurance, \$8,000," and indorsed upon it was the statutory condition, No. 8, R. S. O. c. 162, as to subsequent insurance in any other company, without the company's assent thereto "by writing signed by a duly authorized agent." A portion of the "further insurance" for \$8,000 mentioned was a policy for \$2,000 in the Western Ins. Co., which appellant allowed to expire, substituting one for the same amount in the Queen Ins. Co., without consent or notification. *Held*, reversing the judgment appealed from, that the condition as to subsequent insurance referred to further insurance on existing policy beyond the amount allowed by the policy, and not to one substituted for one of like amount allowed to lapse and that therefore the policy sued upon was not avoided by the non-communication of the \$2,000 insurance so taken. *Parsons v. Standard Fire Ins. Co.*, v., 233.*

19. *Stock of goods—Condition in policy—Assignment—Written consent—Chattel mortgage.]—A policy contained the provision:—"If the property insured is assigned without the written consent of the company at the head office indorsed hereon, signed by the secretary or assistant secretary of the company, this policy will thereby become void and all liability of the company shall thenceforth cease. *Held*, affirming the Supreme Court (N.B.), that a chattel mortgage of the property insured was not an assignment within the meaning of such condition. *Sovereign F. Ins. Co. v. Peters*, xii., 33.*

20. *Condition in policy—Subsequent insurance—Notice to agent—Waiver—Estoppel—Adjustment—Powers of inspector.]—A policy contained the condition:—"In case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not) notice thereof must be given in writing at once, and such subsequent assurance indorsed on the policy granted by this*

company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect." The insured effected subsequent insurance and verbally notified the agent, but there was no indorsement made on the policy, nor any acknowledgment in writing by the company. A loss occurred, damage was adjusted by the inspector of the company, and neither he, nor the agent, made any objection to the loss on the ground of non-compliance with the above condition. In a suit on the policy the company pleaded breach of the condition in reply to which the plaintiff set up a waiver of the condition and contended that by the act of the agent and inspector the company were estopped from setting it up.—*Held*, reversing the judgment appealed from (18 N. S. Rep. 478), that the insured not having complied with the condition the policy ceased and became of no effect on the subsequent insurance being effected, and that neither the agent nor the inspector had power to waive a compliance with its terms. *Western Assur. Co. v. Doull*, xii., 446.

21. *Condition — Magistrate's certificate — Waiver.*—A policy contained the conditions:—"The assured must procure a certificate, under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or assurance as creditors or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured really, by misfortune and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned." "No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by indorsement upon this policy, signed by the agents of the company at Halifax, N. S." The premises were destroyed by fire and assured applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused. He finally obtained the certificate from two magistrates residing at a distance. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that if such offer was not accepted the claim would be contested. The agent, on a subsequent occasion, told the assured that he objected to the claim, as he "did not think it was a square loss." *Held*, affirming the judgment appealed from (6 Russ & Geld. 209), that the non-production of the certificate required by the above condition prevented the assured from recovering on the policy. *Held*, also, that even if such condition could be waived without indorsement on the policy, the acts of the agent did not amount to a waiver.—*Semble*, that the condition could not be so waived. *Logan v. Commercial Union Ins. Co.*, xiii., 270.

22. *Condition in policy—Hazardous or extra-hazardous business — Increase of risk—Finding of jury—Judgment non obstante.*—A policy on a spool factory contained conditions:—"That in case the above described premises shall at any time during the continuance of this insurance, be appropriated or ap-

plied to or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous or for the purpose of storing, using or vending therein any of the goods, articles or merchandise denominated hazardous or extra-hazardous unless otherwise specially provided for, or hereafter agreed to by the company in writing or added to or indorsed on this policy, then this policy shall become void. Any change material to the risk, and within the control or knowledge of the insured, shall void the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent." *Held*, reversing the judgment appealed from (6 Russ. & Geld. 502), that the introduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly that such manufacture in itself was a hazardous, if not an extra-hazardous business, notwithstanding that on the trial of the action on the policy the jury found, in answer to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured. *Sovereign Fire Ins. Co. v. Mow*, xiv., 612.

23. *Condition in policy—Particular account of loss—Failure to furnish—Finding of jury—Evidence.*—A policy required that in case of loss the insured should, within 14 days, furnish as particular an account of the property destroyed, &c., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of, and found the loss to be between \$3,000 and \$4,000. An action on the policy was defended on the ground of non-compliance with condition. On trial the jury answered all the questions submitted to them, except two, in favour of N. These questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, &c., were not answered. The trial judge gave judgment in favour of N., which the court *en banc* reversed, and ordered judgment to be entered for the company. *Held*, affirming the decision appealed from (25 N. S. Rep. 317), that as the evidence conclusively shewed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost, the condition was not complied with. *Held*, further, that as under the evidence the jury could not have answered the questions they refused to answer in favour of N., a new trial was unnecessary, and judgment was properly entered for the company. *Nixon v. Queen Ins. Co.*, xxiii., 26.

24. *Condition against assigning policy — Breach of condition.*—A condition in a policy provided that if the policy or any interest therein should be assigned, parted with, or in any way incumbered, the insurance should be absolutely void, unless the consent of the company thereto was obtained and indorsed on

the policy. S. insured under the policy assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon, and all renewals thereof to a creditor. At the time of assignment S. had other insurance on the property, the policies of which did not prohibit assignment. The consent of the company to the transfer was not obtained and indorsed on the policy. *Held*, affirming the decision appealed from (26 N. S. Rep. 20), that the mortgage of the policy by S., without such consent, made it void, and he could not recover the amount insured in case of loss. *Salterio v. City of London Fire Ins. Co.*, xxiii., 32.

25. *Condition in policy — Change of title in property insured—Chattel mortgage.*—A policy provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease; that the policy should not be assignable without the consent of the company indorsed thereon, and that all incumbrances effected by the assured should be notified within 15 days therefrom. *Held*, reversing the decision appealed from (23 N. S. Rep. 16) that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy. *Sovereign Ins. Co. v. Peters* (12 Can. S. C. R. 33) distinguished. *Held*, further, that it was an incumbrance even if the condition meant an incumbrance on the policy. *Citizens' Ins. Co. v. Salterio*, xxiii., 155.

26. *Conditions in policy—Breach—Waiver—Recognition of existing risk after breach—Authority of agent.*—A policy on a factory and machinery contained a condition making it void if the property was sold or conveyed, or the interest of the parties therein changed. *Held*, affirming the decision of the Supreme Court (N. B.) that by a chattel mortgage, given by the accused on the said property, his interest therein was changed and the policy forfeited under said condition. *Held* further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Torrop v. Imperial Fire Ins. Co.*, xxvi., 585.

27. *Conditions of policy — Notice—Proofs of loss — Change in risk.*—Where a condition in a policy provided that any change material to the risk, within the control or knowledge of the insured should avoid the policy, unless notice was given to the contrary: — *Held*, that changing the occupation of the insured premises from a dwelling into an hotel was a change material to the risk within the meaning of this condition. (See Q. R. 5 Q. B. 434). *Guerin v. Manchester Fire Ins. Co.*, xxix., 139.

28. *Condition in policy — Notice of subsequent insurance—Inability of assured to give notice.*—By a condition in a policy the insured was "forthwith" to give notice to the company of any other insurance on the same property, and have a memo. thereof indorsed on the policy; otherwise the policy would be void, provided that if such notice should be given after it issued the company had the option to continue or cancel it. *Held*, affirming the judgment of the Supreme Court (N. B.), that this condition did not apply to a case in which the application for other insurance was accepted on the day on which the

property insured was destroyed by fire and notice of such acceptance did not reach the assured until after the loss. *Commercial Union Assur. Co. v. Temple*, xxix., 206.

See Nos. 29 and 30, *infra*.

29. *Insurance against fire—Condition in policy — Interest of insured — Mortgagor as owner — Further insurance.*—By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property whether as owner, trustee . . . mortgagee, lessee or otherwise is not truly stated." *Held*, that a mortgagor was sole and unconditional owner within the terms of said condition.—By another condition the policy would be avoided if the assured should have to obtain other insurance, whether valid or not, on the property. The assured applied for other insurance, but before being notified of the acceptance of his application the premises were destroyed by fire. *Held*, that there was no breach of said condition. *Commercial Union Assurance Co. v. Temple* (29 Can. S. C. R. 206) followed.—The judgment appealed from (35 N. B. Rep. 171) was affirmed. *Western Assurance Co. v. Temple*, ~~xxxi.~~ 373.

See No. 28, *ante*, and No. 30, *infra*.

30. *Insurance against fire — Condition in policy — Interest of insured — Mortgagor as owner—Further insurance—Estoppel—Pleading.*—By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property, whether as owner, trustee . . . mortgagee, lessee or otherwise, is not truly stated." *Held*, that a mortgagor was sole and unconditional owner within the terms of said condition.—By another condition the policy would be avoided if the assured should have to obtain other insurance, whether valid or not, on the property. The assured applied for other insurance, but before being notified of the acceptance of his application the premises were destroyed by fire. *Held*, that there was no breach of said condition. *Commercial Union Assurance Co. v. Temple* (29 Can. S. C. R. 206) followed.—In one count of his declaration plaintiff admitted a breach of said condition, but alleged that it was waived. On the trial counsel agreed that the facts proved in the case against the Commercial Union should be taken as proved in the present case. These facts shewed, as held by the decision in the previous case, that there was no breach. *Held*, that the agreement at the trial prevented the appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition.—The judgment appealed from (35 N. B. Rep. 171) was affirmed. *Western Assurance Co. v. Temple*, ~~xxxi.~~ 373.

See Nos. 28 and 29, *ante*.

31. *Misrepresentation — Reference to plan —Breach of condition — Falsa demonstratio —Canvasser—Agency.*

See No. 77, *infra*.

4. CONDITION OF POLICY.

32. *Condition of policy — Loss by explosion—Fire caused by explosion — Exemption*

from liability.]—A policy contained a condition that “the company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning.” A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted liability for damage caused by fire, but not for that caused by explosion. *Held*, reversing the judgment appealed from (11 Ont. App. R. 741), *Taschereau, J., dubitante*, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion. *Hobbs v. Northern Assurance Co.; Hobbs v. Guardian Assurance Co.* xii., 631.

33. *Conditions of policy — Notice — Proofs of loss—Change in risk—Insurable interest—Mortgage clause — Arbitration — Condition precedent — Foreign statutory conditions — R. S. O. (1897) c. 203, s. 168—Transfer of mortgage — Assignment of rights after loss—Signification — Arts. 1571, 2475, 2478, 2483, 2574, 2576 C. C. — Right of action.* — Where a condition in a policy of insurance against fire provided that any change material to the risk within the control or knowledge of the insured should avoid the policy, unless notice was given to the company: *Held*, that changing the occupation of the insured premises from a dwelling to a hotel was a change material to the risk within the meaning of this condition.—A mortgagee of insured premises to whom payment is to be made in case of loss “as his interest may appear” cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss.—In the Province of Quebec an assignment of rights under a policy of insurance is ineffectual unless signification thereof has been made in compliance with the provisions of article 1571 of the Civil Code.—Where a condition in a policy provided that no action should be maintainable against the company for any claim under the policy until after an award should have been obtained in the manner therein provided fixing the amount of the claim:—*Held*, that the making of such award was a condition precedent to any right of action to recover a claim for loss under the policy.—*Quere, per Taschereau, J.* Do Ontario statutory conditions printed on the back of a policy issued in Quebec and not referred to in the body of the policy, form part of the contract between the parties? *Guerin v. The Manchester Assur. Co.* xxix., 139.

34. *Condition in policy — Notice of subsequent insurance — Inability of assured to give notice.*—By condition in a policy, insured was “forthwith” to give notice to the company of any other insurance made, or which might afterwards be made, on the same property and have a memorandum thereof indorsed on the policy, otherwise the policy would be void; provided that if such notice should be given after it issued the company had the option to continue or cancel it. *Held*, affirming the judgment of the Supreme Court (N. B.), that this condition did not apply to a case in which the application for other insurance was accepted on the day on which the property insured was destroyed by fire

and notice of such acceptance did not reach the assured until after the loss. *Commercial Union Assur. Co. v. Temple*, xxix., 206.
See Nos. 28, 29 and 30, *ante*.

35. *Condition in policy — Time limit for submitting particulars of loss—Condition precedent — Waiver — Authority of agent.*—A condition in a policy provided that assured “is to deliver within 15 days after the fire, in writing, as particular an account of the loss as the nature of the case permits.” *Held*, following *Employers’ Liability Assur. Corporation v. Taylor* (29 Can. S. C. R. 104), and reversing the judgment appealed from (31 N. S. Rep. 348), that compliance with this provision was a condition precedent to an action on the policy. *Held*, also, that a person not an officer of the insurance company appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such condition, and if he had such authority he could not, after 15 days had expired, extend the time without express authority from his principal. *Held*, further, that compliance with the condition could not in any case be waived unless the waiver was clearly expressed in writing signed by the company’s manager in Montreal, as required by another condition in the policy. *Atlas Assur. Co. v. Brownell*, xxix., 537.

36. *Condition in policy — Ship insured “while running” — Variation from statutory conditions.*—A policy issued in 1895 insured the hull of the SS. Baltic, including engines, &c., “whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra-hazardous building.” The Baltic was laid up in 1893 and was never afterwards sent to sea. In 1896 she was destroyed by fire.—*Held*, reversing the judgment appealed from (25 Ont. App. R. 393) that the policy never attached; that the steamship was only insured while employed on inland waters during the navigation season or laid up in safety during the winter months.—*Held*, also, that the above stipulation was not a condition but rather a description of the subject matter of the insurance, and did not come within s. 115 of the Ontario Insurance Act relating to variations from statutory conditions. *London Assur. Corporation v. Great Northern Transit Co.*, xxix., 577.

37. *Termination of policy — Surrender—Waiver — Estoppel — Husband and wife — Insurable interest — Tenant for life — Damages—Practice—Parties.*

See No. 82, *infra*.

38. *Application — Transfer of interest — Property in goods — Construction of agreement — Warranty — Pleading — Evidence — Findings of jury.*

See No. 78, *infra*.

39. *Condition of policy — Proof of loss — Waiver—Acts of officials.*

See No. 2, *ante*.

5. CONDITION PRECEDENT.

40. *Payment of loss — Notice of claim—Mutual Insurance Company—Statutory con-*

ditions.]—A policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O. (1877) c. 162, and in such a policy where the loss is payable only within three months after notice by insured according to the provisions of 36 Vict. c. 44, s. 52 (Ont.),* the company are entitled to three months from the date of the furnishing of the claim papers before being subject to an action, and that therefore an action instituted more than three months after notice of the loss, but only 51 days after the filing of the claim papers in conformity with the statute had been prematurely brought. *Ballagh v. Royal Mutual Fire Ins. Co* (5 Ont. App. R. 87) approved. Judgment appealed from (4 Ont. App. R. 293) reversed. *Mutual Fire Ins. Co. of Wellington, v. Frey, v. 82.*

* R. S. O. (1877) c. 161, s. 56.

41. *Arbitration and award — Condition precedent.*]—Where a condition in the policy provided that no action should be maintainable against the company for any claim under the policy until after an award should have been obtained in the manner therein provided fixing the amount of the claim:—*Held*, that the making of such award was a condition precedent to any right of action to recover a claim for loss under the policy. (See Q. R. 5 Q. B. 434) *Guerin v. Manchester Fire Assur. Co., xxix., 139.*

42. *Construction of contract — “Until” — Condition precedent — Waiver — Estoppel — Authority of agent.*]—Conditions of a policy required proofs &c., within 14 days after loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that *until* such proofs were produced no money should be payable by the insurer, and for forfeiture of all rights of the insured if the claim should not, for the space of three months after the occurrence of the fire, be in all respects verified in the manner aforesaid. *Held*, reversing the judgment appealed from (31 N. S. Rep. 337) that the condition as to the production of proofs within 14 days was a condition precedent to the liability of the insurer; that the force of the word “until” in the subsequent clause could not give to the omission to produce such proofs within the time specified, the effect of postponing recovery merely until after their production, and that the clause as to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.—Neither the local agent for soliciting risks nor an adjuster sent for the purpose of investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, and as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified. *Atlas Assur. Co. v. Brownell* (29 Can. S. O. R. 537) followed. *Commercial Union Assur. Co. v. Margeson, xxix., 601.*

43. *Proofs of loss — Change in risk — Notice — Insurable interest — Mortgage clause — Arbitration — Condition precedent — Foreign statutory conditions — Transfer of mortgage — Assignment of rights after loss — Signification.*

See No. 33, *ante*.

44. *Time limit for proofs of loss — Condition precedent — Waiver — Authority of agent.*

See No. 35, *ante*.

6. CONDITION OF STATUTE.

45. *Mutual insurance company — Contract — Termination — Notice — Statutory conditions — R. S. O. (1887) c. 167 — Waiver — Estoppel.*]—B. applied to a mutual company for insurance on his property for 4 years, undertaking to pay amounts required from time to time, and a 4 months' note for the first premium. He received a receipt beginning as follows: “Received from B. an undertaking for the sum of \$46.50, being the premium for an insurance to the extent of \$1,500 on the property described in his application of this date” and then providing that the company could cancel the contract at any time within 50 days by notice mailed to the applicant, and that non-receipt of a policy within 50 days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B. and no policy was issued within the time which expired March 4, 1891. On April 17th B. received a letter from the manager asking him to remit funds to pay his note maturing May 15. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, rejecting his application and returning the undertaking and note. On April 24 the property was destroyed by fire. B. notified the manager by telegraph and on April 29th the latter wrote, returning the money remitted by B., who afterwards sent it again to the manager and it was again returned. B. then brought action, which was dismissed. A new trial was ordered by the Divisional Court, and affirmed by the Court of Appeal. *Held*, affirming the decision appealed from (22 Ont. App. R. 68), Gwynne, J., dissenting, that there was a valid contract by the company with B. for insurance for 4 years; that the statutory conditions in the Ontario Insurance Act (R. S. O. [1887] c. 167) governed such contract, though not in the form of a policy; that if the provision as to non-receipt of a policy within 50 days was a variation of the statutory conditions, it was ineffectual for non-compliance with condition 115 requiring variation to be written in a different coloured ink from the rest of the document, and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until 7 days after its receipt. *Held*, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract, and were estopped from denying that B. was insured. *Dominion Grange Mutual Fire Ins. Association v. Bradt, xxv., 154.*

46. *Policy of insurance — Statutory conditions — Variations — Co-insurance.*]—The co-insurance clause printed as a variation from the statutory conditions in a policy of insurance against fire, requiring the insured in consideration of a reduced premium to keep the property covered by other policies to at least 75 per cent. of its value, will not be pronounced unjust and unreasonable within the

meaning of s. 115 of the Ontario Insurance Act (R. S. O. [1887] c. 167). Judgment appealed from (27 Ont. App. R. 373) affirmed. *Eckardt v. Lancashire Ins. Co.*, xxxi., 72.

47. Constitutional law — Trade and commerce — Jurisdiction of local legislature — Omission of statutory conditions — Option of insured.

See No. 68, *infra*.

48. Representation by insured — Description of property — Error in policy — Contract — Statutory condition — Variation — Arbitration — Waiver.

See No. 93, *infra*.

49. Proofs of loss — Change in risk — Notice — Insurable interest — Mortgage clause — Arbitration — Condition precedent — Foreign statutory conditions — Transfer of mortgage — Assignment of rights after loss — Signification.

See No. 33, *ante*.

50. Condition in policy — Ship insured "while running" — Variation from statutory condition.

See No. 36, *ante*.

51. Renewal of fire policy — Void mercantile risk — Mortgage clause.

See No. 54, *infra*.

52. Application — Untrue statement — Materiality — Statutory condition.

See No. 94, *infra*.

7 CONTRACT OF INSURANCE.

53. Construction of policy — Asylum for insane — Main building — Annex.] — The Asylum for the Insane, London, consists of a centre building containing all necessary accommodation for patients, a kitchen, laundry, and engine-room built of brick and roofed with slate situate some 60 feet to the rear of the middle of the centre building, and connected with it by a passage or covered way with brick walls about 10 feet high, roofed with slate and with a tramway to convey food from the kitchen to the southern portion of the centre building. A policy of insurance against fire insured the "main building." *Held*, affirming the Court of Appeal for Ontario, that the policy covered the kitchen, laundry and engine-room. *Etna Ins. Co. v. Attorney-General of Ontario*, xviii., 707.

54. Fire insurance — Void policy — Renewal — Mortgage clause.] — By s. 167 of the Ontario Insurance Act a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy. *Held*, reversing 3 Ont. L. R. 127 and restoring the trial judgment (32 O. R. 369), Girouard, J., *contra*, that the renewal is not a new contract of insurance. Therefore where the original policy was void for non-disclosure of prior insurance the renewal was likewise a nullity though the prior insurance had ceased to exist in the interval. *Held*, per Girouard, J., that the renewal was a new contract which was avoided by non-disclosure of the concealment in the application for the original policy. — The mortgage clause attached to a policy of insurance against fire which provided that "the insurance as to the interest only of the

mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, &c.," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy. *Quere*, Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy? *Liverpool & London & Globe Ins. Co. v. The Agricultural Savings and Loan Co.*, xxxiii., 94.

55. Interim receipt — Variation in description of premises — Authority of agent — Construction of contract.

See No. 75, *infra*.

56. Risk on building and stock for separate amounts — Misstatement — Incumbrances — Condition of policy — Indivisibility of contract.

See No. 91, *infra*.

57. Trust assignment — Conditions in policy — Notice to agent — Loss payable to creditors — Right of action — Contract.

See No. 17, *ante*.

58. Appointment of agent — Delegation of authority — Interim receipt — Contract binding on company.

See PRINCIPAL AND AGENT, 3.

59. Condition of policy — Loss by explosion — Fire caused by explosion — Exemption from liability.

See No. 32, *ante*.

60. Representation by insured — Description of property — Error in policy — Contract — Statutory condition — Variation — Arbitration — Waiver.

See No. 93, *infra*.

61. "Mortgage clause" — Payment to mortgagee — Liability of insurer to insured — Subrogation in rights of mortgagee — Release of mortgage.

See No. 71, *infra*.

62. Application — Transfer of interest — Property in goods — Construction of agreement — Warranty — Pleading — Evidence — Findings of jury.

See No. 78, *infra*.

63. Mutual insurance company — Contract — Termination — Notice — Statutory conditions — Waiver — Estoppel.

See No. 45, *ante*.

64. Condition in policy — Ship insured "while running" — Variation from statutory condition.

See No. 36, *ante*.

65. Construction of contract — "Until" — Condition precedent — Waiver — Estoppel — Authority of agent.

See No. 42, *ante*.

8. FOREIGN LAW.

66. Statutory conditions — Foreign law — R. S. O. (1897) c. 203, s. 168. — *Quere*, per

Taschereau, J. Do Ontario statutory conditions printed on the back of a policy issued in Quebec and not referred to in the body of the policy, form part of the contract between the parties? (See Q. R. 5 Q. B. 434.) *Guerin v. Manchester Fire Assce. Co.*, xxix., 139.

See No. 68, *infra*.

9. FRAUD.

67. *Condition of policy—Fraudulent statement—Proof of fraud—Presumption—Assignment of policy—Fraud by assignor.*—Where an insurance policy is to be forfeited if the claim is in any respect fraudulent, it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or interference, or by circumstantial evidence.—*The assignee of the policy cannot recover on it if fraud is established against the assignor. North British and Mercantile Ins. Co. v. Tourville*, xxv., 177.

10. LEGISLATIVE JURISDICTION.

68. *Constitution law—Trade and commerce—Jurisdiction of local legislatures—B. N. A. Act, 1867, ss. 91, 92—R. S. O. (1877) c. 162—Omission of statutory conditions—Option of insured.*—“The Fire Insurance Act,” R. S. O. (1877) c. 162, was not *ultra vires* of the Legislature of Ontario and applies to all fire insurance companies licensed to carry on insurance business in Canada, taking risks on property within the Province of Ontario.—The statute in question, prescribing conditions incidental to insurance contracts, relating to property situate in Ontario, was not a regulation of trade and commerce within the meaning of the words of s.s. 2, s. 91, B. N. A. Act, 1867.—An insurer in Ontario who has not printed on the policy or contract of insurance the statutory conditions in the manner indicated in the statute, cannot set up against the insured his own conditions or the statutory conditions, but in such a case, the insured alone is entitled to avail himself of any statutory condition. (The judgments appealed from were affirmed, *Taschereau and Gwynne, JJ.*, dissenting.) — *Per Taschereau and Gwynne, JJ.* The power to legislate upon the subject matter of insurance is vested exclusively in the Dominion Parliament by virtue of its power to pass laws for the regulation of trade and commerce under s. 91 of the B. N. A. Act, 1867. *The Citizens' Ins. Co. v. Parsons; The Queen Ins. Co. v. Parsons; Western Ins. Co. v. Johnston*, iv., 215.

On appeal to the Privy Council, the judgment was affirmed in respect to the validity of the provincial statute, but on the merits it was reversed. (7 App. Cas. 96.)

AND see No. 66, *ante*.

11. MISTAKE.

69. *Representation by insured—Description of property—Error in policy—Contract—Statutory condition—Variation—Arbitration—Waiver.*

See No. 93, *infra*.

70. *Proofs of loss—Change in risk—Notice—Insurable interest—Mortgage clause—Arbitration—Condition precedent—Foreign statutory conditions—Transfer of mortgage—Assignment of rights after loss—Signification.*

See Nos. 33 *ante*, 72, 73, *infra*.

12. MORTGAGE CLAUSE.

71. *Payment of loss to mortgagee—Claim of non-liability towards mortgagor—Subrogation of insurer to rights of mortgagee—Release of mortgage.*—Mortgagee insured the mortgaged property to the extent of its claim thereon under a covenant in the mortgage for insurance on the mortgaged premises in a sum not less than the amount of the mortgage. The policy issued in the name of the mortgagor with a condition that whenever the insurance company should pay the mortgagees for any loss thereunder and claimed that as to the mortgagor no liability therefor existed, the company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred the company paid the insurance to the mortgagees and the mortgagor claimed that his mortgage was thereby discharged. The company disputed this contention and insisted that they were subrogated in the rights of the mortgagees under the condition. In an action to compel the company to discharge the mortgage, the Court of Appeal (15 Ont. App. Cas. 421), affirming the trial court (14 O. R. 322), held, *inter alia*, that the right of an insurer to subrogation in such a case depended upon whether or not there was a good defence against the claim of the mortgagor who, as between himself and the insurer, was the party insured, and that the payment inured to the benefit of the mortgagor as the company in making it dealt with the mortgagees as an agent for the mortgagor. The Supreme Court affirmed the judgment appealed from, and dismissed the appeal with costs, *Patterson, J.*, taking no part in the judgment. [See note *below*.]—*Held, per Taschereau and Gwynne, JJ.*, that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause which was inserted in the policy without the knowledge and consent of the mortgagor could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor; and that the payment to the mortgagees discharged the mortgage.—Also, that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him; not having done so they could not, in the present action, raise any questions which might have afforded them a defence in an action against them on the policy by the mortgagor. *Imperial Fire Ins. Co. v. Bull*, xviii., 697.

NOTE.—Reasons for the decision of the Supreme Court were delivered as follows:

FOURNIER, J.—I am of opinion that the judgment of the Court of Appeal is right and should be affirmed, and this appeal dismissed with costs. Mr. Justice Fournier also announced the judgment of Strong, J., who was

absent when judgment was delivered, saying that His Lordship Mr. Justice Strong concurred in the decision that the judgment appealed from should be affirmed and the appeal dismissed with costs.

TASCHEREAU, J.—I am of opinion to dismiss this appeal for the reasons given by my brother Gwynne. I also refer to the case of *Sovereign Ins. Co. v. Peters* (12 Can. S. C. R. 33), where this court has already decided that a mortgage of a property insured is not an assignment which renders a policy void under a condition that an assignment without notice to the company should void the policy.

GWYNNE, J.—The grounds upon which I desire to rest my judgment are as follows. As between the mortgagees and the mortgagor the mortgagees were bound in effecting an insurance of the mortgaged premises to effect one for the benefit of the mortgagor in respect of his interest and not one for the benefit of the mortgagees themselves and in respect of their interest. The policy which the mortgagees, under their obligation to the mortgagor as above, did effect was one wherein and whereby the mortgagor is the person expressed to be insured with a provision that the loss—that is to say the insured person's loss, if any, is payable to the mortgagees. Under such a provision payment to the mortgagees of any loss sustained by the mortgagor would be a fulfilment of the insurer's covenant with the insured as expressed in the policy. A policy so expressed cannot become converted into or be construed to be a policy wherein and whereby the mortgagee became the person insured and to the extent of his own interest alone. The subrogation clause, therefore, which without the knowledge and consent of the mortgagor was inserted in the policy, which the mortgagees under their obligation to the mortgagor as above stated procured to be entered into by the Imperial Fire Insurance Company with the mortgagor, cannot have the effect of converting the policy, framed as it is with the mortgagor as the insured person and to cover his loss in case the insured premises should be destroyed or damaged by fire, into a policy with the mortgagees as the insured persons and to cover their interest in case of injury by fire to the insured premises. — The policy in the present case, therefore, must be read and construed as one wherein and whereby the mortgagor is the person insured, the payment of the amount of whose loss, if any there be, being made to the mortgagees will discharge the mortgage. The mortgagees' interest in the policy is in fact, as it appears to me, precisely the same as if the mortgagees were assignees of a policy of insurance effected with the mortgagor. A subrogation clause, therefore, of the nature of that inserted in the policy cannot be appealed to by the mortgagees or any person claiming through them as against the mortgagor. Payment therefore by the insurance company to the mortgagees to whom by the policy in the present case the mortgagor's loss, if any, was made payable, must be regarded as a payment made in pursuance of the policy and on account of the mortgagor, who is the person expressed to be insured, and of his loss. And the insurance company after such payment cannot be heard to say that in fact they paid the money to the mortgagees as upon a policy of insurance with them alone to cover their interest only which policy is contained in the subrogation clause of which the mortgagor knew nothing.—If under any circumstances in a policy framed as the

present one is, with the mortgagor as the person expressed to be insured, such a subrogation clause can have the effect of creating a valid contract between an insurance company and a mortgagee, as to which I express no opinion, the insurance company must, I think, contest their liability with the mortgagor and establish their indemnity from liability to him before they can with safety pay the mortgagee under the subrogation clause. Upon an assignment of the mortgage by the mortgagees in such a case, it may be admitted that the insurance company like any other assignee would acquire an interest in the mortgage; but the insurance company in the present case having paid the amount secured by the policy to the mortgagees under a policy wherein the mortgagor was expressed to be the person insured and which contained a direction that the loss, if any, that is of the mortgagor, should be paid to the mortgagees, the company cannot in the present action dispute the mortgagor's right to have recovered, in case he had brought an action on the policy, upon any ground which by the policy created a forfeiture of it, as if this was an action on the policy which it is not, nor anything of the kind. The mortgagor in the present action simply insists that the mortgagees have received monies from the insurance company in discharge of the insurance company's liability to the mortgagor under the policy, and the mortgagees cannot under the circumstances be heard to say that the monies they received from the insurance company were paid under a contract between the insurance company and the mortgagees to cover the mortgagees' interest only in the insured premises. The mortgage having been thus paid in full, the mortgagees must re-convey the mortgaged premises to the mortgagor, and in an action of this nature no question does, nor in my opinion can, arise as to whether anything has been done or omitted to be done by the mortgagor, the doing or omitting to do which would have given the insurance company a good defence to any action brought, if such had been brought, against them upon the policy by the mortgagor. All such inquiry is in my opinion wholly irrelevant in the present suit. For these reasons I am of opinion that the appeal must be dismissed with costs and that the mortgagor is entitled to a reconveyance to him of the mortgaged premises.

72. *Policy of fire insurance — "Mortgage clause" — Payment to mortgagee—Subrogation — Discharge of mortgage.* — Where a policy of insurance against fire contains the "mortgage clause," payment by the insurer to the mortgagee in the case of loss, when the insured has forfeited his rights under the policy, does not operate as a discharge of the mortgage but simply substitutes the insurer to the mortgagee's rights as his remedy in such a case. *Per Taschereau, J., in re Guerin v. Manchester Fire Assur. Co., xxix., 139, at p. 156.*

(NOTE.—Compare *Imperial Fire Ins. Co. v. Bull*, xviii., 697; 15 Ont. App. R. 421; 14 O. R. 322; No. 71 and note, ante.)

73. *Mortgage clause — Insurable interest—Transfer of mortgage.* — A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss. (See *Q. R. 5 Q. B. 434.*) *Guerin v. Manchester Fire Assur. Co., xxix., 139.*

74. *Renewal of fire policy—Void mercantile risk—Mortgage clause.*

See No. 54, ante.

13. REPRESENTATIONS AND WARRANTIES.

(a) As to Property Insured.

75. *Interim receipt—Variation in description of premises in policy—Authority of agent—Construction of contract.*—On 9th August, 1871, the plaintiffs applied through the company's agent H., at Hamilton, for \$6,000 insurance on goods in a store on the south side of King street, described in the application as No. 272 in defendant's special tariff book, and marked No. 1 on a diagram indorsed in pencil by the secretary of the company at Montreal; this diagram being a copy of the diagram on a previous application by insured. The premium was fixed at 62½ cents on the \$100, and was paid next day. On the same day (10th August) plaintiffs gave written notice to H. that they had added two flats next door to their former premises (part of No. 273 in defendant's special tariff book), and that part of their stock was then in these new flats. A few days later H. inspected the building, and said the rate would have to be increased in consequence of the cuttings. On 29th August, H. notified defendant of the opening into the adjoining building but did not communicate the written notice in its entirety. An increased rate, making it one per cent., was fixed, and paid by 23rd September, the agent issuing an interim receipt, dated back, 9th August, for full premium. The policy issued, dated 9th August, describing the premises substantially as in the application of 9th August, and referring to the diagram indorsed on the application of the insured, S. T., 272. On the policy there was an N. B. in reference to "an opening in the east end gable of the premises, through which communication is had with the adjoining house occupied by one ———." The policy was handed to plaintiffs in September, 1871, and the loss occurred in March, 1872.—Plaintiffs' action in Queen's Bench (33 U. C. Q. B. 284), failed on the ground that the description did not cover goods in the added flats.—Plaintiffs filed a bill to reform the policy or restrain the defendant from pleading in the action at law that the policy covered only goods contained in S. T., No. 272. (See 21 Gr. 548; 23 Gr. 442.)—*Held, per Richards, C.J., and Strong and Taschereau, JJ.,* that the construction of the application, written notice and interim receipt, read together, established a contract of insurance between the plaintiffs and the defendant, embracing the goods situated in the flats added by plaintiffs, and that notwithstanding the acceptance of a policy which did not cover goods in the added flats, plaintiffs were entitled to recover for the loss sustained in respect of the goods contained in such added flats. *Held, per Ritchie, Fournier and Henry, JJ.,* that the evidence did not establish an application for insurance on the goods in the added flats, nor an agreement for such insurance by the agent, but that the application, interim receipt and agreement were confined to the goods in the premises, S. T., No. 272.—The court being thus equally divided the appeal was dismissed without costs. *Liverpool and London and Globe Ins. Co. v. Wyld, i., 604.*

76. *Misrepresentation—Situation of risk—Survey by agent.*—*M., appellants' agent, who*

solicited S. for insurance with the appellants, had previously examined the premises, T. S. signed the application which M. had filled up, on the back of which was a diagram purporting to represent the exact situation of the building in relation to adjoining buildings. T. S. stated at the time of signing the application that the distances put down in the diagram were not accurate and M. promised to make accurate measurements and correction. A condition of the policy provided, that if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured and not of the company, "but the company will be responsible for all surveys made to their agents personally." *Held, affirming the judgment appealed from* (2 Ont. App. R. 81), that with respect to the survey, description and diagram the insured was dealing with M., as the agent of the company, and that any inaccuracy, omission or errors therein were those of the agent of the company acting within the scope of his authority, and not of the insured. *Hastings Mutual Fire Ins. Co. v. Shannon, ii., 394.*

77. *Misdescription—Reference to plan—Breach of condition—Falsa demonstratio non nocet—Canvasser—Agency.*—A policy described goods insured as stock of dry goods, &c., while in that 1½ story building occupied as a store-house, said building shewn on plan on back of application as "feed-house," situate attached to wood-shed of assured's dwelling house. The plan had been made by a canvasser who had obtained the application, and the building on plan marked "feed-house," did not in any respect conform to the description in the policy, but another building thereon answered the description in every way except as to the designation "feed-house." The goods were stored in this latter building and were burnt. The company refused to pay, alleging breach of a condition in the policy that no inflammable materials should be stored on the premises, as well as misdescription of the building containing the goods insured. A barrel of oil was in the building marked "feed-house" at the time of the fire. The jury found for plaintiff and motion for nonsuit, pursuant to leave reserved, was refused by the Supreme Court (N.B.) *Held, affirming the judgment appealed from* (30 N. B. Rep. 316), that the nonsuit was rightly refused; that it was evident that the building in which the goods were stored was that intended to be described in the policy; that the building marked "feed-house" being detached from that in which the goods were was a suitable place for storing oil, which, therefore, was not a breach of the condition; that the case was a proper one for the application of the maxim *falsa demonstratio non nocet*, but, if not, the matter was one for the jury who had pronounced upon it.—*Held, further*, that the canvasser who secured the application could not be regarded as agent of the assured, but was the agent of the company which was bound by his acts. *Guardian Ins. Co. v. Connely, xx., 208.*

78. *Representation in application—Transfer of interest—Property in goods—Construction of agreement—Warranty—Pleading—Evidence—Findings of jury.*—M. agreed to cut and store ice by written agreement which provided that the ice houses and all implements were to be the property of P., who after the completion of the contract was to convey same to M.; the ice was to be delivered on board vessels to be sent by P. who was to

accept only good merchantable ice so delivered and stored. The ice was cut and stored and M. effected insurance thereon and on the buildings and tools. In his application in answer to the question, "Does the property to be insured belong exclusively to the applicant, or is it held in trust or on commission, or as mortgagee?" The written reply was, "Yes, to applicant." At the end of the application was a declaration that the "foregoing was a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value and risk of the property to be insured so far as the same are known to the applicant and material to the risk."—The property was destroyed by fire and payment of insurance was refused on the ground that the property belonged to P. and not to M. Defendant sought to prove that other insurance on the ice had been effected by P., and that under a condition of the policy the amount of M.'s damages, if he was entitled to recover, should be reduced by the amount of the insurance effected by P. This defence was not pleaded. The policies to P. were not produced at the trial and verbal evidence of the contents was received subject to objection. A verdict was given for M. for the full amount of his policy.—*Held*, affirming the judgment appealed from (30 N. B. Rep. 363), that the property in the ice was in M.; that it was the buildings and implements only which were to be the property of P. by the agreement and not the ice which was at M.'s risk and shipped.—*Held*, further, Gwynne, J., dissenting, that the insurance to P. and the condition of the policy should have been pleaded but, if it had been, the evidence as to it was improperly received and must be disregarded.—*Held*, per Ritchie, C.J., that the application of M. for insurance not being made part of the policy by insertion or reference the statements in it were not warranties, but mere collateral representations which would not avoid the policy unless the facts mis-stated were material to the risk. If materiality was a question of law, the non-communication of the agreement with P. could not affect the risk; if a question of fact, it was passed upon by the jury. — *Per Strong, J.* The application being properly connected with it by verbal testimony, formed part of the policy and statements in it were warranties, but as M. only pleaded himself to the truth of the answers "so far as known to him and material to the risk" and such knowledge and materiality were for the jury to pass upon, the result was the same whether they were warranties or collateral representations. *North British and Mercantile Ins. Co. v. McClellan*, xxi., 288.

(b) As to Interest of Insured.

79. Possession of insured property — *Parol agreement — Insurable interest — Advances to build a vessel — Equitable interest.*—C. made advances to B. upon a vessel, then in course of construction, upon the faith of a verbal agreement with B.; that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When vessel was well advanced C. disclosed the facts and nature of his interest to the agent of the company which issued a policy against loss by fire to C. The vessel was still unfinished, and in B.'s possession when she was burned. *Held*, reversing the judgment appealed from (2 P. & B. 240), that C.'s interest, relating

as it did to a specific chattel, was an equitable interest which was insurable, and therefore C. was entitled to recover. *Clark v. Scottish Imperial Fire Ins. Co.*, iv., 192, 706.

NOTE.—The judgment of Strong, J., referred to at page 212 of the report, appears on page 706 of the same volume.

80. Representation—Sale à droit de remède—*Contre lettre—Insurable interest—Transfer of policy—Art. 2482 C. C.*—In an application T. represented that he was the owner of premises and effects, while he had previously sold the real property to S., subject to right of redemption, of which right T., at the time, had availed himself by paying back part of the advances, leaving still due to S. \$1,500. Subsequently the respective interests of T. and S. were fully explained to the company and a transfer of the policy for—(amount in blank) was made to S. by T. and accepted by the company. The action was by the transferee for \$3,280, total amount of insurance on the building and effects. *Held*, affirming the judgment appealed from (2 Legal News 206), that at the time of the application T. had an insurable interest, and as the company had accepted the transfer, which was intended by all parties to be for \$1,500, the amount then due by T. to S. the latter was entitled to recover the \$1,500. *Held*, also, that S., having no insurable interest in the moveables, the transfer to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to the moveables. *Ottawa Agricultural Ins. Co. v. Sheridan*, v., 157.

81. Appeal—New trial—Policy—Insurable interest—Condition—Renewal—New contract—Representations.]—J., manager for the appellant, insured the stock of S., a debtor, in the name and for the benefit of the appellant, at the time representing appellant to be mortgagee of the stock. S. became insolvent, and J. was appointed creditor's assignee, the property of the insolvent being then conveyed to him. On 8th March, 1876, S. made a bill of sale of his stock to J., upon effecting composition before it was confirmed by the court. The insurance was renewed on 5th August, 1876, one year after its issue. On 12th January, 1877, the bill of sale to J. was discharged and a new one given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on 8th March, 1877. A condition of the policy was "that all insurances whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself, or by the surrounding or adjacent buildings." On trial before Smith, J., without a jury, a verdict was given for the plaintiff and the Supreme Court (N. S.) set it aside, and ordered a new trial, on the ground that plaintiff had no insurable interest in the property when insurance was effected, and that no interest subsequently acquired would entitle him to maintain the action.—On appeal, *Held*, (1) That the appeal should be heard notwithstanding an objection that it was asserted from a judgment ordering a new trial on the ground of verdict being against the weight of evidence. *Eureka Woollen Mills Co. v. Moss* (11 Can. S. C. R. 91), approved and distinguished.—(2) That the ap-

pellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract. Judgment appealed from (5 Russ & Geld. 172) affirmed. *Howard v. Lancashire Ins. Co.*, xi., 92.

82. *Policy — Termination by company — Surrender—Waiver—Estoppel—Husband and wife—Insurable interest in wife's property—Tenant for life—Damages—Practice—Parties—Striking out name of wife joined as co-plaintiff.*—A., as mortgagee, effected insurance on C.'s property, under authority from and in the name of C., with loss payable to himself. During continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. The notice stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took policy to agent of insurers, who was also agent of another insurance company, and left it with him, directing him to put risk in latter company. No receipt was given, and the property was destroyed by fire immediately after. Payment was resisted on the ground that policy was surrendered; that C. had parted with his interest in the property by giving a deed to one B. who had re-conveyed to C.'s wife, and that proper proofs of loss had not been given, claiming, in reply to a plea of waiver in regard to proofs, that such waiver should have been in writing, according to a condition in the policy. They had refused to return policy on demand. *Held*, reversing the judgment appealed from (15 N. S. Rep. 218), Fournier, J., dissenting, that C. had an insurable interest in the property at the time of the loss, as the husband of the owner in fee and tenant by the courtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by the deed to B.—That the company, by wrongfully withholding the policy, were estopped from claiming that proofs of loss had not been given according to indorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing, if such condition applied to waiver of proofs of loss.—That the measure of damages recoverable by tenant for life of the insured premises is the full value of such premises to the extent of the sum insured.—Under the practice in Nova Scotia where the wife is improperly joined as co-plaintiff with the husband the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone.—*Per* Fournier, J., dissenting, that the sending of the circular by the company, and compliance with its terms by the assured in giving up the policy to the company's agent, was a surrender of said policy, and plaintiff therefore could not recover. *Caldwell v. Stadacona Fire and Life Ins. Co.*, xi., 212.

83. *Insurable interest—Mortgagee—Assignment of policy — Acceptance of premiums—Notice.*—In 1877 T. held insurance on property which he mortgaged to W. in 1881, and an indorsement on the policy which had been annually renewed, made the loss payable to W. In 1882 T. conveyed his equity of redemption to W., and a few months after, at the request of W., indorsement was made on the policy permitting the premises to remain

vacant. The policy was renewed each year until 1885, when all the policies of the company were called in and replaced by new policies, that held by W. being replaced by another in the name of T., to which W. objected and returned it to the agent who retained it. The premiums were paid by W. up to the end of 1886.—The premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T. having the vacancy permit and an assignment from T. to W. indorsed thereon and containing a condition not in the old policy, namely, that all indorsements or transfers were to be authorized by the office at St. John, N. B., and signed by the general agent there. The company having refused payment, an action was brought on the new policy, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court (N. S.), set aside a verdict for plaintiff and ordered a new trial on the ground that his interest was not insured and that T. had no insurable interest to enable W. to recover on the assignment. *Held*, reversing the judgment appealed from (20 N. S. Rep. 487), that the company, having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, must be taken to have intended to deal with W. as owner of the property and the contract of insurance was complete. *Wyman v. Imperial Ins. Co.*, xvi., 715.

84. *Application—Ownership of property insured—Misrepresentation.*—A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation and occupancy of the property, or any omission to make known a fact material to the risk would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured, and of the land on which it stood, whereas it was, to his knowledge, and that of the sub-agent who secured the application, situated upon the public highway.—*Held*, reversing the Supreme Court (N.B.), that as the application was more than once referred to in the policy it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition. *Norwich Union Fire Ins. Co. v. LeBell*, xxix., 470.

85. *Representation — Concealment — Insurable interest—Unpaid vendor.*—An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss though his interest may be limited if, when he effected the insurance, he intended to protect the interest of the vendee as well as his own.—The fact that the vendor is not sole owner need not be stated in the policy, nor disclosed to the insurer.—Judgment appealed from (26 Ont. App. R. 277) reversed, and that of the trial judge (29 O. R. 394) restored. *Keefer v. Phania Ins. Co.*, xxxi., 144.

86. *Insurance by mortgagor or owner—Condition in policy—"Sole and unconditional ownership."*

See No. 29, ante.

87. *Application — Transfer of interest — Property in goods — Construction of agreement — Warranty — Pleading — Evidence — Findings of jury.*

See No. 78, ante.

88. *Mortgage clause — Insurable interest — Transfer of mortgage.*

See Nos. 72, 73, ante.

89. *Condition in policy — Interest of insured — Mortgagor — Owner — Further insurance.*

See No. 29, ante.

90. *Conditions in fire policy — Interest of insured — Mortgagor or owner — Further insurance — Estoppel.*

See No. 29, ante.

(c) *As to Material Statements.*

91. *Risk on building and stock for separate amounts — Misstatement — Incumbrances on land — Condition of policy — Indivisibility of contract — 36 Vict. c. 44, s. 36 (Ont.)* — Appellants issued a policy of insurance subject to 36 Vict. c. 44 (Ont.) for \$1,000 on building, and \$2,000 on stock. The application, which had been signed in blank and delivered to the person through whom the policy was effected, stated that there were no incumbrances on the property, although there were several mortgages. After issue of policy, respondents elected a further incumbrance on the land, but did not notify defendant. The proviso (since repealed by 39 Vict. c. 7,) to s. 36 declared, "That the concealment of any incumbrances on the insured property, or on the land on which it may be situate, . . . shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors shall see fit in their discretion to waive the defect." A condition of the policy provided that it should be void by omission to make known any fact material to the risk. The Common Pleas (26 U. C. C. P. 465) refused to set aside the verdict in favour of the appellant, but the Court of Error and Appeal (1 Ont. App. R. 545) held the policy divisible and respondents entitled to recover insurance on the stock. *Held*, reversing the judgment appealed from, that the contract of insurance on the building and on the stock was entire and indivisible, and that the misrepresentation as to incumbrances, by the conditions of the policy, as well as by s. 36 of 36 Vict. c. 44 (Ont.), rendered the policy wholly void. *Gore District Mutual Fire Ins. Co. v. Samo*, ii., 411.

92. *Misrepresentation — Existing insurance — Verbal notice to agent — Application and policy.* — Plaintiff applied for further insurance for two months on machinery, through S., the company's agent at D., authorized to receive applications, accept premiums and issue interim receipts, valid only for 30 days. He informed S. of other insurances on the property, but not knowing the amount in the Gore Mutual Co., requested him to ascertain it, signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for 30 days. S. forwarded the application to the head office without mention of insurance in the Gore

Mutual Company. The risk was accepted, and, in accordance with practice on risks over short periods, instead of a formal policy, a certificate issued stating that plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The machinery was destroyed by fire, after the 30 days, but within the two months, and a policy issued, indorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and indorsed, or otherwise acknowledged in writing, otherwise the policy to be of no effect; and another, that all notices for any purpose must be in writing. The insurance in the Gore Mutual Company was not indorsed on the policy. On appeal from the Court of Appeal (2 Ont. App. R. 158) reversing a decree in favour of the plaintiff (24 Gr. 299): — *Held*, affirming the judgment appealed from, that as the application in writing did not contain a full and truthful statement of previous insurances, the verbal notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the company and that the plaintiff was not entitled to have the policy reformed by the indorsement of the Gore Mutual policy thereon, and could not recover. *Billington v. Provincial Ins. Co.*, iii., 182.

93. *Representation by insured — Description of property — Error in policy — Contract — Statutory condition — R. S. O. (1877) c. 162 — Just or reasonable variation — Arbitration — Waiver.* — The agent of an insurance company filled up an application for insurance on a building built of boards and fixed the premium at the rate demanded on brick buildings, there being no tariff for board buildings. The words "boards" was so badly written that it was difficult to decipher it, but the character of the building was designated on a diagram on the back of the application, which the agents were instructed to mark with red in case of a brick, and black in case of a frame building. In this case it was in black. At the head office the word intended for boards was read "brick," and the policy issued as on a brick building. A loss having occurred, the company, under a clause in the policy, caused an arbitration to be had, but afterwards refused to pay the amount awarded to the insured, claiming that by reason of the error in the policy there was no existing contract of insurance. *Held*, affirming the judgment appealed from (14 Ont. App. R. 328), that as there had been no misrepresentation by the assured, and no mutual mistake, the parties were *ad idem* and the contract was complete, and even if it were otherwise the company could not set up this defence after treating the contract as existing by the reference to arbitration under the policy. — By the 17th condition R. S. O. (1877) c. 162, a loss is not payable until 30 days after proofs of loss are put in unless otherwise provided by statute or agreement of the parties. — *Held*, per Ritchie, C.J., and Fournier, Henry and Gwynne, JJ., that this is a privilege accorded to the company, and while the time may be further limited by agreement it cannot be extended. — *Per* Strong, J. That a variation of the condition by inserting a clause in the policy extending the time to 60 days is not a variation by agreement of the parties, nor is such varied condition a just or reasonable one. *City of London Fire Ins. Co. v. Smith*, xv., 69.

94. *Fire insurance — Application—Untrue statement — Materiality — Statutory condition.*—In an application for insurance against fire, among the questions to the applicant were: "Have you ever had any property destroyed by fire?" Ans.—"Yes." "Give date of fire and, if insured, name of company interested?" Ans.—"1892, National and London & Lancashire." The evidence shewed that there was a fire on the applicant's properties in 1882 and two fires in 1892, and the insurance by the policy granted on this application was on property which replaced that destroyed by the latter fires. *Held*, reversing the judgment appealed from (35 N. S. Rep. 488) that the above questions were material to the risk and the answers untrue. The first statutory condition, therefore, precluded recovery on the policy. *Western Assur. Co. v. Harrison*, xxxiii., 473.

95. *Verbal notice to agent—Application in blank—Misrepresentation.*

See No. 92, ante.

96. *Verbal notice to agent — Application for insurance signed in blank—Misrepresentation.*

See No. 92, ante.

97. *Application — Transfer of interest — Property in goods — Construction of agreement — Warranty — Pleading — Evidence—Findings of jury.*

See No. 78, ante.

98. *Proofs of loss — Change in risk — Notice — Insurable interest—Mortgage clause — Arbitration — Condition precedent — Foreign statutory conditions — Transfer of mortgage—Assignment of rights after loss—Signification.*

See Nos. 72, 73, ante.

99. *Interest of insured — Mortgagor — Owner — Further insurance.*

See No. 29, ante.

100. *Renewal of fire policy—Void mercantile risk — Mortgage clause.*

See No. 54, ante.

INSURANCE GUARANTEE.

Guarantee policy — Honesty of employee—Notice of defalcation.

See SURETYSHIP, 7.

INSURANCE, LIFE.

1. ACTS OF AGENTS AND OFFICERS, 1, 2.

2. CONDITION OF POLICY, 3, 4.

3. CONDITION PRECEDENT, 5, 6.

4. CONTRACT, 7-15.

5. FRIENDLY SOCIETIES, 16, 17.

6. INSURABLE INTEREST, 18-23.

7. MISREPRESENTATION, 24-27.

8. MISTAKE, 28.

9. PREMIUMS AND ASSESSMENTS, 29-32.

1. ACTS OF AGENTS AND OFFICERS.

1. *Cancellation of policy — Agency—Art. 610 C. C.—Unworthy beneficiary—Murder of assured — Exclusion from succession.*—The action to cancel a policy was against the representatives of a deceased policy holder who was murdered by his wife and her lover, who were executed for the murder. Deceased left all his property to his wife, and had no issue surviving. The widow was judicially deprived of all rights as beneficiary under the policy and the will as unworthy of succession. The company charged the remaining beneficiaries with endeavouring to take advantage of fraud and the felony. The Supreme Court affirmed the judgment appealed from (Q. R. 9 Q. B. 499) which held, that as there was no evidence that, at the date of the policies, assured was aware of the evil intentions of his wife, nor that she was acting as agent in effecting the insurances, the fact that she might then have had such intentions and subsequently murdered her husband would not have the effect of discharging the insurer from liability under the policies toward the legal representatives of the assured. *Standard Life Assur. Co. v. Trudeau*, et al., xxxi., 376.

2. *Insurance company — Appointment of medical examiner. — Breach of contract — Authority of agent.*

See CONTRACT, 153.

2. CONDITION OF POLICY.

3. *Declarations and statements in application — Intemperate habits — Increase of risk—Promissory warranty.*—The application, signed by applicant, contained the question and the answer: "Are your habits sober and temperate? A.—Yes." Also an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated that "if any of the declarations or statements made in the application of this policy upon the faith of which this policy is issued shall be found in any respect untrue, in such case the policy shall be null and void." Insured became intemperate during the year preceding his death, but medical opinion was divided as to whether his intemperate habits materially increased the risk. *Held*, on the merits, per Ritchie, C.J., and Strong, J., (Fournier and Henry, JJ., contra,) that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract.—Judgment appealed from (M. L. R. 2 Q. B. 323) affirmed. *Boyce v. Phoenix Mutual Life Ins. Co.*, xiv., 723.

4. *Incontestable policy — Delivery of contract—Operation of conditions.*

See No. 12, *infra*.

3. CONDITION PRECEDENT.

5. *Payment of premium — Delivery of policy — Memo. on margin — Countersignature — Condition precedent.*—Evidence was given of payment of premium, and rebutting evidence that it had never been paid. The jury

found that the premium was paid and the policy delivered to the insured as a completed instrument, although it had not been countersigned as required by the memo. on the margin. Verdict entered for the plaintiff was affirmed. *Held*, affirming the judgment appealed from (21 N. S. Rep. 169), Ritchie, C. J., and Gwynne, J., dissenting, that the necessity of countersigning by the agent was not a condition precedent to the validity of the policy, and the jury having found that the premium was paid their verdict should stand. (See 10 Can. S. C. R. 92, and 13 Can. S. C. R. 218). *Confederation Life Ass'n v. O'Donnell*, xvi., 717.

See Nos. 7 and 8, *infra*.

6. Condition precedent to action — Allegation and proof of performance — Waiver.

See ACTION, 27.

4. CONTRACT.

7. Unpaid premium — Delivery of policy — Countersigning — Escrow — New trial — Weight of evidence. — In an action on a policy, the company pleaded that the policy was never delivered, that the premium had never been paid, and that it was not a perfected contract. The policy was sent from Toronto to the agent at Halifax, to receive the premium, countersign the policy and deliver it. The agent did not countersign, and on the policy was printed: — "This policy is not valid unless countersigned by —, agent at —, countersigned this — day of —, Agent." The agent gave evidence that he delivered the policy to the party assuring, not countersigned, in order that he might read the conditions, and that the premium had not been paid. The policy was found after death of assured not countersigned, it was dated 1st October, 1872; the first premium would have covered the year up to the 1st October, 1873, and assured died 10th July, 1873. The judgment in favour of plaintiff was affirmed by the Supreme Court (N. S.) *Held*, per Ritchie, C.J., and Strong and Taschereau, JJ., (Fournier and Henry, JJ., dissenting), that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore the company was not liable. — *Per* Gwynne, J. That the instrument was delivered as an escrow to the agent, not to be delivered as a binding policy until the premium should be paid and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an escrow, and to hold the company bound by the instrument as one completely executed and delivered as their deed. — Judgment appealed from (2 Russ. & Geld. 231) reversed and new trial ordered. *Confederation Life Ass'n v. O'Donnell*, x., 92.

See No. 5, *ante*, and No. 8, *infra*.

8. Delivery of policy — Payment of premium — Countersigning — Condition — Instructions to agent — Escrow — Evidence — Entry in books of deceased — Not exclusively against interest — New trial. — Action on the policy of life insurance referred to in Nos. 5 and 7, *supra*. On the trial the judge admitted in evidence a book entry made by deceased holder of the policy, shewing a payment to the agent of the company of an amount equal to the premium, which the evidence shewed was paid by

money given to deceased by his father. He also admitted the evidence of the agent, who had since died, taken at a former trial of the cause, to the effect that the premium was not paid, and that he would not countersign the policy until it was paid, and that the policy was only given to deceased to enable him to examine it, and not as a duly executed policy. The jury found for plaintiff, but stated, in answer to a question submitted by the court, that the agent had been instructed not to deliver the policy until it was countersigned. *Held*, per Ritchie, C.J., and Gwynne, J., that the policy was only delivered to the agent as an escrow, and as it was never duly executed and delivered the company was not liable. — *Per* Strong, J. That the memorandum as to countersigning was not a condition of the policy, and the plaintiff was not barred by non-compliance with its terms; but the evidence of the entry in the books of the deceased was improperly admitted, and there should be a new trial. — *Per* Fournier and Henry, JJ. That the policy was properly executed and delivered, and as there was sufficient evidence to sustain the verdict independent of the evidence alleged to have been improperly admitted at the trial, the appeal should be dismissed. — *Per* Henry, J. Under the present practice the court is bound to uphold a verdict if there is sufficient legal evidence to sustain it independently of the evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. Strong, J., *contra*. — The court being thus divided in opinion a new trial was granted. *Confederation Life Ass'n v. O'Donnell* (10 Can. S. C. R. 92) approved. *Confederation Life Ass'n v. O'Donnell*, xiii., 218.

See Nos. 5 and 7, *ante*.

9. Unconditional policy — Misrepresentation — Reference to application — Novation — Indication of payee — Delegation — Return of premium — Parties — Practice — R. S. C. c. 124, ss. 27, 28 — Arts. 1174, 1180, 2487, 2488, 2585 C. C. — An unconditional life policy was issued in favour of a creditor of assured, "upon the representations, agreements and stipulations" contained in application signed by assured, one of which was that if any misrepresentation was made by the applicant, or untrue answers given by him to the medical examiner of the company, the premiums paid would become forfeited and the policy be null and void. The answers as to health were untrue, the insurer's own medical attendant stating that insured's was a life not insurable. *Held*, 1st, that the policy was thereby made void, *ad initio*, and the insurer could invoke such nullity against the person in whose favour the policy was made payable, and was not obliged to return any part of the premium paid. — 2ndly. That the statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of R. S. C. c. 124, ss. 27 & 28, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Parliament of Canada. — 3rdly. That the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation; and the provisions contained in art. 1180, C. C. are not applicable in such a case. — It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the insured were not made parties to the cause. *Venner v. Sun Life Ins. Co.*, xvii., 394.

10. *Life insurance — Agency — Art. 610 C. C.—Unworthy beneficiary—Murder of assured — Exclusion from succession.*—The judgment appealed from (Q. R. 9 Q. B. 499) which held that as there was no evidence that, at the date of policies sued on, assured, who was murdered by the beneficiary, was aware of her evil intentions, nor that she was acting as his agent in effecting the assurances, the fact that she might then have had the intention to murder and did subsequently murder her husband would not have the effect of discharging the insurer from liability upon the policies towards the legal representatives of the assured. *Standard Life Assur. Co. v. Trudeau*, xxxi., 376.

11. *Life insurance — Terms of contract—Delivery of policy — Payment of premiums.*—A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium.—Where the insured, being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms nor induced not to read it, has neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of and contract agreed upon. *Provident Savings Life Assurance Society of New York v. Mowat*, xxxii., 147.

12. *Commencement of insurance contract—Delivery of policy — Incontestability—Operation of conditions.*—An application for life insurance dated 16th September, 1894, and made part of the contract to be effected provided that the issue of a policy in the usual form and delivered should be the only acceptance thereof and that the place of contract for all purposes should be the head office of the company at Toronto. The policy insured the applicant's life to 5th October, 1895, and provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that the company affixed its seal and the president and managing director signed and delivered this contract at Toronto "this 27th day of September, A.D. 1894." The insured lived in British Columbia and the policy and receipt were mailed at Toronto on 27th September to the company's agent at Winnipeg, and forwarded by him on 1st October to the insured, who would not receive it before 7th October. Insured died on 30th September, 1897. *Held*, *Taschereau, C.J.*, dissenting, that the policy and receipt were delivered, and the contract of insurance was completed, at least as early as 27th September, 1894, when the papers were mailed at Toronto.—The policy provided that after being in force for three years only certain specified conditions therein should be binding on the holder and in all other respects the liability of the company thereunder should not be disputed. The insured violated a condition, but not one so specified, that would have avoided the policy but for this clause.—*Held*, that said provision covered breaches of conditions made during the three years the policy was in force, and was not confined to those committed subsequent thereto, and as the three years expired on the 27th September, 1897, the insured dying three days later the company was liable. *North American Life Assur. Co. v. Elson*, xxxiii., 383.

13. *Policy without seal — 37 Vict. c. 85 (Ont.)—Shabby defence—Equitable relief—Estoppel.*

See COMPANY LAW, 28.

14. *Delivery of policy—Rejection of evidence—New trial.*

See EVIDENCE, 15.

15. *Act securing benefits to wife and children—58 Vict. c. 25 (N. B.).*

See INSURANCE, ACCIDENT, 6.

5. FRIENDLY SOCIETIES.

16. *Relief association—Government railway — Injury to employee—Lord Campbell's Act—Art. 1056 C. C.—Exonerated from liability—R. S. C. c. 38, s. 50.*—An employee of the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually \$6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant: *Held*, reversing the judgment appealed from (6 Can. Ex. C. R. 276), that the rule of the association was an answer to an action by his widow under art. 1056 C. C. to recover compensation for his death. *The Queen v. Grenier*, xxx., 42.

17. *Payment of assessments — Suspension of member—Forfeiture.*

See No. 31, *infra*.

6. INSURABLE INTEREST.

18. *Assignment of policy — Bona fides — Insurable interest — Wagering policy — Payment of premiums.*—G. applied for insurance on his life, underwent medical examination, and signed and procured the usual papers, which were forwarded to the head office and a policy returned to the agent for delivery. G. was unable to pay the premium for some time, but a third party, at the request of the agent, took an assignment of the policy and paid the premium. Subsequently the policy was assigned to plaintiff and the premiums were thenceforth paid by him. Prior to G.'s death the general agent of the company inquired into the circumstances and authorized the agent to continue to receive the premiums from the plaintiff as assignee of the policy. *Held*, reversing the judgment appealed from (3 Legal News 322; 25 L. C. Jur. 232), *Gwynne, J.*, dissenting, that at the time the policy issued G. intended to effect a *bona fide* insurance for his own benefit, and, as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy. *Vezina v. New York Life Ins. Co.*, vi., 30.

19. *Interest of beneficiary — Wager policy — 14 Geo. III. c. 48 (Imp.)*—The statute 14 Geo. III., c. 48, enacts: 1. That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons or on other event or events whatever wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made, shall have no interest, or by way of gaming

or wagering; and that every insurance made contrary to the true intent and meaning of this Act shall be null and void to all intents and purposes whatsoever. 2. That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwritten. 3. That in all cases when the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events. *Held*, affirming the judgment appealed from (6 Russ. & Geld. 440), that this statute never was intended to prevent a person from effecting a *bond fide* insurance on his own life, and making the sum insured payable to whom he pleases, such insurance not being "by way of gaming or wagering" within the meaning of the first section of the Act. *Held*, also, that s. 2 of the said Act applies only to a policy on the life of another, not to a policy by a man on his own life. *North American Life Assur. Co. v. Craigen*, xiii., 278.

20. *Assignment of policy — Married woman — Art. 183 C. C. — Authorization of husband.* — The appellant's interest in the policy was as assignee of B., wife of L., to whom insured had transferred his interest. *Held*, per Strong, Taschereau and Gwynne, JJ., that the appellant had no *locus standi*, there being no evidence that B. had been authorized by her husband to accept or transfer the policy. — Judgment appealed from (M. L. R. 2 Q. B. 323) affirmed. *Boyce v. Phoenix Mutual Life Ins. Co.*, xiv., 723.

21. *Wagering policy — Nullity — Waiver of illegality — Insurable interest — Estoppel* — 14 Geo. III., c. 48 (Imp.) — Arts. 2474, 2480, 2590 C. C. — A condition by which the policy is to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy. — Judgment of the Queen's Bench reversed, Sedgewick, J., dissenting. *Manufacturers Life Ins. Co. v. Anctil*, xxviii., 103.

— Affirmed on appeal by Privy Council, (1899) A. C. 604.

22. *Life insurance — Wager policy — Endowment* — 14 Geo. III., c. 48, s. 1 (Imp.) — *Action for cancellation — Return of premiums* — If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit and pays all the premiums himself, the policy is a wagering policy and void under 14 Geo. III., c. 48, s. 1 (Imp.) — The Act applies to an endowment as well as to an all life policy. — Judgment of the Court of Appeal (2 Ont. L. R. 559) affirmed. — In an action by the company for cancellation of the policy under said Act a return of the premiums paid will not be made a condition of obtaining cancellation. — Judgment of the Court of Appeal (2 Ont. L. R. 559) reversed, Davies and Mills, JJ., dissenting. *Brophy v. North American Life Assur. Co.*, xxxii., 261.

23. *Partnership — Insurance on members — Registered declaration — Evidence to contradict* — Art. 1835 C. C. — O. S. L. C. c. 65, s. 1.

See EVIDENCE, 21.

7. MISREPRESENTATION.

24. *Reasonable accuracy — Application — Declaration by assured — Basis of contract — Warranty — Misdirection.* — An application for life insurance contained the following declaration after the applicant's answers to the questions submitted:—"I, the said G. M. (the person whose life is to be insured), do hereby warrant and guarantee that the answers given to the above questions (all of which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association until the first premium thereon shall be paid to a duly authorized agent of the association during my lifetime and good health. I (the party in whose favour the insurance is granted) do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association." *Held*, affirming the judgment appealed from (14 Ont. App. R. 218), that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to the best of my knowledge and belief." — At the trial the jury were charged that if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant, their verdict should be for the plaintiffs. *Held*, a proper direction. *Confederation Life Association v. Müller*, xiv., 330.

25. *Mutual society — Bond of membership — Warranty — Concealment — Misstatement — Pleading.* — On application for insurance in a mutual assessment insurance society applicant declared and warranted that if in any answers there should be any untruth, evasion or concealment of facts, any bond granted on such application should be null and void. In an action on a bond so issued, it was shewn that insured had mis-stated date of birth, giving 19th instead of 23rd February, 1835; that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the society contended that it was, in fact, a severe attack; that he had stated that he was in "perfect health" at date of application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose, and that the attack of apoplexy, which he admitted occurred 5 years before application, in fact occurred within 4 years. The trial judge found that the mis-statement as to date of birth was immaterial, as it could not have increased the number of years on which premiums were calculated; that the attack of apoplexy was a slight, not a severe attack; that applicant was in "good" if not "perfect" health when application was made; that the bleeding at the nose to which insured was subject, was not a disease and not dangerous to his health; but that mis-statement as to time of occur-

rence of attack of apoplexy was material, and on this last issue found for the society, and on all others for the plaintiff. The court *en banc* reversed this decision and gave judgment for plaintiff on all issues, holding that as to the issue found by the trial judge for the society, there was a variance between the plea and the application which prevented the society from taking advantage of the mis-statement. *Held*, Gwynne and Patterson, JJ., dissenting, that the decision of the court *en banc* (20 N. S. Rep. 347) was right, and should be affirmed. *Mutual Relief Society of N. S. v. Webster*, xvi., 718.

26. *Application — Reference, to application in policy — Warranty — Mis-statement — Incomplete answer.*—The bond of membership in an insurance society insured the members holding it "in consideration of statements made in the application hereof," &c., and in a declaration annexed to the application the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue. *Held*, that the application was a part of the contract for insurance and incorporated with the bond.—The declaration warranted the truth of answers to questions and of statements therein, and agreed that if any of them were not true, full and complete, the bond should be null and void. One of the questions to be answered was: "Have you ever had any of the following diseases? Answer, opposite each, yes or no." The names of the diseases were given in perpendicular columns, and at the head of each column the applicant wrote "no," placing under it and opposite the disease named marks like inverted commas. On trial of action on bond pursuant to this application it was found that applicant had had a disease opposite to which one of these marks had been placed. *Held*, affirming the judgment appealed from (21 N. S. Rep. 274), that whether applicant intended this mark to mean "no" and thus deny that he had had such disease, or intended it as an evasion of the question, the bond was void for want of a true answer to the question. *Fitzrandolph v. Mutual Relief Society of N. S.*, xvii., 333.

27. *Conditions and Warranties — Indorsements on policy — Inaccurate statements — Misrepresentations — Latent disease — Material facts — Cancellation of policy — Return of premium — Statute, construction of*—55 Vict. c. 39, s. 33 (Ont.).—The provisions of s.s. 2, s. 33 of "The Insurance Corporations Act, 1892," (Ont.), limiting conditions and warranties indorsed on policies providing for the avoidance of the contract by reason of untrue statement in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements, but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by s.s. 3.—Misrepresentations upon an application so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. *Venner v. Sun Life Ins. Co.* (17 Can. S. C. R. 394) followed. *Jordan v. Provincial Provident Institution*, xxviii., 554.

8. MISTAKE.

28. *Death or endowment policy — Mistake — Amount insured — Premium — Parol evidence.*—s. c. D.—23

—Action on a policy of life insurance for \$2,000, payable at the death, or at the expiration of eight years. The premium mentioned was \$163.44, to be paid annually, partly in cash and partly by B.'s notes. The company pleaded that insurance had been effected for \$1,000 only, but the policy had by mistake been issued for \$2,000; that as soon as discovered, a policy for \$1,000 had been offered, and that previous to action the company tendered \$832.97, the amount due, which sum, with \$25.15 for costs (which had not been tendered) was brought into court. Since October, 1869, when a new policy was offered, the premiums were paid and accepted under an agreement that rights would not thereby be prejudiced, and that the company would abide by the decision of the court after the insurance should have become payable. Parol evidence was given to shew how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a \$1,000 policy. *Held*, reversing the judgment appealed from (20 L. C. Jur. 286), that the insurance effected was for \$1,000 only and that the policy had by mistake been issued for \$2,000. *Ætna Life Ins. Co. v. Brodie*, v., 1.

9. PREMIUMS AND ASSESSMENTS.

29. *Premium notes — Non-payment — Forfeiture — Conditions — Collateral agreements.*—Assured gave the company to cover the first annual premium upon a policy of life insurance, two agreements in the form of promissory notes payable in 3 and 6 months from the date of the policy, each of which contained an undertaking or condition by the assured, should default be made in payment at maturity, that the policy should thereby become void. The policy contained no condition as to forfeiture for non-payment of premiums. The first note was not paid at maturity and, while it remained unpaid and before the second note fell due, the assured died. *Held*, affirming the decision appealed from (20 Ont. App. R. 564), that, by non-payment of the portion of premium payable three months after date of policy, as agreed, the policy had become void. *Frank v. Sun Life Assur. Co.*, 22nd May, 1894.

30. *Condition in policy — Note given for premium — Non-payment — Demand of payment after maturity — Waiver.*—A condition in a policy provided that if any premium, or note, &c., given therefor was not paid when due, the policy should be void. *Held*, affirming the decision appealed from (26 Ont. App. R. 187), that where a note given for a premium under said policy was partly paid when due, and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void. *Held*, further, that a demand for payment after maturity of the renewal was not a waiver of the breach of the condition so as to keep the policy in force. *McGeachie v. North American Life Ins. Co.*, xxiii., 148.

31. *Benefit association — Payment of assessments — Forfeiture — Waiver — Pleading.*—A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived. *Held*, reversing the judgment of the Court of Appeal (Ont.), that the waiver, not having been

pleaded, could not be relied on as an answer to the plea of non-payment. *Allen v. Merchants' Marine Ins. Co.* (15 Can. S. C. R. 488) followed. *Knights of Maccabees v. Hüller*, xxix., 397.

32. *Life insurance — Condition of policy — Payment of premium — Delivery of policy — Evidence*—Art. 1233 C. C.] — A production from the custody of representatives of the insured of a policy of life insurance, raises a *prima facie* presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional.—The reception of such proof cannot, under the circumstances, be considered as an admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of art. 1233 of the Civil Code. *Mutual Life Assurance Co. of Canada v. Giguère*, xxxii., 348.

INSURANCE, MARINE.

1. ABANDONMENT, 1-9.
2. AVERAGE, 10.
3. BARRATRY, 11.
4. CONDITIONS, 12-16.
5. CONTRACT, 17-28.
6. DEVIATION, 29, 30.
7. INSURABLE INTEREST, 31-33.
8. LOSSES, 34-47.
9. MISREPRESENTATION AND CONCEALMENT, 48-50.
10. WARRANTY, 51-58.

1. ABANDONMENT.

1. *Total loss — Notice of abandonment — Waiver.*—[The underwriters' agent refused to accept a notice of abandonment, given by owners. Owners telegraphed captain that they had abandoned and for him to proceed under best advice, and he repaired at much less cost than report estimated. *Held* reversing the judgment appealed from (23 N. B. Rep. 160), that the telegraph did not constitute a waiver of the notice of abandonment. *Millville Mutual Marine Ins. Co. v. Driscoll*, xi., 183.

2. *Abandonment by agent—Special authority.*—[An agent effecting insurance under authority for that purpose only may, in case of loss, give notice of abandonment to the underwriters without any other or special authority.—Judgment appealed from (26 N. B. Rep. 339) affirmed. *Merchants' Marine Ins. Co. v. Barss*, xv., 185.

3. *Trover — Conversion of vessel — Joint owners—Abandonment—Salvage.*—[A vessel, partly insured, was wrecked and the ship's husband abandoned her to the underwriters who sold her and her outfit to one K. The sale was afterwards abandoned and the under-

writers notified the ship's husband that she was not a total loss, and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The owner of twenty-four uninsured shares in the vessel brought an action against the underwriters for conversion of her interest. *Held*, affirming the decision appealed from (32 N. B. Rep. 191), that the ship's husband was agent of the uninsured owner in respect of the vessel, and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of his interest by any action of the underwriters, but by the decree of the court under which she was sold for salvage. *Rourke v. Union Ins. Co.*, xxi., 344.

4. *Abandonment — Repairs — "Boston clause" — Findings of jury — Setting aside verdict.*—[In three cases, tried together, the Supreme Court (N. S.) (30 N. S. Rep. 480) affirmed the decision of the trial court upon a verdict in favour of plaintiff. Action on policy containing the "Boston clause" stipulating that "the acts of the assured or insurers in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of the abandonment." The "Hattie Louise" left Trinidad for Vineyard Haven laden with molasses, encountered heavy weather and put into St. Thomas, W. I., leaking. Survey resulted in an order to discharge and store cargo and repair, but before anything was done, plaintiff's agent arrived at St. T., also J. B., agent for insurance companies on the risk. Several interviews resulted in disagreement, plaintiff's agent insisting that the cargo should be transhipped and the ship taken to a northern port after making temporary repairs, but J. B. insisting on permanent repairs at St. T. and carrying cargo forward. Notice of abandonment was given 28th December, plaintiff's agent withdrew from the project of repairing and the work was proceeded with by J. B. After the ship came off the slip, cargo was reloaded and she was still leaky and unseaworthy and it was considered necessary again to discharge the cargo. Disbursements so far were \$4,014.48, and the ship (valued at \$6,000 originally) had not been re-metaled or re-classed. A loan on bottomry failed, consignees refused to allow the cargo to be discharged a second time till claims were paid and she was sold for claims. The jury found that there was acceptance of abandonment. On appeal to the Supreme Court of Canada a new trial was ordered upon terms as to costs (29 Can. S. C. R. 449) (21st November, 1898), and after judgment upon the new trial, resulting in favour of the plaintiff, on another appeal to the Supreme Court of Canada, the judgment was affirmed, the decision of the court being delivered by Taschereau, J., who said, referring to the order for new trial:—"In order that the insurance companies might have full opportunity of adducing further evidence which had not been received at the former trials, we indulged them by granting new trials to enable them to produce letters in respect to the transactions which took place at St. T., then said to be in possession of witnesses there. This indulgence was granted at their own expense and they were given 30 days in which to make settlement of these costs, otherwise the appeals were to stand dismissed." After the hearing on the appeal from the judgment on the new trials, it was

considered that the new evidence so produced shewed nothing to justify interference with the judgment appealed from. *Ins. Co. of North America v. McLeod*; *Western Ins. Co. v. McLeod*; *Nova Scotia Marine Ins. Co. v. McLeod*, xxix., 449; and 15th May, 1901.

5. Notice of abandonment—Art. 2544 C. C.—Constructive total loss.

See No. 38, *infra*.

6. Constructive total loss—Repairs by underwriters.

See No. 39, *infra*.

7. Loss of voyage—Constructive total loss of ship—Sale by mortgagee—Diligence.

See No. 42, *infra*.

8. Constructive total loss—Necessity of sale by master—Notice of abandonment.

See No. 44, *infra*.

9. Waiver—Acceptance of abandonment—"Boston clause"—Repairs.

See No. 4, *ante*.

2. AVERAGE.

10. Salvage—General average—Insurance on hull—Cost of saving uninsured cargo—Average bond.]—A vessel loaded with coal stranded and was abandoned. Notice of abandonment was given on the hull. The owners of cargo, not insured, offered to take it out of the vessel but the underwriters preferred to do it themselves and an average bond was executed by the underwriters and owners by which they respectively agreed to pay the loss according to their several shares in the vessel, her earnings as freight and her cargo, the same to be stated and apportioned in accordance with the established usage and law of the province in similar cases by a named adjuster. Efforts having been made to save both vessel and cargo, resulting in a portion of the latter being taken out but the remainder and the vessel being abandoned, the adjuster apportioned the loss making the greater part payable by the owners of the cargo. In an action on the bond, *Held*, affirming the judgment appealed from (19 Ont. App. R. 41), that the owners of cargo were only liable, under the bond, to pay what would be legally due according to the principles of the law relating to general average; that the cargo and vessel were never in that common peril which is the foundation of the right to claim for general average, that the money expended, beyond what was the actual cost of the salvage of the cargo saved, was in no sense expended for the benefit of the cargo owners; and the defendants having paid into court a sum sufficient to cover such actual cost the underwriters were not entitled to a greater amount. *Western Assurance Co. v. Ontario Coal Co.*, xxi., 383.

3. BARRATRY.

11. Exceptions in policy—Barratry—Proximate cause of loss—Perils of the seas.]—Insurance in a marine policy against loss "by perils of the seas," does not cover a loss by barratry.—It is not necessary that barratry should be expressly excepted in a marine

policy to relieve the insurers from liability for such a loss.—*Per Stroug, J.*, dissenting. If the proximate cause of the loss is a peril of the seas covered by the policy the underwriter is liable, though the primary cause may have been a barratrous act. Judgment appealed from (20 N. S. Rep. 514) affirmed. *O'Connor v. Merchants' Marine Ins. Co.*, xvi., 331.

4. CONDITIONS.

12. Condition of policy—Prosecution of claims—Prescription—Limitation of liability—Renunciation—Art. 2184 C. C.—Waiver—Pleading—Appeal.]—A condition in a marine policy that all claims under such a policy shall be void unless prosecuted within one year from date of loss, is a valid condition not contrary to art. 2184 C. C. and all claims under such a policy will be barred if not sued on within one year from the date of the loss.—The plaintiff cannot rely on appeal on a waiver of the condition, unless such waiver has been properly pleaded.—*Per Taschereau, J.* The debtor cannot stipulate for enlargement of the time limited for prescription, but the creditor may stipulate for a shorter limitation. Judgment appealed from (M. L. R. 3 Q. B. 293) affirmed. *Allen v. Merchants' Marine Ins. Co.*, xv., 488.

13. Limitation of time—Commencement of action—Defective protest.]—A clause in the policy required action to be brought within 12 months from date of depositing claim for loss or damage at the office of the assurers. A protest was deposited accompanied by a demand for the insurance. The protest was defective and some months later an amended claim was deposited. *Held*, affirming the judgment appealed from (20 N. S. Rep. 15), that an action begun more than 12 months after the original, but less than 12 months after the amended claim was deposited, was too late. *Robertson v. Pugh*, xv., 706.

14. Breach of condition—Additional insurance—Cancellation of policy—Premium retained.]—Plaintiffs insured in the St. Lawrence Insurance Association, of which defendant was the broker and an underwriter, \$2,000 on their schooner "Nimrod" for 12 months. In the application were the words "insurance elsewhere not to exceed \$2,000." The policy issued, dated 25th October, 1870, without any reference to this condition. On the day application was made plaintiffs insured further \$2,000 in the Mutual Insurance Association of Pictou. In November afterwards another \$2,000 was insured in the Union Marine Insurance Company. After all the insurances had been effected, the schooner proceeded on her voyage and was, as was long afterwards ascertained, abandoned at sea as a total wreck on 19th February, 1871.—On 20th February 1871, defendant's association (none of the parties having had any intimation of the loss), cancelled their policy on account of the insurance in the Mutual Marine Insurance Company, charging plaintiff's premium up to that date and remitting the portion payable after that date.—The Supreme Court (N.S.) directed judgment to be entered for the defendants. *Held*, reversing the judgment appealed from (3 R. & C. 276), that the cancellation operated only from the 20th February, 1871, up to which date the premium was charged, and not from November, 1870. *McDonald v. Doull*, Cass. Dig. (2 ed.) 384.

15. *Condition not to load more than registered tonnage with stone, &c., without agent's consent—Breach—Agency—Loading with phosphate rock—Evidence—Consent by agent—Proof of contract—Prior insurance—Finding of jury.*—A voyage policy on plaintiff's vessel "Pretty Jemima," contained, *inter alia*, the following clauses:—"Warranted not to load more than registered tons with stones, marble, lead, ores or brick, without the consent of the agent of the Providence Washington Insurance Company. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Providence Washington Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby assured."—It appeared that the vessel was loaded with phosphate rock, and plaintiff gave evidence of a conversation with the company's agent in which the latter wanted to charge more premium than on a previous policy, because the vessel was going to carry phosphate. He also cautioned plaintiff about loading the vessel; how to lay the floor so as to distribute the weight over the ship. Plaintiff's evidence on this matter closes as follows: "R. (the agent) said I could load down to the mark, the load line, same as if loading coal." It also appeared that there was \$1,100 prior insurance on one-eighth of the vessel, which plaintiff had bought, but of which he had never received the title. *Held*, affirming the judgment appealed from (19 N. B. Rep. 28). Gwynne, J., dissenting, that the agent's consent had been obtained to the loading of the vessel beyond her registered tonnage, and there was consequently no breach of the above condition of the policy.—*Held*, also, that the defendants were liable, up to the amount insured, only for so much of the assured value as was not covered by the prior insurance of \$1,100.—*Per Gwynne, J.* That the consent of the agent should have been alleged by plaintiff in his pleading and, not having been so alleged, could not be set up as an answer to the defendant's pleas. That the jury should have been requested to find whether or not phosphate rock was stone within the meaning of such condition, and that there should be a new trial to have such a finding by the jury.—The policy was signed by R., as the company's agent; he issued and countersigned it as agent, received the premium and acted throughout as such agent, and was so recognized by the president of the company. *Held*, that this was sufficient in the first instance, if uncontradicted, to justify the jury in finding that R. was the agent of the company. *Robertson v. Provincial M. & G. Ins. Co.* (8 N. B. Rep. 379) followed. Appeal dismissed with costs. *Providence Washington Ins. Co. v. Chapman*, Cass. Dig. (2 ed.) 386.

See No. 23, *infra*.

16. *Navigation—Delays—Deviation—Enhancement of risk—Implied condition.*

See No. 29, *infra*.

5. CONTRACT.

17. *Description of voyage—Deviation—Question for jury—Misdirection—Waiver—Defective case—Amendment of record—Practice.*—Policy on a ship for a voyage from

Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom. The ship went from Valparaiso to Lobos, an island from 25 to 40 miles off the coast of South America and was afterwards lost. *Held*, that whether or not Lobos was a loading port on the western coast of South America within the policy was a question for the jury, and as this question had not been submitted to them, a new trial was ordered on the ground of misdirection. — After judgment application was made to vary or reverse the judgment on affidavits shewing that the question was submitted and answered. *Held*, that the application was too late, as the court had to determine the appeal case transmitted, and the respondent had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended.—Judgment appealed from (28 N. B. Rep. 435) affirmed. *Providence Washington Ins. Co. v. Gerow*, xiv, 731.

See No. 19, *infra*.

18. *Average—Constructive total loss—Partial loss—Adjustment—"Cost of repairs"—One-third new for old—Vessel not repaired.*—A policy had a clause:—"In case of repairs, the usual deduction of $\frac{1}{3}$ will not be made until after six months from date of first registration, but after such date the deduction will be made; the insurers shall not be liable for constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel under an adjustment, as of partial loss according to the terms of this policy, shall amount to more than half of its value, as declared in this policy." The ship, disabled at sea, put into port for repairs. It was found that cost of repairs and expenses would exceed more than half the value declared in policy if usual deduction of $\frac{1}{3}$ allowed in adjusting partial loss under terms of policy was not made, but not if it was made. *Held*, affirming the judgments appealed from (27 N. B. Rep. 513). Patterson, J., dissenting, that the "cost of repair" in the policy meant the net amount after allowing $\frac{1}{3}$ of the actual cost in respect of new for old, according to the rule usually followed in adjusting partial loss, and not the estimated amount of the gross costs of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value. *Gerow v. British American Ins. Co.; Gerow v. Royal Canadian Ins. Co.*, xvi, 524.

19. *Construction of policy—Deviation—Loading port—Commercial usage.*—The voyage specified included "a loading port on the western coast of South America," and payment of a loss under the policy was resisted on the ground of deviation, the vessel having loaded at Lobos, one of the Guano Islands, 25 to 40 miles off the coast. Evidence was given by ship-owners and mariners to the effect that, according to commercial usage, the description in the policy would include the Guano Islands, and there was evidence that when the insurance was effected a reduction of premium was offered for an undertaking that the vessel would load guano. The jury found, on an express direction by the court, that the island where the vessel loaded was on the western coast of South America within the meaning of the policy. *Held*, affirming the judgment appealed from (28 N. B. Rep. 435), that the words in the policy must be taken

to have been used in a commercial sense and as understood by shippers, ship-owners and underwriters; and the jury having based their verdict on the evidence of what such understanding would be, and the company being aware of a guano freight being contemplated, the finding should not be disturbed. *Providence Washington Ins. Co. v. Gerow*, xvii., 387.

See No. 17, *ante*.

20. *Insurance "on advances"—Wording of policy—Insurable interest.*—A policy provided that L., on account of owners, in case of loss to be paid to L. do cause to be insured, lost or not lost, the sum of \$2,000, *on advances*, upon the body, &c., of the "Lizzie Perry." The rest of the policy was applicable to insurance on the ship only. L. was managing owner, who had expended considerable money in repairs on the vessel. The insurers claimed that the insurance was on advances by the owners which were not insurable. *Held*, affirming the judgment appealed from (23 N. S. Rep. 537), that the instrument must, if possible, be construed as valid and effectual and to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship. *British America Assur. Co. v. Law*, xxi., 325.

21. *Contract — Application for insurance — Negligence — Escrow — Trover.*—B. to insure his vessel "U. C. Chandler" went to brokers, who filled out an application and sent it by a clerk to K., agent for a foreign marine insurance company. The vessel was valued at \$2,500 and rate of premium fixed at 11 per cent. K. refused to forward the application unless the valuation was raised to \$3,000—or 12 per cent. premium was paid. This was not acceded to by the brokers, but K. filled out an application with the valuation increased and forwarded it to the head office of his company. On the day it was mailed the vessel was lost and four days after K. received a telegram from the attorney of the company at the head office as follows: "'Chandler' having been in trouble we have telegraphed you declining risk, but had previously mailed policy; please decline risk and return policy." The policy was received by K. next day and he returned it at once; he did not shew it to the brokers or to B., nor inform them of its receipt. B. sued K. in damages for neglect in not forwarding the application promptly, with a count in trover for conversion of the policy. *Held*, affirming the judgment appealed from (31 N. B. Rep. 417), that as K. was never authorized nor requested to forward the application which he did forward, namely, that in which the vessel was valued at \$3,000, and had refused to forward the only application authorized by the brokers on behalf of B., the latter could maintain no action founded on negligence. *Held*, further, that the property in the policy prepared at the head office and sent to K. never passed out of the company and was at the most no more than an escrow in the hands of K., the agent, and therefore trover could not lie against K. for its conversion. *Buck v. Knowlton*, xxi., 371.

22. *Construction of policy—Promissory representation — Coasting voyages — Time policy.*—A time policy issued on a slip containing the words: "Voyage at and from date to 31st December, coasting principally Canso to Halifax, using Prince Edward Island and Newfoundland." The exceptions on the time

risks were: "Prohibited from the River and Gulf of St. Lawrence and ports in Newfoundland, and between the 1st November and 1st May." Sealing voyages and voyages to Greenland and Iceland were also excepted, and "not to use the ports of Schooner Pond, Blockhouse Mines and Chimney Corner, except during the months of June, July and August, the use of such waters, not to vitiate this policy, except during the time such waters are used." The vessel was lost on a voyage from Baltimore to St. Thomas. *Held*, reversing the judgment appealed from (4 Russ. & Geld. 50), that, taking the slip and policy together, a perfectly consistent contract of assurance could be made out, namely, a contract to assure the vessel for the time named, provided she was confined to coasting voyages, and did not, while so employed, use any of the prohibited waters, Henry, J. dissenting. *McKenzie v. Corbett*, Cass. Dig. (2 ed.) 384.

23. *Condition of policy — Counter-signature by agent — Waiver — Overloading — Stone or ores — Phosphate rock—Demurrer.*—A policy of marine insurance contained the reservation: "Policy shall not be valid unless countersigned by R., the said company's duly authorized agent, at his office in St. John, N. B." It was not countersigned by R. Respondent gave evidence to shew that it was issued by R. and sent by him, as directed by respondent, to a person in Nova Scotia. A verdict was given for the plaintiff at the trial, and the company moved for a nonsuit on the ground, *inter alia*, that the policy was invalid on account of not being so countersigned. The nonsuit was refused. *Held*, Fournier and Henry, JJ., dissenting, that the appeal must be allowed and a nonsuit entered.—The policy, as set out in the declaration contained a stipulation that the vessel was not to load more than register tonnage with stone, ores, &c. Defendants pleaded to this count that she did load more than her register tons with stone or ores, namely, phosphate rock, contrary to such condition. Plaintiff replied that phosphate rock was not stone or ore within the meaning of such condition; the defendants demurred to the replication, and, on argument on the demurrer, the replication was held good. (19 N. B. Reps. 28). *Delaware Mutual Ins. Co. v. Chapman*, Cass. Dig. (2 ed.) 387.

See No. 15, *ante*.

24. *Voyage policy—"At and from" a port —Construction of policy — Usage.*—A ship was insured for a voyage "at and from Sydney to St. John, N. B. there and thence," &c. She went to Sydney for orders, and without entering the limits of the port as defined by statute for fiscal purposes, brought up or near the mouth of the harbour and having received her orders by signal attempted to put about for St. John but missed stays and was wrecked. In an action on the policy evidence was given establishing that Sydney was well known as a port of call that ships going there for orders never entered the harbour, and that the insured vessel was within the port according to a Royal Surveyor's Chart furnished to navigators. *Held*, affirming the decision appealed from (33 N. B. Rep. 105), that the words "at and from Sydney" meant at and from the first arrival of the ship; that she was at Sydney within the terms of the policy; and that the policy had attached when she attempted to put about for St. John. *St. Paul Fire and Marine Ins. Co. v. Troop*, xxvi., 5.

25. *Goods shipped and insured in bulk—Loss of portion—Total or partial loss—Construction of policy.*—M. shipped on a schooner a cargo of railway ties, for a voyage from Gaspé to Boston. Policy on cargo provided that "the insurers shall not be liable for any claim for damages on . . . lumber . . . but liable for a total loss of a part if amounting to 5 per cent. on the whole aggregate value of such articles." A certificate given by the agents of the insurers when the insurance was effected had on the margin the following memo., in red ink: "Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to 10 per cent." On the voyage part of cargo was swept off the vessel during a storm, the value of which M. claimed under the policy. *Held*, reversing the decision appealed from (33 N. B. Rep. 109), Taschereau, J., dissenting, that M. was entitled to recover; that though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat it as a total loss; and that the memo. on the certificate did not alter the terms of the policy, the words "free from partial loss" referring not to a partial loss in the abstract applicable to a policy in the ordinary form, but to such a loss according to the contract, embodied in the terms of the policy. *Held*, further, that the policy, certificates and memo. together constituted the contract and must be so construed as to avoid any repugnance between their provisions and that any ambiguity should be construed against the insurers, from whom all the instruments emanated. *Mowat v. Boston Marine Ins. Co.*, xxvi., 47.

26. *Voyage policy — Warranty — Insurable interest — Perils insured against.*
See No. 36, *infra*.

27. *Construction of policy — Trading voyage — Goods insured — Insurable interest.*
See No. 31, *infra*.

28. *Agreement to insure for advances — Construction of contract—New issues.*
See CONTRACT, 10.

6. DEVIATION.

29. *Navigation — Departure from usual course—Delay in prosecuting voyage—Deviation—Enhancement of risk.*—There is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation, but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or inexcusable delay, either in commencing or in completing the voyage, alters the risk and absolves the underwriter from liability from subsequent loss. —In case of deviation by delay, as in case of departure from the usual course of navigation, it is not necessary to shew that the peril has been enhanced in order to avoid the policy.—Judgment appealed from (21 N. S. Rep. 244) affirmed. *Spinney v. Ocean Mutual Marine Ins. Co.*, xvii., 326.

30. *Construction of policy—Duration — Loading port—Commercial usage.*
See No. 19, *ante*.

7. INSURABLE INTEREST.

31. *Construction of policy—Goods insured —Trading voyage—Insurable interest.*—The plaintiffs arranged with the master of the schooner "Mabel Claire" for a trading voyage from Nova Scotia to Labrador and back. They were to furnish the greater part of the cargo and have complete control of all goods put on board until return. The return cargo was to be disposed of by them, to re-pay them for advances, and they were to pay any balance to S.; in trading on the voyage S. was not to dispose of goods on credit, but to bring back goods not disposed of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board at Halifax merchandise exceeding \$6,000, and upon the day the vessel sailed from Halifax, effected the policy sued upon as follows: "R., J. & Co. have this day effected an insurance to the extent of \$2,000, on the undermentioned property, from Halifax to Labrador and back to Halifax on trading voyage. Time not to exceed four months, shipped in good order and well conditioned on board the schooner "Mabel Claire," whereof M. is master this present voyage. Loss, if any, payable to R., J. & Co. Said insurance to be subject to all the forms, conditions, &c., in the policies of the company. Description of goods insured, merchandise under deck, amount \$2,000, rate 5 per cent., premium \$100, to return 2 per cent., if risk ends 1st October, and no loss claimed; additional insurance of \$5,000; warranted free from capture, seizure, and detention, the consequences of any attempt thereat." It was contended that plaintiffs were merely unpaid vendors and had no insurable interest; that goods previously put on board at Liverpool, N. S., were not covered by this policy, and that it was not to cover the return cargo. *Held*, affirming the judgment appealed from (4 Russ. & Geld. 220), that the policy covered not only goods put on board at Halifax, but all the merchandise under deck shipped in good order on board said vessel during the period mentioned in the policy. *Held*, also, that there was sufficient evidence to shew that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel. *Merchants' Marine Ins. Co. v. Rumsey*, ix., 577.

32. *Insurable interest — Representation.*—The part owner of a vessel may insure the shares of other owners with his own, without disclosing the interest really insured, under a policy issued to himself insuring the vessel "for whom it may concern."—Judgment appealed from (26 N. B. Rep. 339) affirmed. *Merchants' Marine Ins. Co. v. Barss*, xv., 185.

33. *Mortgage — Collateral security — Insurable interest.*
See No. 36, *infra*.

8. LOSSES.

34. *Stranding — Diligence — Evidence — Constructive total loss — Sale by master — Notice of abandonment.*—In an action as for a total loss, it appeared that the vessel stranded 6th July, 1876, near Port George, N. S. The owner resided at Guysboro, N. S. The master employed surveyors, and on their recommendation, confirmed by his judgment,

the vessel was advertised for sale the following day, and sold on the 11th July for \$105. The master did not give notice of abandonment nor endeavour to get the vessel off. The purchasers immediately got the vessel off, had her made tight, taken to Pictou, repaired, and afterwards used her in trading and carrying passengers. *Held*, reversing the judgment appealed from (1 Russ. & Geld. 279), that the sale was not justifiable, and the evidence failed to shew any excuse for the master failing to communicate with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total.—*Per Gwynne, J.* It is a point fairly open to inquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts. *Gallagher v. Taylor*, v. 368.

35. *Actual total loss — Constructive total loss — Notice — Abandonment — Sale by master — "Stringent necessity."*—*C.*, as assignee of *W.*, was insured upon the schooner "*Janie R.*" by a voyage policy. On the 14th February, 1879, she had been in Shelbourne harbour since the 7th February, and left with a cargo of potatoes to pursue the voyage, but forced by stress of weather put back to Shelbourne, and on 15th she went ashore, when the tide was about its height. On 17th notice of abandonment was given and not accepted, and on 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with assistance of a vessel in the harbour, and by the use of casks for floating her (appliances of which the master did not avail himself), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or so damaged that she would not have been worth, after repair, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for \$1,560. In an action tried without a jury verdict was given for \$1,913, which was sustained. *Held*, reversing the judgment appealed from (3 Russ. & Geld. 109).—1. That the sale by the master was not justified in the absence of evidence to shew "stringent necessity" for sale after failure of all available means to rescue the vessel.—2. That the undisputed facts disclosed no evidence whatever of an actual total loss, and did not constitute what in law could be pronounced either an absolute or a constructive total loss.—*Per Strong, J.* The right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given. *Providence Washington Ins. Co. v. Corbett*, ix., 256.

36. *Voyage policy — Mortgage—Collateral security — Insurable interest—Actual total loss — Constructive total loss—Notice—Abandonment — Warranty — Concealment — Right of action.*—The barque "*Charley*" at Cochín, on a voyage to Colombo, and thence to New York by way of Alippee, sailed on 22nd April, 1879, arrived at Colombo, left there on 13th May, and while on her way to Alippee struck hard on a reef and was damaged and put back to Colombo. The master cabled to the ship's husband at New York, 23rd May, and received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were

extensive, it was impossible to get them done there, and Bombay, 1,000 miles distant, was the nearest port. After proper surveys and cargo discharged, on 10th June the vessel was stripped and the master sold the materials in lots at auction. On 21st May, *K.*, a mortgagee of forty-six sixty-fourths, (who had assigned his mortgage to a bank by indorsement, as collateral security for a pre-existing debt), being aware of the charter from Cochín to New York, insured his interest, the nature of the risk being: "Upon the body of the barque '*Charley*' beginning the adventure (the said vessel being warranted by the insured to be then in safety), at and from Cochín via Colombo and Alippee to New York." In an action for a total loss, defendant pleaded, 1st, that plaintiff was not interested; 2ndly, that the ship was not lost by perils insured against; 3rdly, concealment. A consent verdict for plaintiff was taken, subject to opinion of the court upon points reserved, and upon the understanding that everything which could be settled by a jury should, upon the evidence, be presumed to be found for the plaintiff. (3 Russ. & Geld. 402). *Held*, 1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance.—2ndly, That the assignment as collateral security to a creditor did not divest plaintiff of all interest so as to disentitle him to recover.—3rdly, That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary.—*Per Strong, J.* A mortgagee, upon giving due notice of abandonment, is not precluded from recovering for a constructive total loss. *Anchor Marine Ins. Co. v. Keith*, ix., 483.

37. *Total loss — Notice — Abandonment—Waiver.*—A ship bound from Porto Rico to New Haven, sustained damage and put into St. Thomas. A survey was held and report made that the cost of putting her in good condition would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised and sold vessel, and purchaser had her repaired at a cost much less than the report, and sent her to sea. *Held*, that there was no evidence to justify the jury in finding that the vessel was a total loss.—Owners of vessel gave notice to agent of underwriters that they would abandon, which agent refused to accept. Owners telegraphed to captain that they had abandoned and for him to proceed under the best advice. *Held*, that this act of telegraphing to the captain did not constitute a waiver of the notice of abandonment. Judgment appealed from (23 N. B. Rep. 160) reversed. *Milville Mutual Marine & Fire Ins. Co. v. Driscoll*, xi., 183.

38. *Constructive total loss — Perils insured against — Abandonment — Arts. 2538, 2541, 2544, C. C.—Notice.*—On 28th September, 1875, a steam barge, loaded with sand, sank while at anchor near Chateauguay. It was raised by the insurers under the salvage clause of the policy, and floated within a week after the disaster. It was shewn that on the starboard side there was an auger hole in the bilge of the barge which had been plugged up with a little wooden plug, and that the plug had come out. On 1st October there was a formal protest at request of master and officers of the barge, setting forth all details of

the wreck. On 6th December, 1875, the insurers were notified that the vessel was abandoned, the notice concluding: "It is hardly necessary for me, after your taking possession of the vessel, to make any further declaration of abandonment, but I now do so in order to put that fact formally on record, and now again give you notice thereof." The vessel was eventually sold by consent of all parties interested for \$150.—In an action on the policy for a total loss, *Held*, reversing the judgment appealed from (33 L. C. Jur. 301; 15 R. L. 449), that there was not sufficient evidence to enable plaintiffs to recover as for a total or constructive total loss of the vessel.—*Per Fournier, J.* That the notice of abandonment was not given in conformity with the art. 2544 C. C., and not made within a reasonable time. *Western Assur. Co. v. Scanlan*, xiii., 207.

39. *Freight insurance — Constructive total loss — Abandonment — Repairs by underwriters.*—A vessel on a voyage from Arecibo to Acapulco and thence to New York, encountered heavy weather, was dismasted and towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master, under advice from the owners, abandoned her to the agent, and refused to assist in repairing damage, and complete the voyage. The agent had the vessel repaired and brought her to New York, with the cargo.—In an action to recover insurance on freight, *Held*, reversing the judgment appealed from (6 Russ & Geld. 323), Strong, J. dissenting, that there being a constructive total loss of the ship the action of the underwriters, in making the repairs and earning the freight, would not prevent the assured from recovering. *Troop v. Merchants' Marine Ins. Co.*, xiii., 506.

40. *Detention by ice—Perils insured against—Ordinary perils of the seas.*—A vessel on her way to Miramichi, was chartered for a voyage from Norfolk, Va., to Liverpool with cotton. She arrived at Miramichi 25th, and sailed for Norfolk on 29th November. Owing to the lateness of the season, however, she could not get out of the river and remained frozen in all winter and had to abandon the cotton freight. *Held*, reversing the judgment appealed from (24 N. B. Rep. 421), Henry, J., dissenting, that the loss occasioned by the detention from the ice was not a loss by "perils of the seas" covered by an ordinary marine policy. *Great Western Ins. Co. v. Jordan*, xiv., 734.

41. *Stranding — Notice of abandonment—Total loss — Evidence — Findings by jury—Recovery for partial loss.*—A vessel insured for a voyage from Newfoundland to Cape Breton went ashore on 30th October at a place where there were no habitations, and the master had to travel several miles to communicate with owners. On 2nd November a tug came to the place, but the master of the tug, after examining the situation, refused to try and get her off. On the 16th November one of the owners and the captain went to the vessel and caused a survey to be had, and the following day she was sold for a small amount, the purchaser eventually stripping her and taking out the sails and rigging. No notice of abandonment was given to the underwriters, and an action on the policy claimed a total loss. At the trial the captain related what

the tug had done and, in his opinion, the vessel was too high on the rocks to be got off. The jury found, in answer to questions, that the vessel was a total wreck in the position she was in and that a notice of abandonment would not have benefited the underwriters. (28 N. B. Rep. 45.) *Held*, per Ritchie, C.J., and Strong, J., that there was evidence to justify the trial judge in leaving to the jury the question whether or not the vessel was a total loss, and the finding of the jury that she was a total loss being one which reasonable men might have arrived at it should not be disturbed.—*Per Taschereau, Gwynne and Patterson, JJ.*, that the vessel having been stranded only, and there being no satisfactory proof that she could not have been rescued and repaired, the owners could not claim a total loss.—*Per Gwynne, J.*, dissenting, that there being evidence of some loss under the policy, and the owner being entitled, in his action for a total loss, to recover damages for a partial loss, a nonsuit could not be entered, but there should be a new trial unless the parties agreed on a reference to ascertain the amount of such damages; also, that plaintiff could not recover damages for a partial loss of which he offered no evidence at the trial, but rested his claim wholly upon a total loss. *Phoenix Ins. Co. v. McGhee*, xviii., 61.

42. *Abandonment — Loss of voyage—Constructive total loss of ship—Sale by mortgagees—Facilities for repairs—Diligence.*—In the course of her voyage, on Saturday, 3rd August, 1882, the "John D. Tupper" went ashore on Phinney's Point, Bay of Fundy, in a very dangerous position, and was much injured. An anchor was got out ready for the tide. When the tide came in the pumps were sounded, and there were 14 inches of water. Half an hour after the first sounding there were 3 or 4 feet of water, but by the aid of the kedge anchor and starboard anchor the vessel was hove off and floated and anchored. The witness who details this, says: "I piloted her up to Port Williams; I was at the wheel; we made sail and thought she would fill: the pumps were going all the time; we did not set the upper sail; I kept as close to the shore as I could in case she filled and rolled over with her deck-load; at Port Williams she ran aground about 100 feet from the breakwater; we could not swing her closer; she was then lying on the beach of the Bay of Fundy; some of the deals of the deck-load were thrown over at Phinney's Point."—At Port Williams the vessel floated once every day. The master on Monday discharged the cargo deck-load and hauled the vessel into the pier.—There were no facilities for repairing vessels of this class at Port Williams, but there were near at hand, at St. John, which could be seen on a fine day from Port Williams. The captain made no efforts to take the vessel to St. John, nor inquiries in reference thereto, but on 20th August, notified the shipper that the voyage was at an end. The vessel was sold at auction (T., one of the mortgagees, acting as auctioneer) and transferred by bill of sale dated 4th September to the purchaser, who thereupon, immediately after the sale, without the slightest apparent difficulty, with her original crew, sailed her to St. John, repaired her there, and in the course of 4 or 5 weeks sent her in a seaworthy condition on a voyage to the West Indies with a cargo. *Held*, affirming the judgment appealed from (7 Russ. & Geld.

298), in view of the fact that there never was any pressing necessity for the sale, nor any time when the ship was unnavigable without any reasonable hope of repair, that the damage never was so great that the owner could not have put her in a state of repair necessary for pursuing the voyage at a convenient and suitable place, and at an expense less than the value of the ship, and that the cargo was not in a perishable condition, but in a place of safety, there was no ground for saying there was either an actual or a constructive total loss, nor that there ought to have been a loss of the voyage; and therefore no question of abandonment arose. *Patch v. Pitman*, Cass. Dig. (2 ed.) 389.

43. *Stranding — Constructive total loss—Sale of vessel — Repairs — Value.*—Action for insurance on freight. On the voyage from Boston to St. Pierre, the vessel sprung a leak and put into Glasgow harbour, near Cape Canso, where a survey was held, some repairs made, and, in accordance with recommendation of surveyors, she proceeded to Port Hawkesbury for further repairs. On the day she left Port Hawkesbury she went ashore, and when the tide ebbed, fell over on her side; part of the cargo was damaged and sold, and the rest taken by the Boston underwriters; the vessel sustained further damage while lying on the shore. The captain made no *bonâ fide* efforts to get her off, and after being several times advertised she was finally sold for \$140; she was got off at a cost of \$70, by the purchasers, repaired for considerably less than her value and sailed for two years, when she was again sold for \$1,800. In the policy she had been valued at \$1,500, and two years before had sold for \$2,000. *Held*, reversing the judgment appealed from (4 Russ. & Geld. 533), that the vessel was not a constructive total loss. *Providence Washington Ins. Co. v. Corbett* (9 Can. S. C. R. 256) approved. *Providence Washington Ins. Co. v. Almon*, Cass. Dig. (2 ed.) 390.

44. *Constructive total loss — Notice of abandonment — Sale of vessel by master — Necessity for sale.*—If a disabled ship can be taken to a port and repaired, though at an expense far exceeding its value, unless notice of abandonment has been given there is not even a constructive total loss.—If the ship is in a place of safety, but cannot be repaired where she is, nor taken to a port of repairs, and if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore and the probability of great deterioration in value during the delay will justify the master, when acting *bonâ fide* and for the benefit of all concerned, in selling without waiting for instructions, and the sale will excuse notice of abandonment. *Nova Scotia Marine Ins. Co. v. Churchill*, xxvi., 65.

45. *Partial loss on cargo—Stranding—Evidence—Jury trial.*—On a voyage from Porto Rico to Halifax, the "Donzella" put into Barrington, N. S., for shelter, the wind being south-east with a heavy snow storm prevailing. She was anchored near the lighthouse with one anchor out, but, as the wind increased, a second anchor was put out. Subsequently, during a heavy gale that sprang up from the north-west, with thick snow, both chains parted. The vessel was then on a lee shore, studded with reefs and shoals, and the tide low. She was abandoned by the master

and crew, and the following morning was not visible from shore. Some time afterwards she was picked up at sea by salvors, and was brought into port and put upon the slip and repaired. When brought in she had four feet of water in her hold, and her cargo was badly damaged. On being put upon the slip it appeared that twelve feet of the shoe were off abaft the main chains, and another twelve feet, about off, forward, under the main chains. The butts on the bottom were open. The keel was more or less chafed and broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side, which looked as if the vessel had dragged or pounded on something. The sides of the keel were bruised more or less, and pieces off of it. The main keel was broomed up. The flying jib-boom and main-boom were broken, and the fore-boom was split. The Supreme Court (N.S.), *en banc*, dismissed a motion for a new trial, and held, that there was sufficient evidence to warrant the jury in coming to the conclusion that the vessel had been on shore, and beating on the rocks for some time, and on which they could properly find a verdict for the plaintiff, and that the trial judge had acted properly, under the circumstances, in refusing to withdraw the case from the jury.—On appeal to the Supreme Court of Canada, the judgment appealed from (30 N. S. Rep. 380) was affirmed, and the appeal dismissed with costs. *British and Foreign Marine Ins. Co. v. Rudolf*, xxviii., 607.

46. *Constructive total loss—Average—Partial loss—Adjustment—One-third new for old.*
See No. 18, ante.

47. *Goods shipped and insured in bulk—Loss of portion—Total or partial loss—Construction of policy.*

See No. 25, ante.

9. MISREPRESENTATION AND CONCEALMENT.

48. *Vessel grounding—Knowledge by applicant before application—Concealment—Material facts—Receipt of premium and issue of policy after knowledge by insurer—Waiver.*—The appellant (defendant) is a member of the Halifax Marine Insurance Association.—On 13th August, 1880, plaintiffs, through their agent, applied to the association for insurance on the cargo of S. S. "Waldensian," on a voyage from Montreal to Glasgow via port or ports, and the risk was accepted the same day by appellant and other underwriters, but no policy was issued or premium paid at the time. The "Waldensian" left Montreal 11th August, 1880; she got aground that afternoon about four o'clock, but succeeded in getting off the same day and proceeded to Quebec, where she arrived about six o'clock, leaking badly, and was there grounded to prevent further damage to cargo. Plaintiff knew on 13th August of the accident to the steamship, but this fact was not disclosed to the underwriters when the insurance was applied for on the day following. Appellant became aware of the accident a day or two after the application for insurance, and a policy was after that issued dated 13th August, and the premium settled in account with the broker of the association. Appellant contended there was no evidence that he or any of the underwriters,

or their broker, knew at the time that the policy was issued or premium paid that the accident was known to plaintiff at the time the insurance was effected, and concealed from the underwriters. The action was for damage to cargo by the leaking of the ship in consequence of her getting aground as stated. The trial judge found that when the insurance was applied for, and the contract completed, the plaintiff was aware of the facts above stated, and concealed them from appellant, also that they were not then known to appellant, and were material to the risk; also, that before the policy was issued or premium paid appellant became aware of said facts and elected to treat the contract as binding, and a verdict was given for plaintiff. A rule *nisi* to set aside the verdict was discharged. *Held*, reversing the judgment appealed from (5 Russ. & Geld. 322), that the evidence shewed that at the time of the payment of the premium appellant did not know that the accident was known to the plaintiff, and the policy was therefore void for concealment of material facts, and there could be no waiver of the omission to communicate the information material to the risk, for the appellant could not waive that which he did not know.—*Appeal allowed with costs. Smith v. Royal Canadian Ins. Co.*, Cass. Dig. (2 ed.) 385.

49. *Representation—Application by ship's husband—Mortgage—Insured for "benefit of all concerned"—Ratification—Nationality of vessel—Concealment of material facts—Warranty.*—A ship's husband, who held a power of attorney from the owners authorizing him to insure on their behalf, and who was also a mortgagee of the vessel, insured "for the benefit of all concerned," and the insurance was accepted by the owners. When insurance was effected the vessel was sailing under the Haytian flag, and neither that fact, nor the fact of the insured having a mortgage interest, was communicated to the underwriters. The vessel was lost and insured realized more than the amount of the mortgage from a prior insurance. One of the underwriters resisted payment on the ground of such prior insurance covering all the interest of the insured, and also of concealment of the above facts. *Held*, affirming the judgment appealed from (3 Russ. & Geld. 207), that the underwriters were liable, the owners having authorized, or subsequently ratified, the insurance effected by the ship's husband, who was under no obligation to disclose his individual interest, in a policy for the benefit of all concerned, nor to disclose the nationality of the vessel, there being no representation or warranty required respecting it by the policy, and no circumstances within his knowledge attaching to the national character of the vessel exposing her to detention and capture. *West v. Seaman*, Cass. Dig. (2 ed.) 388.

50. *Misrepresentation—Vessel "when built"—Repairs to old vessel—Change of name—Register.*—Where payment of an insurance risk is resisted on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made.—Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when material and substantially incorrect.—Representation in a marine policy that the vessel insured was built in 1890, when the fact was that it was an old vessel, extensively repaired, and given a new name and register but containing the original engine, boiler and

machinery with some of the old material, is a misrepresentation and avoids the policy whether made with intent to deceive or not. *Taschereau, J.*, dissenting.—Judgment appealed from (25 N. S. Rep. 210) reversed. *Nova Scotia Marine Ins. Co. v. Stevenson*, xxiii., 137.

10. WARRANTY.

51. *Conditions—Warranty—At and from Quebec to Greenock—"Vessel to go in tow."*—The company issued a policy of marine insurance for \$3,000 upon a cargo of wooden goods laden on board, on a voyage from Quebec to Greenock in favour of "J. C., as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may or shall appertain, in part or in all, doth make insurance and cause \$3,000 to be insured, lost or not lost, at and from Quebec to Greenock, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near Indian Cove, which forms part of the Harbour of Quebec, and was abandoned with cargo, by reason of the ice, four days after leaving the harbour and before reaching the Traverse, to which it is customary to tow all vessels leaving Quebec harbour late in the fall as the minimum distance. *Held*, Fournier and Henry, JJ., dissenting, that the words "from Quebec to Greenock, vessel to go out in tow," meant that she was to go out in tow from the limits of the Harbour of Quebec on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty.—Judgment appealed from (1 Legal News 33) reversed. *Provincial Ins. Co. v. Connolly*, v., 258.

52. *Policy—Default in payment of premium—Premium note—Guarantee—Insolvency—Condition precedent—Arbitration—Award—"Matters in difference."*—A policy contained the clause:—"In case the premium, or the note, or other obligation given for the premium, or any part thereof, should be not paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insured shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business, or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." There was also an arbitration clause affecting any difference which might arise between the company and the insured "as to the loss or damage, or any other matter relating to the insurance," in accordance with the terms and conditions of the policy and the laws of Canada, and obtaining the decision of arbitrators was a condition precedent to action. A note given for the premium was not due when the insured became insolvent; and the plaintiff was appointed assignee. A guarantee was accepted by the company as security for the premium. The note was not paid when due, and was unpaid at the date of loss. The dispute was submitted to arbitrators, who awarded \$5,769.29. *Held*, affirming the judgment appealed from (2 Russ. & Geld. 375),

Strong, J., dissenting, that the premium having, on insolvency, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect, and did not become void on non-payment of the premium note at maturity.—That the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be bad from any mistake of law or otherwise. *Anchor Marine Ins. Co. v. Corbett*, ix., 73.

53. *Voyage policy—Sailing directions—Time of entering gulf—Breach of warranty.*—Action on a voyage policy containing clause "warranted not to enter, or attempt to enter, or to use the Gulf of St. Lawrence, prior to the 10th May, nor after the 13th October (a line drawn from Cape North to Cape Ray, and across the Strait of Canso, to the northern entrance thereof, shall be considered the bounds of the Gulf of St. Lawrence seaward)." The captain said: "The voyage was from Liverpool to Quebec, and ship sailed on 2nd April. Nothing happened until we met with ice to the southward of Newfoundland, shortened sail and dodged about for a few days trying to work our way around it. One night ship was hove to under lower main-top-sail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in the ice three or four hours; laid to all the next day; could not get any further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log book shewed that the ship got into the ice on 7th May, and an expert examined at the trial swore that from the entries in the log book of the 6th, 7th, 8th and 9th May, the captain was attempting to enter the Gulf of St. Lawrence. A verdict was taken for the plaintiff by consent, with leave for the defendants to move to enter a nonsuit or for a new trial, the court below to have the power to mould the verdict, and also to draw inferences of fact the same as a jury. The Supreme Court (N.B.) sustained the verdict. *Held*, reversing the judgment appealed from (24 N. B. Rep. 39), Henry, J., dissenting, that the clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the gulf contrary to warranty. *Taylor v. Moran*, xi., 347.

54. *Warranty in policy—Time of sailing—Action on policy—Limitation of time—Defective proof—Amended claim—Reckoning time.*—A vessel insured for a voyage from Charlottetown to St. Johns, Nfld., left the wharf at Charlottetown 3rd December, with the *bonâ fide* intention of commencing her voyage. After proceeding a short distance, she was obliged by stress of weather to anchor within the limits of the Harbour of Charlottetown and remained there until 4th December, when she proceeded on her voyage. *Held*, that this was a compliance with warranty to sail not later than 3rd December, but a breach of warranty to sail from the port of Charlottetown not later than 3rd December.—Judgment appealed from (20 N. S. Rep. 15) affirmed. *Robertson v. Pugh*, xv., 706.

55. *Warranty—Promissory representation—"Would tow up and back."*—On application for insurance in a foreign port, answers to the questions: "Where is the vessel? When

to sail?" were, as follows: "Was at Buenos Ayres or near port, 3rd February, bound up river; would tow up and back." The vessel was damaged in coming down the river not in tow. It was admitted that towing up and down the river was a matter material to the risk. *Held*, affirming the judgment appealed from (22 N. S. Rep. 5), that the words, "would tow up and back" in the application did not express a mere expectation or belief on the part of the assured, but amounted to a promissory representation that the vessel would be towed up and down, and this representation not having been carried out the policy was void. *Bailey v. Ocean Mutual Marine Ins. Co.*, xix., 153.

56. *Warranted no other insurance—Construction of policy.*—The application had, on its face, "no other insurance," and the policy issued in favour of J. B. & Co. on account of whom it might concern contained the words "warranted no other insurance." Declaration in the usual form averred interest in the firm of J. B. & Co., and H. W., or some or one of them. Defence rested solely on the contention that the warranty meant there should be no other insurance on the vessel during the continuance of the risk. After the policy issued, H. W., being indebted to S. for assistance in building the vessel, instructed S. to effect insurance on the vessel to cover his debt, which S. did, on behalf of whom it might concern, and both policies were in full force at the time of the loss.—*Held*, affirming the judgment appealed from (5 Russ. & Geld. 301), that the words "no other insurance," and "warranted no other insurance," meant that there should be no other insurance on the vessel during the continuance of the risk. *Butler v. Merchants' Marine Ins. Co.*, Cass. Dig. (2 ed.) 390.

57. *Voyage policy—Warranted safe—Perils insured against.*

See No. 36, ante.

58. *Misrepresentation—Concealment—Insurable interest—Nationality.*

See No. 49, ante.

INTERDICTION.

Authorization by interdicted husband—Marriage laws—Registry laws—Sheriff's sale—Warranty—Succession—Renunciation—Donation by interdict.—*Semble*, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization. *Rousseau v. Burland*, xxxii., 541.

INTEREST.

1. *Joint executors—Liability for moneys received—Uncollected debts—Art. 913 C. C.—Taking accounts—Legal rate of interest.*—Testamentary executors cannot be charged a greater rate than six per cent. per annum for interest on moneys collected by them, after an account has been demanded, unless there is proof that a higher rate was realized by them through the use of such moneys. *Darling v. Brown*, ii., 26.

See 21 L. C. Jur. 169.

2. *Rate of interest on judgment—Rate on note—Covenant in mortgage—Collateral security.*—A note dated 11th January, 1862, payable to and indorsed by S. H., was for \$3,000 with interest at 2 per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1862, with interest thereon at the rate of 24 per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt 6 per cent. only from the date of the recovery of the judgment. *Held*, that the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of 24 per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John v. Rykert*, x., 278.

3. *Mortgage—Rate of interest—Fixed time for re-payment—Contract—Rate after maturity.*—A mortgage of real estate provided for payment of the principal secured on or before a fixed date "with interest thereon at the rate of 10 per centum per annum until such principal money and interest shall be fully paid and satisfied." *Held*, affirming the judgment appealed from (17 Ont. App. R. 85), that the mortgage carried interest at the rate of 10 per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of 6 per cent. on the unpaid principal. *St. John v. Rykert* (10 Can. S. C. R. 278) followed. *People's Loan and Deposit Co. v. Grant*, xviii., 262.

4. *Damages against the Crown—Government contract.*—M. by petition of right claimed damages for breach of contract for parliamentary and departmental printing for a specified period. The alleged breach consisted in the Government giving a portion of the printing to others, the suppliants claiming that, by the terms of the contract, they were entitled to the whole of it. The Crown demurred, and, as to the departmental printing, the demurrer was overruled (8 Can. S. C. R. 210). The petition subsequently came on for hearing in the Exchequer Court, and a reference was made to the Registrar and Queen's Printer to ascertain and report as to the profit lost to the suppliants by not being allowed to do the departmental printing. The referees found a certain sum as the profit lost to suppliants, stating in their report, that the suppliants claimed interest on the amount, but that the referees were of opinion they had no power, under the order of reference to consider the question of interest.—No exception was taken to the report, and suppliants moved for judgment for the amount found with interest, as damages under the petition of right. Henry, J., gave judgment for the amount found by the referees with interest at 6 per cent., to be computed on the aggregate of the sums which, according to the report, the suppliants up to the 31st December in each year during the currency of the contract, would have received as profit.—On appeal as to the allowing of interest, *Held*, Henry, J., dissenting, that the suppliants were not entitled to interest on the amount found by the re-

ferrees for loss of profits. (See 4 Ex. C. R. 257.) *The Queen v. MacLean*, Cass. Dig. (2 ed.) 399.

5. *Stay of judgment—Allowance of interest—Discretion of court.*—The question of allowing interest for the time judgment has been stayed pursuant to s. 6 of the Supreme and Exchequer Courts Act is a matter which the court will dispose of *ex mero motu*. *McQueen v. Phoenix Mutual Fire Ins. Co.*, Cass Dig. (2 ed.) 688; Cass. S. C. Prac. (2 ed.) 87.

6. *Interest against the Crown—Supreme Court Act—Practice—Consent to reversal.*—In a case before the Exchequer Court for return of duties improperly imposed, judgment against the claimants, affirmed by the Supreme Court, was reversed by the Privy Council and judgment ordered to be entered for the claim with costs. The Exchequer Court judgment was then entered for the principal only, interest being refused, and appeal was taken to the Supreme Court. In the meantime, a petition by the Crown to the Privy Council for a declaration that the claimants were not entitled to interest under their Lordships' judgment, was dismissed, their Lordships stating that as interest had been claimed and the question not argued in any of the courts, it should be allowed. The Crown thereupon consented, under s. 52, Supreme and Exchequer Courts Act, to a reversal of the Exchequer Court judgment as to interest. (See 4 Ex. C. R. 262; 25 Can. S. C. R. 24; [1896] A. C. 551.) *Toronto Ry. Co. v. The Queen*, Cass. S. C. Prac. (2 ed.) 87.

7. *Contracts binding the Crown—Goods sold and delivered—Errors and omissions—Interest—Arts. 1067 & 1077 C. C.*—Where a claim against the Crown arises in the Province of Quebec, and there is no contract in writing, the thirty-third section of "The Exchequer Court Act," does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that province.—Judgment appealed from (6 Ex. C. R. 39) affirmed. *The Queen v. Henderson*, xxviii., 425.

8. *Expropriation of land—Lands injuriously affected—Damages—Interest—Award.*—If in the construction of a public work land of a private owner is injuriously affected and the compensation therefor is determined by arbitration, interest cannot be allowed by the arbitrator on the amount of damages awarded.—Judgment appealed from (26 Ont. App. R. 351) affirmed. *Leak v. City of Toronto*, xxx., 321.

9. *Charging interest—Debt certain and time certain—3 & 4 Wm. IV. c. 42, s. 28 (Imp.).*—To entitle a creditor to interest under 3 & 4 Wm. IV. c. 42, s. 28 (Imp.) the written instrument under which it is claimed must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. *Sinclair v. Preston*, xxxi., 408.

10. *Duties on export of lumber—Improper levy—Payment of interest—Liability of Crown for further interest.*—The petition of right was to recover unpaid interest on duties exacted by the Government of New Brunswick for export duties for taking lumber cut

under licenses from the Dominion of Canada. on lands in dispute between the provinces and eventually found to belong to Canada. The interest was claimed as both provinces and Dominion had paid interest and otherwise admitted liability therefor. The Crown claimed that it paid as a matter of grace and without liability by statute or express contract, and that the interest could not be recovered by suit. The Supreme Court held that there was no liability of the Crown for interest, there having been no statutory liability nor express contract therefor, and that none arose on account of payments of interest from time to time or on the account stated as claimed. *Dunn v. The King*, 12th Nov. 1901.

11. *Deposit in court — Order on office to pay over interest received on deposit — Rule by third party entitled to moneys in court.*

See PRACTICE AND PROCEDURE, 40.

12. *Adding prescribed interest in claim to give appellate jurisdiction—Supreme Court Act—Amount in dispute.*

See APPEAL, 20.

13. *Taxation — Penalty — Addition to delinquent taxes — Legislative powers — B. N. A. Act (1867) ss. 91, 92—49 Vict. c. 52 (Man.)—Constitutional law.*

See CONSTITUTIONAL LAW, 68.

14. *Rate of interest—Open accounts—Contract.*

See BANKS AND BANKING, 17.

15. *Settlement of minutes of judgment — Allowance of interest.*

See PRACTICE OF SUPERIOR COURT, 173.

16. *Stay of judgment — Motion for allowance of interest — Matter for court ex mero motu.*

See PRACTICE OF SUP. COURT, 165, 166.

17. *Expropriation by railway — Award — Additional interest — Confirmation of title—Diligence in obtaining—Railway Act, 1888, ss. 162, 170, 172.*

See EXPROPRIATION OF LANDS, 23.

18. *Vendor and purchaser — Agreement to pay interest — Delay — Default of vendor.*

See VENDOR AND PURCHASER, 30.

19. *Contract for purchase of land—Agreement to pay interest—Wilful default of vendor—Deposit of purchase money in bank.*

See VENDOR AND PURCHASER, 31.

20. *Debt of Province of Canada to Dominion — Subsidies — Half-yearly payments — Deduction of interest — B. N. A. Act, ss. 112, 114, 115, 116, 118—36 Vict. c. 30 (D.)—47 Vict. c. 4 (D.).*

See CONSTITUTIONAL LAW, 3.

21. *Appeal from Court of Review—Appeal to Privy Council — Applicable amount — Addition of interest — C. C. P. arts. 1115, 1178, 1178 (a)—R. S. Q. art. 2311—54 & 55 Vict. (D.) c. 25, s. 3, s. s. 3—54 Vict. (Que.) c. 48 (amending art. 1115 C. C. P.).*

See APPEAL, 69.

22. *Mortgage — Loan to pay off prior incumbrance — Assignment of mortgage—Purchase of equity of redemption—Accounts.*

See MORTGAGE, 64.

23. *Bonus—Usury laws—C. S. C. s. 58—Arts. 1785 C. C.*

See BUILDING SOCIETY, 3.

24. *Default clause in mortgage — Principal falling due — Proviso as to arrears — Rate of interest.*

See MORTGAGE, 69.

25. *Contract with unlawful consideration—Répétition de l'indu — Trade combination — Public policy — Conspiracy account.*

See CONTRACT, 165.

26. *Public work — Breach of contract — Appropriation of plant—Damages.*

See CONTRACT, 21.

27. *Customs duties improperly levied—Interest on rebate—Lex loci—Lex fori—Repetition—Presumption of good faith—Mistake — Arts. 1047, 1049 C. C.*

See CUSTOMS DUTIES, 5.

28. *Contract for construction of works—Reductions for portions omitted—Partial cancellation of contract—Arts. 1065, 2691 C. C.—Deferred payments — Computation of interest — Payments in advance—Rebates.*

See CONTRACT, 170.

INTERLOCUTORY PROCEEDINGS.

1. *Hypothecary claims — Assignment — Notice—Arts. 20, 144, 761 C. C. P.—Action to annul deed — Parties in interest — Incidental proceedings—Collocation and distribution.]—The appeal from judgments of distribution under art. 761 C. C. P. is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provisions of art. 144 C. C. P. that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. *Guertin v. Gosselin*, xxvii., 514.*

2. *Appeal — Interlocutory order — Trial by jury—Final judgment—R. S. C. c. 135, s. 24 —Arts. 348-350 C. C. P.*

See APPEAL, 195.

INTERNATIONAL LAW.

1. *Construction of statute — Winding-up Act — Foreign corporation—Conflict of laws.*

See WINDING-UP ACT, 1.

2. *Foreign corporation — Contract in Canada — Monopoly — Public policy.*

See COMITY.

INTERPLEADER.

1. *Levy under execution — Charging lands under Territories Real Property Act — Indemnity to sheriff — Pleading joint pleas.*—In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead, but may be joined properly in a defence with the execution creditor. *Taylor v. Robertson*, xxxi., 615.

2. *Lands taken or sold under execution — Lien—Application of proceeds.*

See SALE, 66.

AND see PRACTICE AND PROCEDURE.

INTERPRETATION.

See CONTRACT — STATUTE — WORDS AND TERMS.

INTERROGATORIES.

1. *Evidence — Faits et articles — Judicial admissions — Arts. 221-225 C. C. P.*—The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties.—Judgment appealed from (Q. R. 6 Q. B. 458) affirmed. *Durocher v. Durocher*, xxvii., 363.

2. *Articulated facts — Evasive answers — Taken pro confessions—Arts. 228, 229 C. C. P.*
See EVIDENCE, 159.

3. *Faits et articles — Taking pro confessions—Art. 229 C. C. P.—Motion in trial court.*
See EVIDENCE, 160.

INTERROGATORY, COMMISSION.

See COMMISSION.

INTERVENTION.

1. *Right to intervene — Vagueness and uncertainty as to beneficiaries — “Poor relatives” — “Public Protestant charities” — “Charitable uses — Persona designata.”*—In 1865 J. G. R., a merchant of Quebec, whilst temporarily in New York made a holograph will as follows:—“I hereby will and bequeath all my property, assets or means of any kind to my brother Frank, who will use one-half of them for public protestant charities in Quebec and Carluke, say the Protestant Hospital Home, the French-Canadian Mission, and amongst poor relatives as he may judge best, the other half for himself and for his own use, excepting two thousand pounds which he will send to Miss Mary Frame, Overton Farm.—James G. Ross.” In an action to have the will declared invalid interventions were filed by Morrin College, an institution where youth are instructed in the higher

branches of learning and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay Asylum, a corporate institution for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator, claiming as a poor relative. *Held*, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene: Sedgewick, J., dissenting; that Finlay Asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will. *Held*, further, that in the gift to “poor relatives” the word “poor” was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word “relatives” should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed. *Held*, per Fournier and Taschereau, J.J., that the bequest to “poor relatives” was absolutely null for uncertainty.—Judgment appealed from (Q. R. 2 Q. B. 413) affirmed. *Ross v. Ross*, xxv., 307.

2. *Plaintiff's intervention — Cause en dé-libéré—Art. 154 C. C. P.*

See SUBSTITUTION, 1.

INTESTACY.

Devise defeated by paramount rule of law—Inheritance following course directed by law ab intestat.

See WILL, 25.

AND see PARTITION—SUCCESSIONS.

INVENTION.

See PATENT OF INVENTION.

IRRIGATION.

Adjoining lands — Threatened damage to one — Right of owner to guard against without reference to neighbour—Sic utere tuo ut alienum non lœdas.—Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level he has a right to protect himself against such injury by all lawful means without regard to any damage that may result to land of his neighbour from the measures he adopts. *McBryan v. Canadian Pacific Ry. Co.*, xlix., 359.

AND see DRAINAGE—RIVERS AND STREAMS—WATERCOURSES.

JOINT STOCK COMPANY.

See COMPANY LAW.

JOINT TENANTS.

1. *Survivorship — Action — Life estate — Remainder.*

See TITLE TO LAND, 79.

2. *Joint negotiations — Deed of land to one only — Resulting trust.*

See TITLE TO LAND, 117.

3. *Devise of lands — Joint charges in will — Severance of tenancy.*

See TENANTS IN COMMON, 1.

4. *Construction of devise — Life estate — Joint lives — Remainder — Survivor dying without issue.*

See WILL, 34.

JUDGE.

1. *Trial without jury — Findings of fact — Reviewing evidence on appeal.*

See APPEAL, 210.

2. *Appointment — Provincial courts — County Court judges — C. S. B. C. c. 25 — 53 Vict. c. 8 (B. C.).*

See CONSTITUTIONAL LAW, 22.

3. *Collision — Rule of the road — Opinion of assessors — Delegation of judicial functions.*

See ADMIRALTY LAW, 1.

4. *Disqualification — Appeal — Quorum in such case—52 Vict. c. 37, s. 1—Practice.*

See QUORUM, 1.

5. *Dispensing with notice of action — Discretion of trial judge—Review on appeal.*

See NEGLIGENCE, 191.

6. *Disqualification — Resignation of judge — Re-hearing of appeal.*

See PRACTICE OF SUP. COURT, 156.

7. *Construction of statute — Special leave to appeal — “Judge of court appealed from” — Jurisdiction—R. S. C. c. 135, s. 42.*

See APPEAL, 336.

JUDGMENT.

1. *APPEALABLE JUDGMENTS AND ORDERS, 1-12.*

2. *COLLUSION AND FRAUD, 13-14.*

3. *ENTRY OF JUDGMENT, 15-19.*

4. *ESTOPPEL, 20-27.*

5. *FINAL JUDGMENTS AND ORDERS, 28-33.*

6. *FOREIGN JUDGMENTS, 34-37.*

7. *IMPEACHMENT OF JUDGMENT, 38-39.*

8. *REGISTRATION, 40.*

9. *REVOCATION, 41, 42.*

1. APPEALABLE JUDGMENTS AND ORDERS.

1. *Appeal — Collocation and distribution—Art. 761 C. C. P.—Hypothecary claims — As-*

*signment — Notice — Registration — Prêtenom — Arts. 20 and 144 C. C. P.—Action to annul deed — Parties in interest — Incidental proceedings.]—The appeal from judgments of distribution under art. 761 C. C. P. is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provisions of art. 144 C. C. P. that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. *Guertin v. Gosselin*, xxvii., 514.*

2. *Appeal — Jurisdiction — Reference to court for opinion — 54 Vict. c. 5 (B. C.)—R. S. C. c. 135, ss. 24 and 28.]—The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made under a provincial statute, for hearing and consideration of any matter which the Lieutenant-Governor-in-Council may think fit, although the statute provides that such opinion shall be deemed a judgment of the court. *Union Colliery Co. v. Attorney-General of B. C.*, xxvii., 637.*

See [1899] A. C. 580 and 33 Can. Gaz. 418 for judgment of Privy Council on appeal subsequently taken direct from the decision of the Supreme Court of British Columbia.

3. *Appeal — Court of Review — Right of appeal to Privy Council — Construction of statute — Final judgment—R. S. C. c. 135, ss. 24 (j), 28 & 29—54 & 55 Vict. c. 25, s. 3 (D.)—Certain ratepayers of the City of Montreal having objections to one of the commissioners named in proceedings taken for the expropriation of land required for the improvement of a public street, in which they were interested, presented a petition to the Superior Court demanding his recusal. The petition was dismissed; on an appeal to the Court of Review, the judgment dismissing the petition was affirmed, and further appeal was then taken to the Supreme Court of Canada. On motion to quash the appeal for want of jurisdiction: *Held*, that no appeal *de plano* would lie from the judgment of the Court of Review to Her Majesty's Privy Council, and consequently there was no appeal therefrom to the Supreme Court of Canada under the provisions of the Act, 54 & 55 Vict. c. 25, s. 3, amending The Supreme and Exchequer Courts Act. *Held*, further, that the judgment of the Court of Review was not a final judgment within the meaning of s. 29 of The Supreme and Exchequer Courts Act. (See Q. R. 12 S. C. 134.). *Ethier v. Ewing*, xxix., 446.*

4. *Public street — Obstruction — Building “upon” or “close to” line—Petition for removal — Variance.*

See PRACTICE AND PROCEDURE, 68.

5. *Appeal — Time limit — Commencement of — Pronouncing or entry of judgment — Security — Extension of time—Order of judge — Vacation—R. S. C. c. 135, ss. 40, 42, 46.*

See APPEAL, 430.

6. Appeal — Time limit — Commencement of — Pronouncing or entry of judgment — Security — Extension of time — Order of judge—R. S. C. c. 135, ss. 40, 42, 46.

See APPEAL, 431.

7. Opposition to judgment — Reasons — False returns of service — Arts. 18, 89 et seq., 483, 489 C. C. P.—Rescisoire and rescindant.

See OPPOSITION, 11.

8. Appeal — Jurisdiction — 52 Vict. c. 37, s. 2 (D.)—Appointment of presiding officers — County Court judges — 55 Vict. c. 48 (Ont.)—57 Vict. c. 51, s. 5 (Ont.)—58 Vict. c. 47 (Ont.)—Construction of statute—Appeal from assessment — Final judgment — "Court of Last Resort."

See STATUTE, 62.

9. Appeal — Jurisdiction — Discretionary order — Default to plead — R. S. C. c. 65—Ontario Judicature Act, rule 135, ss. 24 (a) and 27—R. S. O. c. 44, s. 796.

See APPEAL, 196.

10. Appeal from Court of Review — Trial judgment varied — Right of appeal.

See APPEAL, 289.

11. Appeal — Jurisdiction — Final judgment — Plea of prescription — Judgment dismissing plea—Costs—R. S. C. c. 135, s. 24—Art. 2267 C. C.

See APPEAL, 290.

12. Appeal—Special leave — 60 & 61 Vict. c. 34 (e)—Error in judgment — Concurrent jurisdiction — Procedure—Mandamus.

See APPEAL, 337.

2. COLLUSION AND FRAUD.

13. Setting aside judgment — Collusion — Cognovit.]—S., a judgment creditor of N., sr., applied to the Supreme Court (N. B.) on affidavits, to have a judgment of N., jr., against N., sr., his father, set aside as obtained by collusion and fraud, and to cover assets of N., sr. The statements in the affidavits were: that a cognovit was given and judgment signed the same day; that no account was rendered of the debt; that no entries were made by N., jr., against his father; that the account for which the cognovit was given was made up from calculation and not from books; that the father had offered to have the judgment discharged on payment of a much smaller sum; that on an examination of the matter for disclosure he would not swear that he owed his son the amount and that he had no settlement of accounts. The affidavits in answer stated how the debts had accrued, giving details; that there was no collusion between the father and son; that the son frequently asked his father for a settlement but could not get it; and that he had never been a party to or authorized any settlement. The court below held that the applicant had failed to shew fraud and refused to set aside the judgment. The decision of the court below was affirmed. *Snowball v. Neilson*, xvi., 719.

14. Tierce opposition — Want of parties — Prescription escheat—Collusion — Champerty—Litigious rights.

See TITLE TO LAND, 131.

3. ENTRY OF JUDGMENT.

15. Mistake in settling minutes — Amendment — To be read *nunc pro tunc* — Application in court.]—Where an error has occurred in drawing up the minutes of its judgment, the Supreme Court of Canada amended the minutes to make them conform to the intention of the court and the principles upon which the decision was based, and the judgment so amended was ordered to be read *nunc pro tunc*. (The application was by petition presented in court before five of the judges, who were present at the delivery of the judgment so amended, Strong, J., being absent.) *Smith v. Goldie*, 9th December, 1885; Cass. Dig. (2 ed.) 689; Cass. S. C. Prac. (2 ed.) 86, 149. (See 9 S. C. Rep. 46.)

16. Case under consideration — Death of party after hearing—Entry of judgment *nunc pro tunc*.

See PRACTICE OF SUP. COURT, 227.

17. Mistake in calculation — Amendment of error — Transmission of record for correction—Order on court below.

See PRACTICE OF SUP. COURT, 179.

18. Rectification of slight errors in judgment — Duty of appellate court.

See APPEAL, 394.

19. Varying minutes — Special recital — Certificate of proceedings — Appeal to Privy Council.

See PRIVY COUNCIL, 4.

4. ESTOPPEL.

20. Bar to action — Foreign judgment — Estoppel—*Res judicata* — Judgment obtained after action—R. S. N. S. (5 ser.) c. 104, s. 12, s.s. 7; orders 24 and 70, rule 2; order 35, rule 38.]—A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada. Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393) distinguished. — The combined effect of orders 24 and 70, rule 2, and s. 12, s.s. 7 of c. 104 R. S. N. S. (5 ser.), will permit this to be done in Nova Scotia.—The provision of R. S. N. S. (5 ser.) c. 104, order 35, rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive of its correctness, in an action on such judgment in Nova Scotia, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia, who has brought an unsuccessful action in a foreign court against the plaintiff. *Law v. Hansen*, xxv., 69.

21. Judgment against firm—Liability of reputed partner—Action on judgment.]—In an action upon a note against M. I. & Co., as makers, and J. I. as indorser, judgment went by default against the firm, and verdict in favour of J. I., as he indorsed without consideration for accommodation of holders, and upon agreement that he should not be liable upon the note. In a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, *Held*, affirming the judgment appealed from (22 Ont.

App. R. 12), that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as maker or indorser. *Isbester v. Ray, Street & Co.*, xxvi., 79.

22. *Ultra vires contract*—Consent judgment—Action to set aside.]—If a company enters into a transaction which is *ultra vires*, and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding on parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company. *Charlebois v. Delap*, xxvi., 221.

23. *Evidence—Admissions—Nullified instruments.*]—A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law, and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties: *Held*, affirming the judgment appealed from (Q. R. 5 Q. B. 458), Girouard, J., dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and secondly, because the declaration of *faux*, contained in the judgment, did not shew any such admission. *Durocher v. Durocher*, xxvii., 363.

24. *Form of draft*—Art. 473 C. C. P.—*Inscription en faux*.

See TITLE TO LAND, 76.

25. *Judgment interlocutory in part—Final judgment on merits*—Voluntary execution—Waiver of right to appeal—*Res judicata*.

See APPEAL, 162.

26. *Consent judgment*—Action against incorporated company—Forfeiture of charter—*Estoppel*—Compliance with statute—*Res judicata*.

See RES JUDICATA, 15.

27. *Prescription*—Arts 2188, 2262, 2267 C. C.—Waiver—Failure to plea limitation—Defence supplied by court—Reservation of recourse for future damages—Judicial admission—Interruption of prescription—Novation—Costs.

See ACTON, 47.

5. FINAL JUDGMENTS AND ORDERS.

28. *Order vacating*—"Final judgment"—Section 17, *Supreme and Exchequer Courts Act*—Jurisdiction to hear appeal.

See APPEAL, 157.

29. *Court of last resort*—Demurrer sustained on appeal—Final judgment.

See APPEAL, 161.

30. *Interlocutory as to part*—Final upon merits—Binding on lower court—Voluntary execution—*Res judicata*—Waiver of right to appeal.

See APPEAL, 162.

S. C. D.—24

31. *Quashing writ of appeal*—Mat procedure—Interlocutory order—Refere take accounts—"Final judgment."

See APPEAL, 170.

32. *Equal division of judges on ap* Withholding decision—Final judgment Appeal.

See APPEAL, 182.

33. *Appeal*—Interlocutory order—judgment—Arts. 348-350 C. C. P.—*Tri jury*.

See APPEAL, 195.

6. FOREIGN JUDGMENTS.

34. *Order by foreign tribunal*—Winding-up of company—Calls—Contributories—*Act Declaration*—Demurrer.

See WINDING-UP ACT, 11.

35. *Lex loci—Lex domicilii—Foreign Jurisdiction*—Decree in New York—in Quebec—Change of domicile—Action to sue.

See DIVORCE.

36. *Foreign judgment obtained after*—Bar to action—*Estoppel*—*Res judicata*

See No. 20, ante.

37. *Foreign judgment—Original conviction*—Counts in declaration—Ont. Jud

See PLEADING, 8.

7. IMPEACHMENT OF JUDGMENT.

38. *Criminal Code*, s. 575—*Confiscation gaming instruments, moneys, &c.*—*Acti recover.*]—In an action to revendicate 1 seized and confiscated under the provis s. 575 of the Criminal Code. *Held* Strong, C.J., that a judgment declaring forfeiture of moneys so seized cannot laterally impeached in an action of revision. *O'Neil v. Attorney-General of C* xxvi., 122.

38a. *Defective case*—Application to record—*Re-hearing.*]—An application judgment in appeal to vary a decision arising from, upon affidavits, comes too late a to amend any defect should be taken argument and decision of the appeal. *dence Washington Ins. Co. v. Gerou* 731.

39. *Practice—Habeas corpus—Binding of judgment in provincial court.*] application for a writ of *habeas corpus* referred by the judge to the Supreme of the province and, after hearing, the cation was refused. On application quently made to a judge of the Supreme of Canada, in chambers; *Held*, that un circumstances it would be improper to fere with the decision of the provincial *In re White*, xxxi., 383.

8. REGISTRATION.

40. *Registration*—Charge on la Priority.

See REGISTRY LAWS, 24.

9. REVOCATION.

41. *Petition in revocation—Requête civile—Concealment of evidence—Jurisdiction—Art. 1177 C. P. Q.—R. S. C. c. 135, s. 67.*—Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment, on the ground that the opposite party succeeded through the fraudulent concealment of evidence. *Durocher v. Durocher*, xxvii., 634.

42. *Default judgment in term—Opposition afin d'annuler—Disavowal—Remedy by requête civile.*

See OPPOSITION, 3.

JUDICATURE ACTS.

1. *Constitutional law—Section 43, Ontario Judicature Act, 1881—Security allowed under Supreme Court Act—42 Vict. c. 39, s. 31(?)*.]—An appeal to the Court of Appeal for Ontario by defendants was dismissed, the matter in controversy amounting to \$576.30, exclusive of costs. Defendants' application under s. 43 of the Judicature Act for special leave to appeal to the Supreme Court of Canada being refused, application was made to Fournier, J., in chambers, for leave to appeal within thirty days after judgment, and Fournier, J., referred it to the full court.—In the course of the argument the court expressed great doubts as to the constitutionality of s. 43 of the Ontario Statute, but it was ordered, that the defendant be at liberty to give security to prosecute an appeal, and that appellant might pay \$500 into the Supreme Court to the credit of the registrar as security for the costs of the appeal. *Forristal v. McDonald* (18 C. L. J. 421); *Cass. Dig.* (2 ed.) 422, 698, 763; *Cass. S. C. Prac.* (2 ed.) 50.

[NOTE.—In *Clarkson v. Ryan* (17 S. C. R. 251), s. 43, Ontario Judicature Act, is expressly declared to be *ultra vires*.]

2. *Ontario Judicature Act, 1881—Controverted election—Petition—Constitution of court.*

See ELECTION LAW, 101.

3. *Ontario Judicature Act—Practice—Added parties—Orders 46 and 48.*

See PRACTICE AND PROCEDURE, 100.

AND see PLEADING—PRACTICE OF SUPREME COURT—PRACTICE AND PROCEDURE.

JUDICIAL PROCEEDING.

1. *Appeal—Jurisdiction—Judicial proceeding—Opposition to judgment—C. C. P. arts. 484-493—R. S. C. c. 135, s. 29—Appealable amount—54 & 55 Vict. c. 25, s. 3, s.-s. 4—Retrospective legislation.*]—An opposition filed under the provisions of arts. 484 and 487 of the Code of Civil Procedure of Lower Canada, for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of s. 29 of "The Supreme and Exchequer Courts Act," and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court

of Canada when the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled, is of the sum or value of \$2,000. *Turcotte v. Dansereau*, xxvii., 578.

JURAT.

See AFFIDAVIT.

JURISDICTION.

1. *Administration proceedings—Jurisdiction of referee—General directions.*]—A referee before whom administration proceedings are taken has no authority to make an order depriving a solicitor of his lien for costs on a fund in court on the ground that adverse parties had a prior claim on such fund for costs which said solicitor's client had been personally ordered to pay, the administration order not having so directed the referee and there being no general order permitting such interference with the solicitor's *primâ facie* right to the fund. (16 Ont. P. R. 335, reversed). *Bell v. Wright*, xxiv., 656.

2. *Prohibition—Domestic tribunal—Powers—Arts. 3504 et seq. R. S. Q.—58 Vict. c. 36 (Q.)*.]—A writ of prohibition will not lie to prevent the execution of the sentence of an inferior tribunal where there has not been absence or excess of jurisdiction in the exercise of its powers. *Honan v. Bar of Montreal*, xxx., 1.

3. *Petition—Separate trial—Jurisdiction—R. S. C. c. 9, ss. 30 and 50.*

See ELECTION LAW, 15, 140.

4. *Court of probate—Accounts of executors and trustees—Res judicata.*

See TRUSTS, 14.

5. *Action for redemption—Foreign lands—Lex rei sitæ—Action in personam.*

See COURT, 1.

6. *Action—Jurisdiction to entertain—Mortgage of foreign lands—Action to set aside—Secret trust—Lex rei sitæ.*

See LEX REI SITÆ, 1.

7. *Form of commitment—Territorial division—Judicial notice—R. S. C. c. 135, s. 32.*

See HABEAS CORPUS, 7.

8. *B. N. A. Act (1867) s. 111—Exchequer Court of Canada—Petition of right—Debt of Province of Canada.*

See CONSTITUTIONAL LAW, 8.

9. *"Quebec Pharmacy Act"—Unlicensed sale of drugs—Suit for joint penalties in Superior Court.*

See STATUTE, 42.

10. *Expiration of time limited for appeal—Forfeiture—Ouster of jurisdiction—Waiver.*

See APPEAL, 432.

11. *Domicile—Delivery of goods sold—Contract by correspondence—Indication of place of payment—Cause of action.*

See CONTRACT, 134.

12. *Habeas corpus* — *Practice of Supreme Court of Canada*—*Binding effect of judgment in provincial court.*

See HABEAS CORPUS, 10.

13. *Title to land*—*Troubles de droit*—*Evasion*—*Issues on appeal*—*Parties*—*Ouster.*

See APPEAL, 397.

14. *Parties on appeal* — *Practice*—*Proceeding in name of party deceased*—*Amendment in Court of Review*—*Interference with discretion on appeal.*

See APPEAL, 139.

15. *Criminal law* — *Perjury*—*Judicial proceeding*—*De facto tribunal* — *Misleading justice*—*Construction of statute*—*R. S. Q. arts. 5551, 5561*—*Criminal Code, s. 145.*

See CRIMINAL LAW, 24.

16. *Injury from public work* — *Negligence of Crown officials*—*Right of action*—*Liability of the Crown*—50 & 51 Vict. c. 16, ss. 16, 23, 58—*Jurisdiction of Exchequer Court*—*Prescription*—Art. 2261 C. C.

See ACTION, 113.

AND see APPEAL—COURTS.

JURISPRUDENCE.

Binding effect of Supreme Court decisions—*Election petition*—*Preliminary objections.*

See ELECTION LAW, 104.

JURY.

1. CHALLENGES, 1, 2.
2. FINDINGS OF FACT, 3-23.
3. IMPROPER INFLUENCE, 24.
4. MISDIRECTION, &c.; NEW TRIALS, 25-41.
5. ORDER FOR JURY TRIAL, 42.
6. VERDICT, 43-48.

1. CHALLENGES.

1. *Summoning of jury* — *Personation of juror*—*Irregularity cured by verdict*—*R. S. C. c. 174, ss. 246, 259.*

See CRIMINAL LAW, 7.

2. *Criminal procedure*—*Crown challenges*—*Standing aside a second time.*

See CRIMINAL LAW, 10.

2. FINDINGS OF FACT.

3. *Defective snow-plough and bridge* — *Derailment of train*—*Contributory negligence*—*Findings of jury*—*Failure to answer questions*—*Act of incorporation* — *Change of name*—*New trial.*] — A locomotive engineer in the company's employ was killed through the derailing of a snow-plough and consequent breaking of a bridge. The jury found that the derailing was the proximate cause of the

accident; that deceased was guilty of contributory negligence; that the snow-plough and bridge were defective and that the train crew was insufficient. They answered "we do not know" to the questions, as to whose negligence caused the accident; whether or not the defects were known to defendant before or at the time of accident, or could have been discovered by careful inspection; whether defendant was aware of insufficiency of the crew; whether different construction of the bridge would have secured the safety of the train; whether deceased knew the train was off the track before it reached the bridge, and if by reasonable care of the deceased or crew, the accident could have been prevented. The court below were equally divided as to necessity for a new trial. The trial judge instructed that the proximate cause was what caused the accident and not that without which it would not have happened, and there was a question as to the parties, plaintiffs in the action. The court below were also divided in opinion on these points. The Supreme Court of Canada ordered the new trial and affirmed the holdings of the judgment appealed from (27 N. S. Rep. 498) in other respects. *Pudsey v. Dominion Atlantic Ry. Co.*, xxv., 691.

4. *Negligence*—*Matters of fact*—*Finding of jury.*]—W. was working on a vessel in port when a boom had to be taken out of the crutch in which it rested and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced, which the master undertook to do. When the boom was taken out it fell to the deck and W. was injured. In an action against the owners for damages the jury found that the fall of the boom was owing to the said rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants. *Held*, affirming the judgment of the Supreme Court of Nova Scotia (30 N. S. Rep. 548), Gwynne, J., dissenting, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that if secured originally it had become insecure by negligence of defendants, and the jury having negatived negligence their finding should not be ignored. *Williams v. Bartling*, xxix., 548.

5. *Assessment of damages*—*Verdict*—*General damages and loss of rent.*

See NEGLIGENCE, 1.

6. *Negligence*—*Legal crossing*—*Questions*—*Judge's charge*—*Findings of fact*—*Verdict.*

See RAILWAYS, 101.

7. *Questions submitted*—*Verdict*—*Evidence*—*Findings.*

See NEGLIGENCE, 204.

8. *Findings of fact*—*Judgment non obstante*—*Occupation of risk*—*Hazardous business*—*Condition in policy of insurance.*

See INSURANCE, FIRE, 22.

9. *Drawing inferences* — *Presumption* — *Running of railway trains* — *Cause of fire*—*Defective engine.*

See EVIDENCE, 8.

10. *Findings of fact*—*Commercial usage*—*Inferences from nature of cargo.*

See INSURANCE, MARINE, 19.

11. *Appeal on questions of fact—Verdict of jury—Findings by trial judge—Appreciation of evidence.*

See APPEAL, 210.

12. *Direction—Condition precedent—New trial—Findings upon evidence—Benefits accrued.*

See CONTRACT, 59.

13. *Findings of fact—Reversal on appeal.*

See TITLE TO LAND, 100.

14. *Finding on question of fact—Interference with on appeal.*

See MASTER AND SERVANT, 15.

15. *Evidence—Relevancy—Inferences—Collateral facts.*

See EVIDENCE, 18.

16. *Accident insurance—Renewal of policy—Payment of premium—Promissory note—Agent's authority—Findings.*

See INSURANCE, ACCIDENT, 3.

17. *Marine insurance—Partial loss on cargo—Stranding—Evidence—Jury trial.*

See EVIDENCE, 176.

18. *Negligence—Findings of jury—Evidence—Concurrent findings of courts appealed from.*

See NEGLIGENCE, 217.

19. *Marine insurance—Abandonment—Repairs—"Boston clause"—Findings of jury—Setting aside verdict.*

See INSURANCE, MARINE, 4.

20. *Answers to questions—Verdict—Negligence—Shunting railway cars—Evidence.*

See NEGLIGENCE, 21.

21. *Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workmen—Employers' liability—Presumptions—Findings of jury sustained by courts below.*

See NEGLIGENCE, 144.

22. *Answers to questions—Judgment entered on findings—Reversal on appeal.*

See NEGLIGENCE, 51.

23. *Findings of jury—Weight of evidence—Verdict.*

See APPEAL, 243.

3. IMPROPER INFLUENCE.

24. *Trial of felony—Attendance at church—Remarks of preacher—Influence on jury—Evidence.*

See CRIMINAL LAW, 6.

4. MISDIRECTION, &C.; NEW TRIALS.

25. *Charge to jury—Refusal to define fraud—Taking accounts—Jury unable to deal with accounts.]—Counsel for plaintiff requested the judge to instruct the jury as to what constituted fraud under the Statute of Elizabeth and also urged that an account should be*

taken of certain dealings. The judge refused to define fraud as requested and the jury stated that they were unable to deal with the accounts. *Held*, that the judge's refusal amounted to misdirection and there should be a new trial, and that the accounts should have been taken in order properly to decide the case. *Griffiths v. Boscovitz*, xviii., 718.

26. *Negligence—Trial of action—Contributory negligence—Findings of jury—New trial—Evidence.]—On the trial of an action against a street railway company for damages in consequence of injuries received through the negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "Could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the answer was, "We believe that it could have been possible." *Held*, reversing the judgment of the Court of Appeal, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict. *Held*, further, that as the other findings established negligence in the defendant which caused the accident which amounted to a denial of contributory negligence; as there was no evidence of negligence on plaintiff's part in the record; and as the court had before it all the materials for determining the questions in dispute, a new trial was not necessary. *Rowan v. Toronto Ry. Co.*, xxix., 717.*

27. *Negligence—Action for damages—Improper evidence—Misdirection—60 Vict. c. 24, s. 370 (N.B.)—By 60 Vict. c. 24, s. 370 (N.B.) "A new trial is not to be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against the Electric Street Railway Company for damages on account of personal injuries, the Vice-President of the company, called on plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures and on re-examination plaintiff's counsel interrogated him at length as to the selling price of the stock on the Montreal Exchange, and proved that they sold at about 50 per cent. premium. The judge in charging the jury directed them to assess the damages as "upon the extent of the injury plaintiff received independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages. *Held*, that on cross-examination of the witness by defendant's counsel the door was not open for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages.—The injury for which plaintiff sued was his foot being crushed, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W. who thought the limb might be saved, was, four days later, appointed by the company, at*

the suggestion of the plaintiff's attorney, to co-operate with plaintiff's physician. Eventually the foot was amputated and plaintiff made a good recovery. On the trial plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation, and three days before the amputation, when Dr. W. stated that if he could induce plaintiff's attorney to view it from a surgeon's standpoint, and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation. The judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible. *Held*, Strong, C.J., and Gwynne, J., dissenting, that as Dr. W. did not represent the company at the first consultation when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.—To tell a jury to ask themselves "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction. *Hesse v. Saint John Ry. Co.*, xxx., 218.

The judgment appealed from (35 N. B. Rep. 1) was varied, the order for new trial being restricted to the question of damages and the appeal dismissed without costs.

28. *New trial—Verdict—Finding of jury—Question of fact—Misapprehension.*—Where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict. *Fraser v. Drew*, xxx., 241.

29. *Non-direction—Trial of question of interest—Reference to master.*

See EVIDENCE, 4.

30. *Misdirection—Questions for jury—Action of trover.*

See SHERIFF, 4.

31. *Fair direction — Wilful misrepresentation—Policy of insurance—New trial refused.*

See INSURANCE, LIFE, 24.

32. *Verdict against evidence—Misdirection—Trespass on wild lands—Isolated acts.*

See PRESCRIPTION, 15.

33. *Mis-trial — Insufficient answers—Final judgment—New trial—Jurisdiction.*

See APPEAL, 174.

34. *Equity case — Dispensing with jury—Disposal of whole case on motion for new trial.*

See NEW TRIAL, 73.

35. *Libel—General issue—Public affairs—Fair comment — Justification — Pleading—Rejection of evidence—General verdict—Disregard of material question.*

See NEW TRIAL, 33.

36. *Malicious prosecution — Findings of fact — Inferences—Functions of judge—Probable cause—Nonsuit.*

See NEW TRIAL, 34.

37. *Answers to questions — Railway company—Negligence.*

See No. 3, ante.

38. *Negligence — Question for jury—Withdrawal of case from jury—New trial.*

See EVIDENCE, 163.

39. *Negligence — Common fault — Assignment of facts—Inconsistent findings — Misdirection.*

See NEW TRIAL, 93.

40. *Contract—Oral agreement—Evidence—Withdrawal of questions from jury — New trial.*

See EVIDENCE, 228.

41. *Evidence — Malice — Privileged communication — Judge's charge — Unfriendly relations of parties.*

See LIBEL, 7.

5. ORDER FOR JURY TRIAL.

42. *Appeal — Interlocutory order — Trial by jury—Final judgment—R. S. C. c. 135, s. 24—Arts. 348-350 C. C. P.*

See APPEAL, 195.

6. VERDICT.

43. *Disagreement — Verdict — Manitoba Libel Act.*—By s. 11 of the Libel Act (50 Vict. c. 22, Man.), actual malice or culpable negligence must be proved in an action for libel, unless special damages are claimed. *Held*, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand. *Ashdown v. Manitoba "Free Press" Co.*, xx., 43.

44. *Verdict unwarranted—Promissory note—Consideration — Accommodation — Discharge — Agreement — New trial.*—The appeal was from a decision of the Supreme Court of New Brunswick, affirming, by an equally divided court, the verdict for defendant at the trial. The action was on a promissory note indorsed by defendant, who pleaded that it was indorsed on the express understanding that he was not to be called upon to pay it, and that he was discharged by the bank subsequently taking security from the makers. At the trial the defendant had a verdict, the jury finding that the bank, on taking security, had agreed that the note in suit should be paid out of the proceeds of collateral held by the bank. On motion, pursuant to leave reserved, for judgment for plaintiffs or a new trial, the court *en banc* was equally divided, and the verdict stood.—The Supreme Court of Canada, Gwynne, J., dissenting, ordered a new trial, on the ground that the finding of the jury did not warrant the verdict for the defendant. *St. Stephen's Bank v. Bonness*, xxiv., 710.

45. *Municipal drains—Continuing trespass—Limitation of action ex delictu*—58 Vict. c. 4, s. 295 (N. S.).—*Verdict*.]—Action was for trespass by the corporation constructing and maintaining a drain through plaintiff's land. The jury found that the drain had been constructed in 1886 "by virtue of the streets commissioner's power of office." Plaintiff, although aware of the existence of the drain at the time, made no objection till 1896 when the land caved in. The Supreme Court affirmed the judgment appealed from (33 N. S. Rep. 401) which held that the jury had found that the defendant had constructed the drain by its agent and that the trespass, being a continuing one, was not barred by the limitation provided in the "Towns' Incorporation Act of 1895" for actions *ex delictu* against towns. *Town of Truro v. Archibald*, xxxi., 380.

46. *Promissory note — Duress — Verdict of jury*.]—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the notes to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager. *Held*, that the jury having believed the defendant's account and given him a verdict which the evidence justified, such verdict ought to stand. *Western Bank of Canada v. McGill*, xxiii., 581.

47. *Irregular panel — Personation of juror — Effect of verdict*—R. S. C. c. 174, ss. 246, 259.

See CRIMINAL LAW, 7.

48. *Operation of railway — Negligence — Sufficiency of evidence — Findings of jury — Defective machinery — Sparks from engine — Setting aside verdict*.

See NEGLIGENCE, 101.

JUS PUBLICUM.

1. *Foreign corporation — Telegraph monopoly — Public policy — Operation of railway telegraph lines—Contract in restraint of trade—Comity of nations*.

See COMPANY LAW, 2.

2. *Extinction by statute*—44 Vict. c. 1, s. 18 (D.).—*Foreshore of harbour—Right of C. P. R. Company to use*.

See FORESHORE.

3. *Public street — Obstruction — Dedication — Right of owner or occupier to compensation*.

See DEDICATION, 1.

JUSTICE OF THE PEACE.

1. *Commitment upon another's conviction—Canada Temperance Act, 1878, s. 105—Absence — Wrongful arrest — Justification*.]—A. and B., justices of the peace, were sued in damages for issuing a warrant of commitment under which B. was imprisoned upon a conviction before two other justices under the

Canada Temperance Act, 1878. The prosecution was commenced before A. and B., but on return of the summons they were served with a subpoena, to give evidence for the defendant; whereupon two other justices at the request of A. and B., under s. 105 of the Act, heard the case and convicted the appellant. A. and B. though present in the court room as witnesses took no part in the proceedings. —The Supreme Court of New Brunswick ordered a nonsuit to be entered.—On appeal to the Supreme Court of Canada. *Held*, affirming the judgment of the court below, Henry and Taschereau, JJ., dissenting, that, as the conviction was good on its face, it was, until set aside, a justification for the commitment. *Held*, also, that upon the facts disclosed A. and B. were "absent," within the meaning of s. 105 of the Canada Temperance Act, 1878. *Byrne v. Arnold*, Cass. Dig. (2 ed.) 107.

2. *Jurisdiction — Form of commitment — Territorial division — Judicial notice*—R. S. C. c. 135, s. 32.]—A warrant of commitment was made by a stipendiary magistrate for the police division of the municipality of the County of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the County of Pictou." The County of Pictou appeared to be of a greater extent than the municipality of the County of Pictou, there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the County of Pictou. The Nova Scotia Statute of 1895 respecting county corporations (58 Vict. c. 3, s. 8), contains a schedule which mentions Hopewell as a polling district in Pictou County, entitled to return two councillors to the county council. *Held*, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial extent of the police division. *Held*, also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte Macdonald*, xxvii., 683.

3. *Appeal — Certiorari — Merchants' Shipping Act — Seaman's wages — Jurisdiction — Final judgment*.]—*Quere*. Where the Merchants' Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will *certiorari* lie to remove the proceedings into a superior court? *The Queen v. Sailing Ship "Troop" Co.*, xxix., 662.

4. *Requisition calling out militia—Form*.

See MILITARY LAW, 1.

5. *Vindictive damages — Abuse of official position—Elements for consideration*.

See DAMAGES, 50.

6. *Malicious prosecution — Destruction of liquor had in vicinity of public works—Unsealed conviction — Certiorari — Action for damages—Notice*.

See MALICE, 4.

7. *Canada Temperance Act* — Search warrant — Magistrate's jurisdiction — Constable — Justification of ministerial officer — Goods in custodia legis — Replevin — Estoppel — Res judicata — Judgment inter partes.

See CANADA TEMPERANCE ACT, 6.

8. *Game laws* — Game killed out of season — Seizure of furs — Jurisdiction — R. S. Q. arts. 1405-1409 — Writ of prohibition.

See PROHIBITION, 3.

9. *Nova Scotia Liquor License Act, 1895* — Conviction — Jurisdiction — Affidavit on certiorari — Powers of Provincial Legislature — Matter of procedure.

See CERTIORARI, 4.

LACHES.

1. *Equity suit* — Specific performance — Agreement to convey land — Possession.] — In a suit for specific performance of an agreement by the devisee of land to convey to P., it appeared that the agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later. P. was in possession of the land during the interval. Held, that as the evidence clearly shewed that P. was only in possession as agent of the trustees under the will and caretaker of the land, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit. *Porter v. Hale*, xxiii., 265.

2. *Crown* — Suretyship — Postmaster's bond — Penal clause — *Lex loci contractus* — Negligence — Laches of Crown officials — Release of sureties — Arts. 1053, 1054, 1131, 1135, 1927, 1929, 1265, C. C.] — The rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute. (6 Ex. C. R. 236 affirmed). *Black v. The Queen*, xxix., 693.

3. *Sale by agent* — Simulated purchase — Fraudulent conveyance — Title to land.

See TRUSTS, 1.

4. *Want of diligence* — Engineer's certificate — Railway construction.

See CONTRACT, 54.

5. *Trustee* — Administrator of estate — Release by next of kin — Recession of release — Laches — Estoppel — Delays.

See TRUSTS, 13.

6. *Action in warranty* — Joint speculation — Partnership of ownership *pas indivis* — Neglect to withdraw collections.

See NEGLIGENCE, 152.

7. *Agent lending moneys* — "Neglect to obtain sufficient security" — Responsibility for losses — Measure of damages.

See PRINCIPAL AND AGENT, 49.

8. *Carelessness in warehousing* — Taking damp grain into storage.

See WAREHOUSEMAN, 3.

9. *Fraudulent alteration of marked cheque* — Payment by mistake — Necessity of taking precautions.

See BANKS AND BANKING, 11.

10. *Delay in bringing action to rescind contract* — Artifice — Misrepresentation — Consideration — Challenging — Test suit — Estoppel — Waiver.

See VENDOR AND PURCHASER, 26.

LANDLORD AND TENANT.

1. CONTRACT, 1-4.
2. DETERMINATION OF TENANCY, 5-7.
3. DISTRESS, 8-11.
4. EVICTION, 12.
5. MORTGAGED PREMISES, 13, 14.
6. NEGLIGENCE, 15-20.
7. OVERHOLDING TENANTS, 21-24.
8. RENEWAL OF LEASE, 25-27.
9. TENANTS AT WILL OR BY SUFFRANCE, 28-30.

1. CONTRACT.

1. *Attornment* — Creation of tenancy by mortgage — Demise to mortgagor — Rent reserved — Distress — 8 Anne c. 14 — Statute of Frauds — R. S. O. (1887) c. 100, s. 8 — Tenant at will — *Locus standi of third parties*.] — A mortgage of lands for \$20,000 payable with interest at 7% per annum as follows. \$500 on 1st December, 1883; \$500 on 1st June and 1st December in each of the four following years; and \$15,500 on 1st June, 1888; contained the provision: "And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken, and be in all respects in satisfaction of the moneys so then payable according to the said proviso." The mortgage did not contain the statutory distress clause, or provide for possession by mortgagor until default and it was not executed by the mortgagees. The mortgagor was in possession of part of the premises and his tenants of the remainder, and such possession continued after the mortgage was executed. The goods of the mortgagor having been seized under execution the mortgagee claimed a year's rent under the Statute of Anne. Held, reversing the judgment appealed from (16 Ont. App. R. 255), (Ritchie, C. J., and Taschereau, J., dissenting), that the deed failed to create between the mortgagor and mortgagees the relation of landlord and tenant, so as to give the mortgagees the right to distrain for arrears of rent, under the provisions of 8 Anne, c. 14, as against an execution creditor of the mortgagor; because, even if the deed could operate as a lease although not signed by the mortgagees,

the rent reserved was so unreasonable and excessive as to shew conclusively that the parties could not have intended to create a tenancy and that the arrangement was unreal and fictitious.—The right to impugn the validity of a lease between a mortgagor and mortgagees on the ground that it is merely fictitious and colourable is not to be confined to any particular class such as assignees in bankruptcy, but may be exercised wherever the interests of third parties may be involved.—*Per Strong, J.* The execution of the deed by the mortgagor estopped him from disputing the tenancy, and the mortgagees were also estopped by their acceptance of the mortgagor as their tenant, evidenced by their accepting the deed, advancing their money upon the faith of it and permitting the mortgagor to remain in possession.—The mortgage deed, although executed by the mortgagor only, operated in any event to create a tenancy at will, at the same rental as that expressly reserved by the demise clause. Section 3 of 8 and 9 Vict. c. 106 (1. S. O. 1887, c. 100, s. 8), has not the effect of repealing the words of the Statute of Frauds which make the lease required by that statute to be in writing signed by the lessor so far effectual as to create a tenancy at will.—*Per Gwynne and Patterson, JJ.* The mortgage deed not having been signed by the mortgagees failed to create even a tenancy at will.—*Per Gwynne, J.* The form adopted for the demise clause is such that by the mortgagees executing the deed it would operate as a lease, and by their not executing it the clause would be simply inoperative.—*Per Ritchie, C.J., and Taschereau, J.* The execution of the mortgage by the mortgagor and his continuing in possession under it amounted to an attornment and the relation of landlord and tenant was created. The deed was intended to operate as an immediate lease with intent to give the mortgagees an additional remedy by distress and was a *bonâ fide* contract for securing the payment of principal and interest, and in the absence of any bankruptcy or insolvency laws there was nothing to prevent the parties from making such a contract. *Hobbs v. Ontario Loan & Debenture Co.*, xvi., 483.

2. *Notice to quit—Lease for eleven months—Monthly or yearly tenancy—Overholding.*—*R. & Co.* made the following offer in writing to the owner of the premises mentioned therein:—"We are prepared to rent that store where the 'Herald' office used to be and will give \$400 a year for the whole of the ground floor as well as the cellar. We will rent for 11 months from the 1st August next at the rate of \$400 per year." . . . This offer having been accepted *R. & Co.* occupied the premises for a year and seven months, no new agreement being made after the 11 months expired, paying their rent monthly during said period. They then gave a month's notice and quitted the premises. The landlord claiming that the tenancy was from year to year brought an action for rent for the two months after the tenancy ceased according to the notice. *Held*, affirming the judgment appealed from, that the tenancy was one from month to month after the original term ended and the month's notice to quit was sufficient. *Eastman v. Richard & Co.*, xxix., 438.

3. *Lease—Covenant—Forfeiture—Company—Shareholder—Personal liability—Waiver.*—A lease to a joint stock company provided that in case the lessee should assign

for the benefit of creditors six months' rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done, the lessors executing the assignment as creditors assenting thereto. *Held*, reversing the judgment of the Court of Appeal (1 Ont. L. R. 172) that the lessors and the company were distinct legal persons and the individual interests of the former were not affected by the above action. *Salomon v. Salomon & Co.* ([1897] A. C. 22) followed.—The assignee of the company held possession of the leased premises for three months and the lessors accepted rent from him for that time and from sub-lessees for the month following. *Held*, also reversing the judgment appealed from, that as the lessors had claimed the six months' accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; as the assignee had a statutory right to remain in possession for the three months and collect the rents; as the evidence shewed that the receipt by the lessors of the three months' rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the month's rent from the sub-tenants was only for compensation by the latter for being permitted to use and occupy the premises and for their accommodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease.—Mortgagees of the premises having notified the sub-tenants to pay rent to them the assignee paid them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged. *Held*, that this also was no waiver of the lessors' right to claim a forfeiture.—*Quære*, Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company, or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee? *Soper v. Littlejohn*, xxxi., 572.

4. *Attornment in mortgage—Tenancy at will—Distress for arrears of interest—Landlord's privilege.*

See MORTGAGE, 56.

2. DETERMINATION OF TENANCY.

5. *Condition of lease—Payments out of rental—Destruction by force majeure—Determination of contract—Rendering account.*—Art. 19, C. C. P.—When a lease has been determined by *force majeure*, an obligation previously undertaken by the lessor to make payments out of moneys received as rent for the premises destroyed ceases and will not effect a subsequent lease to another tenant.—2. The fact of plaintiffs having styled themselves the "duly named trustees to S.'s creditors," did not give him the right to bring a personal action for S.'s creditors, the action, if any, belonging to the individual creditors of S. under art. 19 C. C. P. *Brown v. Pinsonneault*, iii., 102.

[NOTE.—This decision was overruled in *Porteous v. Reynar* (13 App. Cas. 120).]

6. Lease for eleven months — Notice to quit—Monthly tenancy.

See No. 2, *ante*.

7. Covenant — Forfeiture — Company — Personal liability of shareholder.

See No. 3, *ante*.

3. DISTRESS.

8. Distress for rent — Agreement with house-furnisher — Waiver of privilege.]—W. let an unfurnished house to M., and signed the following agreement, which was delivered to F. by M.:—"The bearer, M., being about to purchase some furniture from Wm. F. & Son, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by F. for any rent that may become due." F. then delivered the furniture to M., to be paid for by monthly payments, and "to remain the property of F. till paid for in full." W. levied upon the furniture, F. replevied and obtained a verdict, which the Supreme Court of Nova Scotia refused to set aside. On appeal, *Held*, affirming the judgment appealed from (2 K. & C. 337), that the agreement signed by W. constituted a binding contract with F. not to distrain. *Wallace v. Fraser*, ii., 522.

9. R. S. O. (1887) c. 143, s. 28—Construction of statute — Distress — Goods of person holding "under" tenant.]—The Ontario Landlord and Tenant Act (R. S. O. [1887] c. 343, s. 28), exempts from distress for rent, the property of all persons except the tenant or person liable. The word tenant includes a sub-tenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant. *Held*, reversing the judgment appealed from (23 Ont. App. R. 517), that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress.—*Farwell v. Jameson*, xxvi., 588.

10. Attornment in mortgage — Tenancy at will—Distress for arrears of interest—Landlord's privilege.

See MORTGAGE, 56.

11. Creation of tenancy by mortgage—Attornment — Demise to mortgagor — Distress — Rent reserved — Statute of Anne — Statute of Frauds — Tenancy at will — Locus standi of third parties.

See No. 1, *ante*.

4. EVICTION.

12. Eviction — Entry by lessor to repair—Intent to deprive tenant of benefit — Suspension of rent — Construction of lease.]—A lease of business premises provided that the lessor could enter upon the premises for the purpose of making repairs and alterations at any time within two months after the 1st May, beginning of the term, but not later, except with the consent of the lessee. An action for rent under the lease was resisted on

the ground that the lessor had been in possession of part of the premises after the specified time without the necessary consent whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. The jury found that no consent had been given by the lessee for such occupation and that the lessee had no beneficial use of the premises while it lasted. *Held*, reversing the judgment appealed from (25 N. B. Rep. 440; 28 N. B. Rep. 300), *Ritchie, C.J.*, and *Strong, J.*, dissenting, 1. that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the acts and conduct of the lessee.—2. The two months' limitation in the lease had reference to the entry by the lessor to commence the repairs and not to his subsequent occupation of the premises, and the lessor having entered upon the premises within the prescribed period, he had reasonable time to complete the work and his subsequent occupation was not wrongful.—*Per Taschereau and Gwynne, J.J.*, that assuming assent was necessary the evidence clearly shewed that the lessor was on the premises after the 1st of July with the assent of the lessee; he had a right, therefore, to remain until such assent was revoked, which was never done.—*Per Patterson, J.*, that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving the tenant of the use of a portion, does not necessarily work an eviction; a tenant may be deprived of the beneficial occupation of the premises for part of his term, by an act of the landlord which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction.—*Per Ritchie, C.J.*, and *Strong, J.*, dissenting, that the jury having negatived consent by the lessee, and the evidence shewing that the acts of the landlord were of such a grave and permanent character as to indicate an intention to deprive the tenant of the beneficial enjoyment of a substantial part of the premises, they amounted to an eviction of the tenant which operated as a suspension of the rent. *Ferguson v. Troop*, xvii., 527.

5. MORTGAGED PREMISES.

13. Attornment in mortgage — Tenancy at will — Distress for arrears of interest — Landlord's privilege.

See MORTGAGE, 56.

14. Creation of tenancy by mortgage — Attornment — Demise to mortgagor — Distress — Rent reserved — Statute of time — Statute of Frauds — Tenancy at will — Locus standi of third parties.

See No. 1, *ante*.

6. NEGLIGENCE.

15. Destruction of leased premises — Reddendum — Covenant by lessee — Accident by fire — Arts. 1053, 1627, 1629, C. C.]—Lessees covenanted to return the leased premises at the expiration of their lease "in as good order, state, &c., as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted." Subsequently the lessor alleging a fire had been caused by the negligence of the lessees brought action

against them for the cost of reconstructing the premises and restoring them in good order and condition less insurance. *Held*, affirming the judgment appealed from (31 L. C. Jur. 307; M. L. R. 3 Q. B. 325), Ritchie, C.J. and Taschereau, J., dissenting, that the lessees were not responsible for the loss, as the fire was an accident within the terms of the exception contained in the lease, and therefore arts. 1053, 1627, 1629, C. C. were not applicable. *Evans v. Skelton*, xvi., 637.

16. *Dangerous material—Negligence—Fire—Arts. 1054, 1627, 1629 C. C.*—Defendant was, on 7th April, 1873, in occupation of a varnish factory which he had leased from the plaintiff, when a fire originating in the factory consumed it as well as adjoining premises belonging to plaintiff, who brought action for damages occasioned by the fire, alleged to have taken place through negligence of defendant and his employees.—The Superior Court found that no fault could attach to defendant or his employees, and dismissed action.—The Queen's Bench (Ramsay and Tessier, J.J., dissenting) reversed this finding and awarded plaintiff damages and costs, holding the defendant liable under art. 1054. *Held*, affirming the judgment appealed from, Henry, J., dissenting, 1. as to the part of the building leased to defendant, there was no doubt as to his responsibility, as he had failed to account for the fire according to arts. 1627, 1629 C. C.—2. As to the buildings of plaintiff in his own occupation the defendant might be considered as a trespasser, on account of gross negligence in the use of dangerous materials and neglect of the most simple precautions to guard against the accident. *Jamieson v. Steel*, Cass. Dig. (2 ed.) 465.

17. *Loss by fire—Cause of fire—Negligence—Civil responsibility—Legal presumption—Rebuttal of—Onus of proof—Hazardous occupation—Arts. 1053, 1064, 1071, 1626, 1627, 1629 C. C.*—To rebut the presumption created by art. 1629 C. C., it is not necessary for the lessee to prove the exact or probable origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him, or to persons for whose acts he should be held responsible.—Judgment appealed from (Q. R. 5 Q. B. 88) affirmed, Strong, C.J. dissenting. *Murphy v. Labbé*, xxvii., 126.

18. *Loss by fire—Negligence—Legal presumption—Rebuttal of—Onus of proof—Construction of agreement—Covenant to return premises in good order—Art. 1629 C. C.*—A steam sawmill was totally destroyed by fire, during the term of the lease, whilst in the possession, and being occupied by the lessee. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as could be expected considering wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to shew that necessary and usual precautions had been taken for the safety of the premises, a night-watchman kept there making regular rounds, that buckets filled with water were kept ready, and force-pumps provided for use in the event of fire, and they submitted that, as the origin of the fire was mysterious and unknown, it should be assumed to have

occurred through natural and fortuitous causes for which they were not responsible. It appeared, however, that the night-watchman had been absent from the part of the mill where the fire was first discovered for a much longer time than was necessary or usual for the making of his rounds, that during his absence the furnaces were left burning without superintendence, that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the fire was actually discovered, that on discovering the fire the watchman failed to make use of the water buckets to quench the incipient flames, but lost time in an attempt to raise additional steam pressure to start the force-pumps before giving the alarm. *Held*, affirming the judgment appealed from (Q. R. 7 Q. B. 9), that the lessee had not shewn any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by art. 1629 C. C. against the lessees had not been rebutted, and that the evidence shewed culpable negligence on the part of the lessees, which rendered them civilly responsible for the loss by fire of the leased premises. *Murphy v. Labbé* (27 Can. S. C. R. 126), approved and followed. *Klock v. Lindsay; Lindsay v. Klock*, xxviii., 453.

19. *Lease of wharf to agent for use of principals—Possession by principals—Control of premises.*

See NEGLIGENCE, 15.

20. *Contract—Monthly or yearly tenancy—Lease for eleven months—Notice to quit.*

See No. 2, ante.

7. OVERHOLDING TENANTS.

21. *Possession fraudulently obtained—Ejection—Landlord's title—Estoppel—Evidence.*—Where a third party, by misrepresenting title obtained possession of leased premises fraudulently from the tenant, it was *Held*, that he was estopped from disputing the title of the landlord. (See 29 Gr. 338). *White v. Nelles*, xi., 587.

22. *Overholding—Verbal lease—Expiration—Notice to quit—Sub-tenancy—Possession by sub-tenant after expiry of original lease—Subsequent distress.*—M. verbally leased premises to a tenant who sub-let a portion. After the original tenancy expired, on 15th November, 1887, the sub-tenant remained in possession and in March, 1888, received notice to quit from M. In June, 1888, M. issued a distress warrant for rent due by the original tenant, and the sub-tenant paid the amount claimed as rent due, but not from herself to such original tenant. More than six months after the notice to quit was given proceedings were taken by M. to recover possession of the premises from the sub-tenant. *Held*, affirming the judgment appealed from (17 Ont. App. R. 27), Fournier, J., dissenting, that the notice to quit given to the sub-tenant, and the distress during the latter's possession on suffrance, did not work estoppel against the landlord as the tenancy had always been repudiated. *Gilmour v. Magee*, xviii., 579.

23. *Overholding tenant—Recovery of leased premises—Art. 1624 C. C.—Claim for use and occupation—Arts. 887, 888 C. C. P.—Juris-*

diction—*R. S. C. art. 5977.*]—An action by the lessor under arts. 887, 888 C. C. P. to recover possession of leased premises from an overholding tenant where a demand of \$40 is joined for their use and occupation since the expiration of the lease must be brought in the Circuit Court, the amount claimed being under \$100. Judgment appealed from (*M. L. R. 6 Q. B. 273*) affirmed, *Fournier, J.*, dissenting. *Blachford v. McBain*, xx., 269.

See APPEAL, 34.

24. *Contract — Lease for eleven months—Overholding tenant—Notice to quit.*

See No. 2, ante.

8. RENEWAL OF LEASE.

25. *Lease—Surrender—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Specific performance—Statute of Frauds.*]—A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years when a new indenture was executed which recited the provisions of the original lease and, after a declaration that the lessors had agreed to continue and extend the same for a further term of 14 years from the end of the term granted thereby at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option. *Held*, affirming the judgment appealed from (28 N. B. Rep. 1), *Ritchie, C.J.*, and *Taschereau, J.*, dissenting, that the lessors were not entitled to a decree for specific performance.—*Per Gwynne, J.*, that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.—Assuming that the renewal clause was incorporated in the second indenture the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors.—The renewal clause was inoperative under the Statute of Frauds which causes leases for three years and upwards, not in writing, to have the effect of estates at will only, and consequently there could be no second term of 14 years except by a second lease executed and signed by the lessors.—*Per Gwynne and Patterson, JJ.* The option of the lessors could only be exer-

cised in case there were no buildings to be valued erected during the term granted by the instrument containing such clause; and if the second indenture was subject to renewal the clause had no effect as there were no buildings erected during the second term.—*Per Ritchie, C.J.*, and *Taschereau, J.* The occupation by the lessees after the terms expired must be held to have been under the lease and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided. *Sears v. City of St. John*, xviii., 702.

26. *Construction of deed—Laying out boundaries—Riparian rights—Possession—Prescription.*]—Where a railway built fences above the water line of a non-navigable stream, which was stated as the boundary of lands conveyed to the company, the possession of the strip of land left unenclosed and of the stream *ad medium filum* by the vendor and his assigns, after the conveyance to the company, is not a possession *animo domini* as required for the acquisitive prescription of ten years under art. 2251 C. C., but merely an occupation as tenant by suffrage upon which no such prescription could be based. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

27. *Attornment in mortgage—Tenancy at will—Distress for arrears of interest—Landlord's privilege.*

See MORTGAGE, 56.

9. TENANTS AT WILL OR BY SUFFRANCE.

28. *Right of action—Prescription—Use and occupation of land—Booming and storing logs—Claim for rent—Arts. 1608, 2188, 2250 C. C.*]—The mode of proceeding given by C. S. L. C. c. 51, did not exclude the right to proceed by ordinary action.—Persons who make use of riparian lands by suffrage of the owner for the purpose of booming and storing logs floated in a public stream are, under art. 1608 C. C., considered as lessees and subject to all the rules concerning leases and the annual value of their occupation should be considered the rent reserved, none having been fixed by the parties. The claim therefor is subject to the prescription of five years under art. 2250 C. C., and this prescription in virtue of art. 2188 C. C., is one which the tribunals are bound to give effect to although not pleaded, and only set up for the first time on appeal. The judgment appealed from (7 Q. L. R. 286; 15 R. L. 514) was varied. *Breakey v. Carter*, Cass. Dig. (2 ed.) 463.

29. *Creation of tenancy by mortgage—Attornment—Devise to mortgagor—Distress—Rent reserved—Statute of Anne—Statute of Frauds—Tenancy at will—Locus standi of third parties.*

See No. 1, ante.

30. *Acquisitive prescription—Possession—Notice of prior title.*

See RAILWAYS, 152.

AND see LEASE.

LARCENY.

See CRIMINAL LAW.

LEASE.

1. ACCIDENTS BY FIRE, 1-4.
2. ASSIGNMENTS, 5-8.
3. CHATTEL LEASE, 9.
4. CONTRACT; COVENANTS, 10-16.
5. CROWN LANDS, 17, 18.
6. DETERMINATION, 19-22.
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8. EMPHYTEUSIS, 28, 29.
9. LEASE FOR LIVES, 30.
10. RENEWAL OF LEASE, 31.
11. SALE OF LEASED PROPERTY, 32-34.
12. SUB-LEASE, 35.

1. ACCIDENTS BY FIRE.

1. *Covenant by lessee — Reddendum — Destruction of leased premises—Accident by fire*—Arts. 1053, 1627, 1629 C. C.]—By notarial lease the lessees covenanted to return leased premises at the expiration of their lease "in as good order, state, &c., as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted." Lessor alleging destruction of the leased premises by fire which had been caused by negligence of lessees brought action for the cost of re-construction in good order and condition less the insurance. *Held*, affirming the judgment appealed from (31 L. C. Jur. 307; M. L. R. 3 Q. B. 325), Ritchie, C.J., and Taschereau, J., dissenting, that the lessees were not responsible for the loss, as the fire was accidental within the exception in the lease, and therefore arts. 1053, 1627 and 1629 C. C. were not applicable. *Evans v. Skelton*, xvi., 637.

2. *Dangerous material—Negligence — Fire*—Arts. 1054, 1627, 1629 C. C.]—Defendant was, on 7th April, 1873, in occupation of a varnish factory which he had leased from the plaintiff, when a fire originating in the factory consumed it as well as adjoining premises belonging to plaintiff, who brought action for damages occasioned by the fire, alleged to have taken place through negligence of defendant and his employees.—The Superior Court found that no fault could attach to defendant or his employees, and dismissed action.—The Queen's Bench (Ramsay and Tessier, J.J., dissenting) reversed this finding and awarded plaintiff damages and costs, holding the defendant liable under art 1054. *Held*, affirming the judgment appealed from, Henry, J., dissenting, 1. As to the part of the building leased to defendant, there was no doubt as to his responsibility, as he had failed to account for the fire according to arts. 1627, 1629 C. C.—2. As to the buildings of plaintiff in his own occupation the defendant might be considered as a trespasser, on account of gross negligence in the use of dangerous materials and neglect of the most simple precautions to guard against the accident. *Jamieson v. Steel*, Cass. Dig. (2 ed.) 465.

3. *Loss by fire — Cause of fire — Negligence — Civil responsibility — Legal presumption — Rebuttal of — Onus of proof—Hazardous occupation — Arts 1053, 1064, 1071, 1626, 1627, 1629 C. C.]*—To rebut the presumption created by art. 1629 C. C., it is not necessary for the lessee to prove the exact

or probable origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him, or to persons for whose acts he should be held responsible.—Judgment appealed from (Q. R. 5 Q. B. 58) affirmed, Strong, C. J., dissenting. *Murphy v. Labbé*, xxvii., 126.

4. *Loss by fire — Negligence — Legal presumption—Rebuttal of—Onus of proof—Construction of agreement — Covenant to return premises in good order—Art 1629 C. C.]*—A steam sawmill was totally destroyed by fire, during the term of the lease, whilst in the possession, and being occupied by the lessee. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as could be expected considering wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to shew that necessary and usual precautions had been taken for the safety of the premises, a night-watchman kept there making regular rounds, that buckets filled with water were kept ready, and force-pumps provided for use in the event of fire, and they submitted that, as the origin of the fire was mysterious and unknown, it should be assumed to have occurred through natural and fortuitous causes for which they were not responsible. It appeared, however, that the night-watchman had been absent from the part of the mill where the fire was first discovered for a much longer time than was necessary or usual for the making of his rounds, that during his absence the furnaces were left burning without superintendence, that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the fire was actually discovered, that on discovering the fire the watchman failed to make use of the water buckets to quench the incipient flames, but lost time in an attempt to raise additional steam pressure to start the force-pumps before giving the alarm. *Held*, affirming the judgment appealed from (Q. R. 7 Q. B. 9), that the lessees had not shewn any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by art. 1629 C. C. against the lessees had not been rebutted, and that the evidence shewed culpable negligence on the part of the lessees, which rendered them civilly responsible for the loss by fire of the leased premises. *Murphy v. Labbé* (27 Can. S. C. R. 126), approved and followed. *Klock v. Lindsay; Lindsay v. Klock*, xxviii., 453.

2. ASSIGNMENTS.

5. *Mortgage — Leasehold premises—Terms of mortgage — Assignment or sub-lease.]*—A lease of real estate for 21 years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease, proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said pre-

mises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be, and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was, "To have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof, and all renewals, &c." *Held*, reversing the judgment appealed from (23 Ont. App. R. 602), that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises, and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of 21 years. *Held*, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease. *Jameson v. London and Canadian Loan and Agency Co.*, xxvii., 435.

6. *Assignment of lease — Mortgage — Discharge — Abandonment of security.*] — The mortgagee of a lease may relieve himself from liability to the lessor on the assignment by way of a mortgage with the latter's consent, by releasing his debt and re-conveying the security. (26 Ont. App. R. 116 affirmed) *Jameson v. London and Canadian Loan and Agency Co.*, xxx., 14.

7. *Assignment by lessee—Covenant in lease —Forfeiture — Company—Shareholder—Personal liability.*]—A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months' rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company and while the lease was in force one of them, at a meeting of the directors moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done, the lessors executing the assignment as creditors assenting thereto. *Held*, reversing the judgment of the Court of Appeal (1 Ont. L. R. 172), that the lessors and the company were distinct legal persons and the individual interests of the former were not affected by the above action. *Salomon v. Salomon & Co.* ([1897] A. C. 22) followed. *Quære*, Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company or would it, on surrender of the original lease have bound the lessor and a purchaser from him for the fee? *Soper v. Littlejohn*, xxxi., 572.

See LANDLORD AND TENANT, 3.

8. *Transfer of lease—Emphyteusis—Alienation for rent—Bail à longues années—Droit mobilier—Cumulative demand—Incompatible pleadings — Réintégrande — Dénonciation de nouvel œuvre.*

See ACTION, 120.

3. CHATTEL LEASE.

9. *Lease of chattels — Property, real and personal—Immoveables by destination—Moveables incorporated with freehold — Severance from realty—Contract—Resolatory condition —Conditional sale — Hypothecary creditor—Unpaid vendor—Arts. 379, 2017, 2083, 2085, 2089 C. C.*

See CONTRACT, 66.

4. CONTRACT; COVENANTS.

10. *Hire of tug — Conditions — Repairs—Negligence — Compensation.*]—The company chartered the tug "Beaver" from K., by written contract, dated at Quebec, 22nd May, 1895, in the words following: "It is agreed between the undersigned that Mr. Kaine charters the tug Beaver for not less than one month from date, at forty-five dollars per day of twenty-four hours. If kept longer than a month the rate of forty dollars per day. Mr. Kaine to furnish tug, crew, provisions, oil, &c., and everything necessary, except coal and pilots above Montreal. The tug to leave here to-morrow morning's tide, the tug to be discharged in Quebec."—The company took possession of the tug; put her in charge of their pilot (who assumed the control, employment and navigation of the vessel), and used the tug for their purposes until 8th July, 1895, when, while still in their possession, the pilot took her, in the daytime, into waters at the foot of the Cornwall rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sunk. She was raised a few days afterwards, towed to port and placed in dock for repairs at Montreal. The orders were to make the necessary repairs to put the vessel in the same condition as she was immediately before the accident, and on 30th July, K. was notified that the repairs were completed, that the tug would be put out of dock the following day, and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased, and requested the company to join in a survey, which, however, they declined to do. The survey was made by a naval architect, who reported that, in addition to the repairs already made, it would cost \$2,494.90 to restore the vessel to the same condition as when leased to the company. On 1st August, K. took possession of the tug, under protest, and brought the action for the amount of this estimate, in addition to the rent accrued with fees for survey and protest. The company admitted the rent due, and tendered that portion of the claim into court. The Superior Court rendered judgment for the amount of the tender, dismissing the action as to the remainder of the claim, on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Courts of Review and Queen's Bench increased the verdict to the full sum claimed, \$4,909.90, by adding the amount of the surveyor's estimate and the fees.—On appeal, *Held*, that the contract between the parties was a contract of lease; that the taking of the vessel, in the daytime, into the waters where she struck was *prima facie* evidence of negligence on the part of the company, and that as the company did not adduce evidence sufficient to rebut the presumption

of fault existing against them, they were responsible, under the Civil Code of Lower Canada, for the damages caused to the vessel during the time it was controlled and used by them. *Held*, further, that the proper estimate of damages under the circumstances, is the cost of the repairs which should be assumed to be the measure of the depreciation in value occasioned by the accident, and that no substantial error arose from regarding the condition and value of the vessel at the commencement of the lease as that in which she ought to have been discharged.—*Girouard, J.*, dissented, and was of opinion that the Superior Court judgment should be restored. *Collins Bay Rafting Co. v. Kaine*, xxix., 247.

11. *Mining rights—License to work mines—Construction of deed—8 Anne c. 14, s. 1—Lien.*

See MINES AND MINERALS, 3.

12. *Attornment by mortgagor—Demise by mortgagee—Colourable process—Statute of Anne—Distress for rent—Statute of Frauds—Locus standi of third parties.*

See LANDLORD AND TENANT, 1.

13. *Lease for lives—Renewal—Insertion of new life—Evidence—Counterpart of lease—Custody—Duration of life—Presumption.*

See No. 31, *infra*.

14. *Lease for 11 months—Monthly or yearly tenancy—Overholding.*

See LANDLORD AND TENANT, 2.

15. *Transfer of lease—Alienation for rent—Emphyteusis Bail à rente—Bail à longues années—Droit mobilier—Cumulative demand—Incompatible pleadings—Réintégrande—Dénonciation de nouvel œuvre—Arts. 567, 572, 1593 C. C.—Arts. 176, 177 (b), 1064, 1066 C. P. Q.*

See ACTION, 120.

16. *Assignment by insolvent lessee—Forfeiture—Shareholder in company—Personal liability.*

See No. 7, *ante*.

5. CROWN LANDS.

17. *Dominion license to cut timber—Disputed territory—Implied covenant—Warranty of title—Quiet enjoyment.*

See CROWN, 92.

18. *Staking mineral claims—Placer mining—Hydraulic concessions—Annulment of prior lease—Volunteer plaintiff—Right of action—Status of adverse claimants—Trespass.*

See MINES AND MINERALS, 14.

AND see CROWN, Nos. 77-108.

6. DETERMINATION.

19. *Mines and minerals—Lease of mining areas—Rental agreement—Payment of rent—Forfeiture—R. S. N. S. (5 ser.) c. 7—52 Vict. c. 23 (N.S.)—By R. S. N. S. (5 ser.) c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of*

work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vict. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by s.s. (c), the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment, and "such advance payment shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act respecting payment of rental, and its refund in certain cases, and by s. 8 said s. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated 10th June, 1889, for twenty-one years from 21st May, 1889. On 1st June, 1891, a rental agreement under the amending Act was executed, under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On 22nd May, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on 9th June, 1894, and an action was afterwards taken by the Attorney-General, on relation of E. to set aside said license as having been illegally and improvidently granted. *Held*, affirming the judgment appealed from, that the phrase "nearest recurring anniversary of the date of the lease" in s.s. (c) of s. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on 10th June, no rent for 1894 was due on 22nd May of that year, at which date the lease was declared forfeited, and E.'s tender on 9th June was in time. *Attorney-General v. Sheraton* (28 N. S. Rep. 492) approved and followed. *Held*, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of formalities prescribed by the original Act, *Temple v. Attorney-General of Nova Scotia*, xxvii., 355.

20. *Mining rights—Covenants—Payment of rent—Quality and quantity of ore found—Right of lessee to determine lease.*

See MINES AND MINERALS, 4.

21. *Sub-tenant—Overholding—Notice to quit—Subsequent distress.*

See LANDLORD AND TENANT, 22.

22. *Lease for lives—Renewal—Insertion of new life—Duration of life—Recovery of leased premises.*

See No. 31, *infra*.

7. DISTURBANCE.

23. *Operation of telegraph system—Lessor and lessee—Arts. 1612, 1614, 1618 C. C.—Disturbance of lessee's use—Reduction of rent—Trespass—Trouble de droit.—By agreement with the Montreal Telegraph Co., the G. N. W. Telegraph Company undertook for 97*

years, from 1st July, 1881, to work, manage and operate the system of telegraph lines owned and operated by the Montreal Telegraph Co., including telegraph lines erected along the S. E. Railway and other railways, and to pay the Montreal Telegraph Co. quarterly during the arrangement a sum equal to a dividend at 8 per cent. upon the capital of the Montreal Telegraph Co. (\$2,000,000), with the further yearly sum of \$5,000 to meet office expenses.—The G. N. W. Telegraph Company brought action for troubles in their enjoyment of the system of telegraph lines by the C. P. Railway Company which had constructed and were operating lines of telegraph along the S. E. Railway and other railways in contravention of the agreements may by such railways with the Montreal Telegraph Co. The G. N. W. Telegraph Company claimed a reduction of rent and damages under the articles of the Code of Civil Procedure relating to lessors and lessees, and arts. 1612 *et seq.* C. C.—*Held*, affirming the judgment appealed from (M. L. R. 6 Q. B. 257), and adopting the reasons for judgment of Wurtel, J., in the Superior Court (M. L. R. 6 S. C. 94), that the alleged interference by the C. P. Railway Company was a mere trespass which did not constitute a *trouble de droit* and did not authorize an action for a reduction of rent under arts. 1616 and 1618 C. C. *Held*, also, *per* Strong, Fournier, Taschereau and Patterson, JJ., adopting the view of the merits taken by Dorion, C. J. (M. L. R. 6 Q. B. 258), that the G. N. W. Telegraph Company by the agreement having assumed all risk of diminished income in the working of the telegraph lines transferred to them and having entered into the agreement after the C. P. Railway Company had obtained authority from Parliament to establish telegraph lines for the transmission of messages for the public, the action should be dismissed. *Great North-Western Telegraph Co. v. Montreal Telegraph Co.*, xx., 170.

24. *Conditions of lease — Construction of deed—Eviction.*—Where a written lease of lands provides for the payment of indemnity to the lessees in case they should be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned. *The Queen v. Poirier*, xxx., 36.

25. *Pew-holder's rights — Disturbance in possession — Action for tort — Measure of damages.*

See ACTION, 41.

26. *Construction of deed — Entry to repair — Intent to deprive tenant of benefit — Suspension of rent.*

See LANDLORD AND TENANT, 12.

27. *Covenant for quiet enjoyment—Sale of premises—Determination of lease—Misrepresentation.*

See No. 33, *infra*.

8. EMPHYTEUSIS.

28. *Emphyteusis — Alienation — Petitory action—Damages—Right of action.*—The

plaintiff had leased lands for 999 years and brought a petitory action to recover them from a third party in adverse occupation. A demand was also made for damages alleged to have been caused to certain of the leased lands by the defendant. On question raised as to the plaintiffs' right of action to recover the lands and for the damages, it was *Held*, affirming the judgment appealed from, that the lease amounted to an emphyteutic lease assigning the *domaine utile*, reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of bringing the action au *pétitoire* which lies in the party having the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

29. *Transfer of lease—Emphyteusis—Alienation for rent—Bail à longues années—Droit mobilier—Cumulative demand—Incompatible pleadings—Réintégrande — Dénonciation de nouvel œuvre.*—An instrument by which lands were leased for sixteen years at an annual rental, subject to renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. The leased premises were transferred by the lessee by deed of sale and, on disturbance, an action with both petitory and possessory conclusions was brought by the transferee against an alleged trespasser, who pleaded title and possession in himself without taking objection to its cumulative form. *Held*, affirming the judgment appealed from, that under the circumstances the action should be treated as petitory only; that the contract under the instrument described was neither emphyteusis nor a *bail à rente* (lease in perpetuity), but merely an ordinary contract of lease which did not convey a title to the land nor real rights sufficient to confer upon the transferee the right of instituting a petitory action in his own name. *Held*, also, that the transfer by the deed of sale of such leased premises would not support the petitory action, as the lessee could not convey proprietary rights which he did not himself possess. *Price v. LeBlond*, xxx., 539.

9. LEASE FOR LIVES.

30. *Lease for lives—Renewal—Insertion of new life—Evidence—Counterpart of lease—Custody—Duration of life—Presumption.*

See No. 31, *infra*.

10. RENEWAL OF LEASE.

31. *Lease for lives—Renewal—Insertion of new life—Evidence of insertion—Counterpart of lease—Custody of—Duration of life—Presumption.*—In 1805, F. demised premises to C., to hold for the lives of the lessee, his brother and his wife, "and renewable forever." The lessee covenanted that on the fall of any of said lives he would, within twelve months, insert a new life and pay a renewal fine, otherwise the right of renewal of the life fallen should be forfeited, and if any question should arise it would be incumbent on the one

interested in the premises to prove the person on whose death the term was made terminable to be alive, or in default such person would be presumed to be dead. In 1884 a purchaser from the assignees of the reversion entered into possession, and in 1890 an action was brought by persons claiming through the lessee to recover possession, and for an account of *mesne* profits. On the trial a counterpart of the lease, found among the papers of the devisee of the lessor, was received in evidence, upon which was an indorsement dated in 1852, and signed by such devisee, by which a new life was inserted in place of one of the original lives, and receipt of the renewal fine was acknowledged. *Held*, affirming the decision appealed from (26 N. S. Rep. 410), that the words "renewable forever," in the habendum, taken in conjunction with the lessee's covenant to pay a fine for inserting a new life in place of any that should fall, conferred a right to renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew; that the indorsement was an operative instrument, though found in possession of the owner of the reversion, or at all events it was an admission by their predecessor in title binding on defendants and entitled plaintiffs to a renewal for a new life so inserted, but the right to further renewal was gone, exact compliance with the requirements of the lease in the payment of the fines being essential and the evidence having shewn that the original lessee was dead, and the proper assumption being that his brother, the third life, who was a married man in 1805, was also dead in 1884, even if the lease itself had not provided that death would be presumed in default of proof to the contrary. *Held, per Gwynne, J.*, dissenting, that the term granted was for the joint lives of the three persons named, and ceased upon the falling of any one life without renewal as provided; and the fines not having been paid on the death of the lessee and his brother, there was a forfeiture which entitled defendants to enter.—The person in possession pleaded that he was a purchaser for value without notice and entitled to the benefit of the Registry Act, R. S. N. S. (5 ser.) c. 84. *Held*, that the memorandum indorsed on the lease was not a deed within s. 18 of the Act, nor a lease within s. 25; that if a speculative purchaser having just such an estate as his conveyance gave him, the person in possession would not be within the protection of the Act; and that there was sufficient evidence of notice.—*Seemle*, that s. 25 of the Nova Scotia Act, R. S. N. S. (5 ser.) c. 84 applies only to leases for years. *Clinch v. Pernette*, xxiv., 385.

11. SALE OF LEASED PROPERTY.

32. *Vendor and purchaser—Sale of leased premises—Termination of lease—Damages—Art. 1663 C. C.]—The Queen's Bench (Q. R. 7 Q. B. 293)*, reversed the decision of the trial court, and held that the purchaser of real estate to be delivered forthwith could not require the vendor to eject the tenants, the existence of leases being no impediment to immediate delivery of the premises sold, and every sale being subject to existing leases up to the time of the expiration of the current term, and further, that if the purchaser refused to carry out the agreement for sale on the ground of the existence of such leases,

he could not have the sale set aside (*rescissio*), with damages against the vendor.—On appeal, the Supreme Court of Canada affirmed the judgment appealed from for the reasons stated in the court below and dismissed the appeal with costs. *Alley v. Canada Life Assur. Co.*, xxviii., 608.

33. *Provision for termination — Sale of premises — Parol agreement — Misrepresentation — Quiet enjoyment.]—A lease of premises used as a factory contained this provision "Provided that the event of the lessor disposing of the factory the lessees will vacate the premises, if necessary, on six months' notice." Held, reversing the judgment appealed from (26 O. R. 78), and that at the trial (29 O. R. 75), that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate. Held, further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment. *Lumbers v. Gold Medal Furniture Mfg. Co.*, xxx., 55.*

34. *Rights of lessee — Mortgage — Foreclosure — Sale of mortgaged premises.*

See MORTGAGE, 27.

12. SUB-LEASE.

35. *Mortgage of leased premises — Terms of deed — Assignment or sub-lease.*

See No. 5, ante.

LEGACY.

See WILL.

LEGAL MAXIMS.

1. *Res magis valeat quam pereat — Application — Verba fortius accipiuntur contra proferentem — Patent ambiguity.]—The intention of the parties to a deed is paramount, and must govern regardless of consequences.—Res magis valeat quam pereat is only a rule to aid in arriving at the intention, and does not authorize the court to override it.—Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favour of either party. *Barthel v. Scotten*, xxiv., 367.*

2. *"Locus regit actum" — Lex domicilii — Lex rei sitæ — Holograph will executed abroad — Form of will.]—In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the City of Quebec, whilst temporarily in the City of New York, made the following will in accordance with the law relating to holograph wills in Lower Canada:*

"I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for protestant charities in Quebec and Carluké, say the Protestant Hospital Home, French-Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000, which he will send to Miss Mary Frame, Overton Farm." A. R. and others, heirs-at-law of the testator, brought action to have the will declared invalid. *Held*, Taschereau, J., dissenting, that the will was valid. *Held*, further Fournier and Taschereau JJ., dissenting, that the rule *locus regit actum* was not in the Province of Quebec, before the Code, nor since under the Code itself (art. 7), imperative, but permissive only. *Held*, also, Taschereau, J., dissenting, that the will was valid even if the rule *locus regit actum* did apply, because it sufficiently appeared from the evidence that by the law of the State of New York the will would be considered good as to moveables wherever situated, having been executed according to the law of the testator's domicile, and good as to immoveables in the Province of Quebec, having been executed according to the law of the situation of those immoveables. *Ross v. Ross*, xxv., 307.

3. "*The King can do no wrong.*"
See RAILWAYS, 100.

4. "*Falsa demonstratio non nocet.*"
See INSURANCE, FIRE, 77.

5. "*Sic utere tuo ut alieno ne lædas.*"
See NEGLIGENCE, 3.

6. "*Partus sequitur ventrem.*"
See CHATTEL MORTGAGE, 16.

7. "*Volenti non fit injuria*" — Reasonable care — Breach of duty — Risk voluntarily incurred — Negligence.
See NEGLIGENCE, 5 and 120.

8. *Omnia præsumuntur contra spoliatores* — Evidence — Presumptions.
See EVIDENCE, 165.

9. *De minimis non curat lex.*
See CANADA TEMPERANCE ACT, 6.

10. *Verba fortius accipiuntur contra proferentem.*
See MUNICIPAL CORPORATION, 138.

11. *Sic utere tuo ut alienum non lædas.*
See NUISANCE, 3.

12. *Qui jure suo utitur neminem lædit.*
See NUISANCE, 3.

13. *In jure non remota causa sed proxima spectatur.*
See CARRIERS, 16.

14. *Cujus dare ejus est disponere.*
See COMPOSITION AND DISCHARGE.

15. *Volenti non fit injuria.*
See MASTER AND SERVANT, 12.

16. *Le rescindant et le rescissoire sont accumulables.*
See OPPOSITION, 11.
s. c. d.—25

17. *Usurpateur n'acquiert que pied à pied.*
See ARBITRATIONS, 18.

18. *Verba chartarum fortius accipiuntur contra proferentem.*
See INSURANCE, ACCIDENT, 4.

19. *Nemo plus juris transferre protest quam ipse habet.*
See INSURANCE, FIRE, 33.

20. "*Sic utere tuo ut alienum non lædas.*"
See IRRIGATION.

21. "*Ignorantia juris non excusat.*"
See TITLE TO LAND, 36.

22. *Volenti non fit injuria.*
See NEGLIGENCE, 47.

23. "*Qui sentit commodum sentire debet et onus.*"
See DRAINAGE, 7.

24. "*Respondeat superior.*"
See PRINCIPAL AND AGENT, 32.

LEGAL TENDER.

Controverted election — Preliminary objections — Deposit of security R. S. C. c. 9, s. 9 (f).]—The preliminary objection was that the security and deposit receipt were illegal and void, the receipt being:—"That the security required by law had been given on behalf of the petitioners by a sum of \$1,000 in a Dominion note, to wit, a bank note for \$1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was in fact a Dominion note of \$1,000. *Held*, affirming the judgment appealed from, that the deposit and receipt complied sufficiently with s. 9 (f) of the Dominion Controverted Elections Act. *Argenteuil Election Case, Christie v. Morrison*, xx., 194.

LEGISLATION.

1. *Revenue* — Customs duties — Imported goods — Importation into Canada — Tariff Act — Construction — Retrospective legislation — R. S. C. c. 32—57 & 58 Vict. c. 33 (D.)—58 & 59 Vict. c. 23 (D.)]—By 57 & 58 Vict. c. 33, s. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada." *Held*, reversing the judgment appealed from (5 Ex. C. R. 177), King and Girouard, JJ., dissenting, that the importation as defined by s. 150 of the Customs Act (R. S. C. c. 32), is not complete until the vessel containing the goods arrives at the port at which they are to be landed.—Section 4 of the Tariff Act, 1895 (58 & 59 Vict. c. 23), provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July. *Held*, reversing 5 Ex. C. R. 177, that goods imported into Canada on May 4th, 1895, were subject to duty under said Act. *The Queen v. Canada Sugar Refining Co.*, xxvii., 395.

[Affirmed by Privy Council (1898) A. C. 735.]

2. *Constitutional law — British North America Act, ss. 65, 92—Act respecting the executive administration of the laws of the province — Provincial penal legislation.*—The local legislatures have the right and power to impose punishments by fine and imprisonment as sanctions for laws which they have power to enact. *B. N. A. Act, s. 92, s. s. 15. Attorney-General of Canada v. Attorney-General of Ontario, xxiii., 458.*

3. *Power to repeal previous Acts — Rights in relation to education — Manitoba Constitutional Act — Appeal from Act or decision.*

See CONSTITUTIONAL LAW, 69.

4. *Powers — Sale of liquor — Prohibition —53 Vict. c. 56, s. 18 (O.)—54 Vict. c. 46 (O.)—Local option.*

See CONSTITUTIONAL LAW, 45.

5. *Powers — Prohibitory laws — Sale of liquor — Local option — Canada Temperance Act.*

See CONSTITUTIONAL LAW, 46.

6. *Constitutional law — Powers of executive councillors — "Letter of credit"—Ratification by Legislature — Obligations binding on the province — Discretion of Government as to expenditures — Petition of right — Negotiable instrument — "Bills of Exchange Act, 1890"—"The Bank Act," R. S. C. c. 120.*

See CONSTITUTIONAL LAW, 26.

7. *Constitutional law — Marital rights — Married woman — Separate estate — Jurisdiction of North-West Territories Legislature — Statute, interpretation of — 40 Vict. c. 7, s. 3, and amendments — R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.*

See CONSTITUTIONAL LAW, 76.

8. *Canadian waters — Property in beds — Public harbours — Erections in navigable waters — Interference with navigation — Rights of fishing — Power to grant — Riparian proprietors — Great lakes and navigable rivers—Operation of Magna Charta — Provincial legislation — R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. arts. 1375 to 1378.*

See CONSTITUTIONAL LAW, 5.

9. *Péremption d'instance — Retrospective legislation — Arts. 1 & 279 C. P. Q.—Art. 454 C. C. P.*

See LIMITATION OF ACTIONS, 13.

10. *Government of Yukon Territory—Legislative jurisdiction of Governor-in-Council — Special appellate tribunal.*

See CONSTITUTIONAL LAW, 79.

LEGISLATURES, PRIVILEGES OF.

See BREACH OF PRIVILEGE.

LESSOR AND LESSEE.

1. *Crown lands — Arbitration and award — Use and occupation—Action for possession*

— *Condition precedent.*] — The appeal was from a decision of the Court of Appeal for Ontario affirming the judgment of the Queen's Bench Division, which had dismissed the appellant's action. The Algoma Trading Company, one of the appellants and plaintiffs, leased certain Crown lands to the respondent Shea, the lease containing a covenant by Shea not to remove gravel or sand from the premises. Shea afterwards ascertained that no patent for the land had been issued to the company, and applied to the Crown Lands Department for a patent thereof to himself, and also sold gravel off the premises to the Canadian Pacific Railway Company. The Algoma Trading Company then pressed the claim they had previously made to the department and the Commissioner of Crown Lands ruled that it should issue to them on payment to Shea for his improvements. Shea refusing to agree to any terms of compensation the company served him with a notice of arbitration, and an award was eventually made which was not taken up as Shea refused to pay his share of the arbitrators' fees. The Algoma Trading Company having assigned their patent to the plaintiff Boulton, an action was brought by him and the company against Shea claiming arrears of rent, payment for use and occupation, damages for breach of the covenant not to remove gravel and delivery of possession.—The Supreme Court, Gwynne, J., dissenting, affirmed the decision of the Court of Appeal that plaintiffs were not in a position to bring the action until Shea had been paid for his improvements. *Boulton v. Shea, xxii., 742.*

2. *Water lots—Filling in—"Buildings and erections."—"Improvements."*] — The lessor of a water lot who had made crib-work thereon filled it in with earth to the level of adjoining dry lands, and thereby made the property available for the construction of sheds and warehouses, claimed compensation for the work so done under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term. *Held*, affirming the judgment of the Court of Appeal, that the crib-work and earth-filling were not "buildings and erections" within the meaning of the proviso. *Adamson v. Rogers, xxvi., 159.*

3. *Emphyteutic lease — Domaine direct — Domaine utile — Right of action.*]—The lessor brought action to recover leased lands from a third party in occupation and also for damages. *Held*, that he had a right to the petitory conclusions as holder of the legal estate although he could not recover the damages the right of action for which accrued only to the lessees as owners of the *domaine utile* (beneficial estate). *Semble*, that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. *Massachusetts Valley Ry. Co. v. Reed, xxxiii., 457.*

LETTING AND HIRING.

See LANDLORD AND TENANT—LEASE—LESSOR AND LESSEE.

LEX DOMICILII.

Will, form of — Holograph will executed abroad — Quebec Civil Code, art. 7—Locus regit actum — Lex rei sitæ.

See WILL, 46.

LEX FORI.

1. *Contract — Lex loci — Lex fori — Fire insurance — Principal and agent — Payment of premium — Interim receipt — Repudiation of acts of sub-agent.*

See INSURANCE, FIRE, 1.

2. *Customs duties — Lex loci — Interest in duties improperly levied — Mistake of law — Repetition — Presumption of good faith — Arts. 1047, 1049 C. C.*

See CUSTOMS DUTIES, 5.

LEX LOCI.

1. *Contract — Lex loci — Lex fori — Fire insurance — Principal and agent — Interim receipt—Repudiation of acts of sub-agent.*

See INSURANCE, FIRE, 1.

2. *Customs duties — Lex fori — Interest on duties improperly levied — Mistake of law —Repetition — Presumption of good faith— Arts. 1047, 1049 C. C.*

See CUSTOMS DUTIES, 5.

LEX REI SITAE.

1. *Action — Jurisdiction to entertain — Mortgage of foreign lands — Action to set aside — Secret trust.]—A Canadian court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought. *Burns v. Davidson* (21 O. R. 547) approved and followed.—Judgment appealed from (23 Ont. App. R. 9) reversed. *Purdum v. Pavey & Co.*, xxvi., 412.*

2. *Form of will — Holograph will executed abroad—Art. 7 C. C. locus regit actum—Lex domicilii.*

See WILL, 46.

LIBEL.

1. *Telegraph message — Liability of company — Special damages — Evidence — Excessive damages — New trial.]—The declaration alleged: 1. That plaintiffs were wholesale and retail merchants at Halifax. That the company wrongfully, falsely and maliciously, by their telegraph lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated and published the false and defamatory message*

following:—"John Silver & Co., wholesale clothiers, of Grenville street, have failed; liabilities heavy." 2. That same message was caused also to be published in other parts of the Dominion. 3. That the company agreed with the proprietor or publisher of the St. John "Daily Telegraph" newspaper, and entered into an arrangement with him, whereby the company was to collect and transmit, by their telegraph lines, news dispatches to said newspaper from time to time; that the publisher should pay for all such messages, and publish them in his newspaper, and that in pursuance of said agreement the company wrongfully, maliciously, and by means of said telegraph, transmitted, sent and published from their office in Halifax to their office in St. John and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and their credit and business standing and reputation were thereby greatly damaged. It was proved that the telegram published in the morning paper was corrected in the evening edition; that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original dispatch was not produced. The only evidence as to damage was of two witnesses, that by reason of the publication they ceased to do business with the plaintiffs as they had previously been accustomed to do. This evidence was objected to, but was received. The dealings of these witnesses with plaintiffs consisted in selling their exchange and sometimes discounting their notes. A motion for non-suit was refused, and the jury rendered a verdict for the plaintiffs with \$7,000 damages. *Held*, reversing the judgment appealed from (2 Russ. & Geld. 17), *Taschereau and Gwynne, J.J.*, dissenting. 1. That the company was responsible for the publication of the libel in question. 2. That the damages were excessive, and therefore a new trial ought to be granted. *Ritchie, C.J.*, doubting, and *Henry, J.*, dissenting.—*Per Taschereau and Gwynne, J.J.*, dissenting. Assuming the agreement in question to be one within the scope of the purposes for which the company was incorporated, and that Snyder had sufficient authority to enter into it on behalf of the company, the evidence established that the company collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the proprietor and publisher of said news, for which the damages were awarded. *Held*, also, *per Strong, Taschereau and Gwynne, J.J.* No special damages having been alleged in the declaration, the evidence as to such damages having been objected to, was inadmissible, and therefore a new trial should be granted. *Dominion Telegraph Co. v. Silver*, x., 238.

2. *Newspaper publication — Innuendoes — Mis-trial — Misdirection — Excessive damages — New trial.]—Action for libel in the following article published in defendant's paper:—"The McNamee-Mitchell Suit. In the sworn evidence of Mr. McNamee, defendant in the suit of *McKenna v. McNamee*, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership in the dry dock contract out in British Columbia, one of whom was the Premier of the province.' The*

Premier of the province at the time referred to was Hon. Mr. W., now a judge of the Supreme Court. Mr. W.'s career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McN. must be labouring under a mistake. Had the statement been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly, nor allowed to pass unheeded."—The innuendoes alleged were:—1. That W. corruptly entered into partnership with McN. while holding offices of public trust, and thereby unlawfully acquired large sums of public money. 2. That he did so under the cloak of his public position, and by fraudulently pretending that he acted in the interest of the Government. 3. That he committed criminal offences punishable by law. 4. That he continued to hold his interest in the contract after his elevation to the bench. *Held*, that the article was susceptible of the first of the above innuendoes, but not of the others which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial.—The jury found for plaintiff, with \$2,500 damages. *Held*, *per* Strong, Fournier, Taschereau and Gwynne JJ., that the case was improperly left to the jury but the only prejudice sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to \$500. *Held*, *per* Ritchie, C.J., that there had been a mis-trial, and the consent of both parties to such reduction was necessary. *Higgins v. Walkem*, xvii., 225.

3. *Confidential communication — False information — Negligence — Damages — Arts. 1053, 1054, 1727, C. C.*—Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. (M. L. R. 5 Q. B. 42 reversed.) *Cossette v. Dun*, xviii., 222.

4. *Malice — Negligence — Manitoba Act relating to newspapers — Deposit of declaration — Publication — Joint stock company — Affidavit — Affirmation — Jury disagreeing — Verdict — Pleading — Special damages — Loss of custom — 50 Vict. c. 22 and 23 (Man.).*—By 50 Vict. c. 22, s. 13 (Man.), "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 Vict. c. 23, "An Act respecting newspapers and other like publications." By s. 1 of the latter Act no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the Act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published; by s. 2 such affidavit or affirmation shall set forth the real and true names, &c., of the printer or publisher of the newspaper and of all the proprietors; by s. 6 if the number of publishers does not exceed 4 the affidavit or affirmation shall be made by all, and if they exceed 4 it shall be

made by 4 of them; and s. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking the affidavits to be used in the Court of Queen's Bench. *Held*, 1. That 50 Vict. c. 23 contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper. —2. That s. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne, J., dissenting. —3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director. —4. That in every proceeding under s. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples. —5. That if the affidavit or affirmation purports to have been taken before a commissioner his authority will be presumed until the contrary is shewn.—By s. 11 of the Libel Act, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed. *Held*, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand. *Held*, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section. —*Per* Strong, J. Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given, or otherwise evidence of the special damage is inadmissible.—Judgment appealed from (6 Man. L. R. 578) affirmed. *Ashdown v. Manitoba "Free Press" Co.*, xx., 43.

5. *Publication in newspaper — Defamatory plea—Incidental demand — Excessive damages — Reduction of verdict—New trial.*—Damages were assessed by a jury at \$6,000 for a newspaper libel and \$4,000 additional on a further libel contained in a defamatory plea. *Held*, on appeal from the Court of Queen's Bench (M. L. R. 4 Q. B. 84), that the damages were excessive; that they should be reduced to a total of \$6,000, and in the event of plaintiff's refusal to accept a reduced verdict for that amount a new trial should be allowed. *Mail Printing Co. v. Laflamme*, Cass. Dig. (2 ed.) 493.

6. *Malice—Libellous resolution — Summary dismissal of municipal official.*—A resolution by which a municipal council summarily dismissed an official without any previous notice recited that he had committed a serious fault by making unfounded charges against his assistant; that he was charged with negligence towards his committee; that he without cause, refused to recognize his assistant, and, by his conduct tended to render the administration of his department inefficient. No malicious motive was shewn to have actuated the council in passing the resolution. —*Held*, that there was nothing in the resolution of a nature to injure the official's character or reputation.—Judgment appealed from (Q. R. 6 Q. B. 177) affirmed. *Davis v. City of Montreal*, xxvii., 539.

7. *Privileged communication — Malice — Charge to jury—Evidence.*—On the trial of

an action claiming damages for a libel alleged to be contained in a privileged communication the judge charged the jury as to privilege and added "if the defendant made the communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him." *Held*, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him.—One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact. *Held*, that as to prove malice the writer's knowledge of the falsity of the fact was the material point the sense in which he may have used the words was the governing consideration.—The judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff.—Judgment appealed from (32 N. S. Rep. 129) affirmed, Gwynne and Sedgewick, JJ., dissenting. *Green v. Miller*, xxxi., 177.

8. *Libel—Privilege—Proof of malice—Admissibility of evidence—Misdirection—New trial.*—G., local manager for Nova Scotia of the Confederation Life Association, of which M. had been a local agent, wrote to Mrs. Freeman, a policy-holder, the following letter: "I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which, up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the company. The receipt for your premium fell due May 30th, days of grace June 30th. If you have made settlement of the premium with Mr. Miller your policy will, of course, be maintained in force, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so I am prompted to write you this letter and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy?" In an action for libel it was shewn that he had not been dismissed from the agency but wanted larger commissions in continuing, which were refused, and that he was not a defaulter but was dilatory in making his returns. On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter

as imputing to M. a wrongful retention of money. *Held*, that such evidence was improperly received and there was a miscarriage of justice by its admission.—The judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true it is malicious and his protection is taken away." *Held*, that this was misdirection, that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant honestly believed them to be true, so that it was misdirection on a vital point.—The majority of the court were of opinion, Girouard and Davies, JJ., *contra*, that as defendant had asked for a new trial only in the court below this court could not order judgment to be entered for him and a new trial was granted.—Judgment of the Supreme Court of Nova Scotia (35 N. S. Rep. 117) reversed. *Green v. Miller*, xxxiii., 193.

9. *Malicious prosecution—Letispendency—Interruption of prescription—Arts. 2262, 2267 C. C.*

See LIMITATION OF ACTIONS, 6.

10. *Newspaper article—Fair comment—Public affairs—Justification—Pleading—Rejection of evidence—Verdict.*

See NEW TRIAL, 33.

11. *Slander—Privileged statements—Public interest—Charging corruption against political candidate—Justification—Challenge to sue—Costs.*

See COSTS, 47.

LICENSES.

1. *Constitutional law—Powers of provincial legislatures—Direct taxation—Manufacturing and trading licenses—Distribution of taxes—Uniformity of taxation—55 & 56 Vict. c. 10 and 56 Vict. c. 15 (Que.)—B. N. A. Act, 1867.*—The provisions of 55 & 56 Vict. c. 10 (Que.), as amended by 56 Vict. c. 15, do not involve a regulation of trade and commerce, and the license fee thereby imposed is a direct tax and *intra vires* of the legislature; the license required to be taken out by the statute is merely an incident to the collection of the tax and does not alter its character.—Where a tax has been imposed by competent legislative authority, the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the courts in declaring it unconstitutional. *Bank of Toronto v. Lambe* (12 App. Cas. 575) followed. *Attorney-General v. The Queen Ins. Co.* (3 App. Cas. 1090) distinguished.—Judgment appealed from (Q. R. 5 S. C. 355) affirmed. *Fortier v. Lambe*, xxv., 422.

2. *License to sell lands—Nova Scotia Probate Act—R. S. N. S. (5 ser.) c. 100; 51 Vict. (N.S.) c. 26—Executors and administrators—Estoppel—Res judicata.*—An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment

creditors of the devisees moved to set aside the license, but failed on their motion, and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon. *Held*, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors, and they were precluded thereby from taking collateral proceedings to charge the lands affected upon grounds invoked or which might have been invoked upon the motion. *Held*, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action. (27 N. S. Rep. 384 affirmed.) *Clark v. Phinney*, xxv., 633.

3. *Mining law — Royalties — Dominion Lands Act — Publication of regulations — Renewal of license — Payment of royalties — Voluntary payment — R. S. C. c. 54, ss. 90, 91.*—The "exclusive right" given by a mining license issued under the Dominion Lands Act, is exclusive only against quartz or hydraulic licenses or owners of surface rights and not against the Crown. Taschereau and Sedgewick, J.J., dissenting.—The provision in s. 91 of the Dominion Lands Act that regulations made thereunder shall have effect only after publication for four successive weeks in the *Canada Gazette* means that the regulations do not come into force on publication in the last of the four successive issues of the *Gazette*, but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of 4th September, they were not in force until the 11th and did not affect a license granted on 9th September.—One of the regulations of 1889 was that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year." *Held*, per C. J. and Girouard and Davies, J.J., reversing the judgment of the Exchequer Court (7 Ex. C. R. 414), Sedgewick, J., *contra*, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only, but he did so subject to the terms of any regulations made since such grant was issued.—The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was granted in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.—Regulations in force when a license issued were shortly after cancelled by new regulations imposing a smaller royalty. *Held*, that the new regulations were substituted for the others and applied to said license. *The King v. Chappelle; The King v. Carmack; The King v. Tweed*, xxxii., 586.

The Privy Council granted leave for appeal and cross-appeal on 4th March, 1903. See *Can. Gaz.* vol. xl., p. 569.

4. *Tax on traders—Residents and non-residents—Discrimination—Ultra vires—33 Vict. c. 4 (N.B.)*

See MUNICIPAL CORPORATION, 1.

5. *Fishing permit—Regulation of fisheries—Navigable streams—Riparian owners—31 Vict. c. 60 (D.)*

See FISHERIES, 2.

6. *Cutting timber—Grant of lands subject to license.*

See TITLE TO LAND, 128.

7. *To cut timber—Rights of licensees—Dominion Lands Act, 1879.*

See CROWN, 85.

8. *Market by-law — Prohibitory fees—Restraint of trade—Legislative jurisdiction.*

See CONSTITUTIONAL LAW, 54.

9. *License to street railway car—Payment for horse car — By-law — Tax on working horses.*

See ASSESSMENT AND TAXES, 12.

10. *License to cut timber—Disputed territory—Dominion license — Orders-in-council—Warranty of title—Breach of contract.*

See CROWN, 92.

11. *Sale of liquor—Charter of city—Cumulative taxes—Special tax—Validity of by-law.*

See MUNICIPAL CORPORATION, 4.

12. *License to enter lands — Trespass — Damages — Easement — Equitable interest—Municipal by-law—Notice.*

See MUNICIPAL CORPORATION, 89.

13. *Constitutional law—Municipal corporation—Powers of legislature—License—Monopoly—Highways and ferries—Tolls—Ferry—Disturbance of licensee — Club associations, companies and partnerships—North-West Territories Act, R. S. C. c. 50, ss. 15 and 24—B. N. A. Act, s. 92, s.-ss. 8, 10 and 15—Rev. Ord. N. W. T. (1888) c. 28—N. W. Ter. Ord. No. 7 of 1891-92, s. 4.*

See MUNICIPAL CORPORATION, 170.

14. *Sale of drugs — "Quebec Pharmacy Act"—Suit for joint penalties.*

See STATUTE, 36.

15. *Sale of Crown lands—Timber licenses—Suspensive condition — Location tickets—Renewal of licenses.*

See CROWN, 95.

AND see CROWN LANDS — LIQUOR LAWS—MINES AND MINERALS—MUNICIPAL CORPORATIONS—TIMBER LIMITS.

LIEN.

1. *Workman's lien for cost of labour and materials—Action of detainue.*—W. left with C. a chronometer for repairs. C., after taking it to pieces, found detent spring much rusted, and sent it to Boston to have it made right. W. offered C. \$25.50 for his work, but C. said he would not deliver the chronometer until full charges, \$47, were paid. W. thereupon sued C. to recover possession and use of his chronometer. The evidence as to the contract was conflicting, and the trial judge charged the jury, as a matter of law, that even if defendant's version were correct as to the orders given him by plaintiff in reference

to putting the instrument in order, plaintiff was entitled to recover, because such order or instructions would give no authority to send the instrument to a foreign country to have any portion of the work done; and that, if it was so sent, no lien would exist in defendant's favour of the value of the work without special instructions or plaintiff's consent; that no such order or consent was shown in the evidence, and that consequently no lien existed. The jury, however, found a verdict for defendant, stating that they had adopted the defendant's statement as to the authority and instructions he had received from the plaintiff in regard to the instrument when it was left with the defendant. A rule for a new trial was discharged on application to the Supreme Court of Nova Scotia. *Held*, affirming the judgment appealed from (2 R. & C. 47), that the rule nisi for a new trial was properly discharged, and that as no fault was found with the work done and the amount demanded was not exorbitant, the respondent had a lien until his charges were paid. *Webber v. Cogswell*, ii, 15.

2. *Vendor's lien—Sale of land—Notice.*—W. S. agreed to transfer his timber limits to W. A. S. in case the latter should, within two years, pay off a mortgage to R. and other liabilities, and in case W. S. was obliged to pay any of such liabilities he was at liberty to sell such portion of said limits as would recoup him. At the same time W. S. wrote to R., authorizing him to transfer to W. A. S. said lands which he held as security on payment of his claim. R. assigned his claim and the limits to B. who, by agreement with W. A. S. and the executors of W. S. continued to carry on the lumber business formerly owned by W. S. Certain of the liabilities of W. S. not having been paid his estate claimed a vendor's lien on such limits, and relied on the letter to R., and on notice to an attorney who prepared the agreement with B. to establish notice of lien in B.—*Held*, affirming the judgment appealed from (5 O. R. 1), that even if such lien existed B. could not be said to be affected with notice of it. *Scott v. Benedict*, xiv., 735.

3. *Materials for railway construction and operation—Receiver in possession—Priority—43 & 44 Vict. c. 49 (Que.)—44 & 45 Vict. c. 43—Privileged claim—Unpaid vendor—Immoveables by destination—Arts. 1973, 1996, 1998, 2009, 2017 C. C.—Current earnings—Current expenses.*—In virtue of a trust conveyance granting a first mortgage executed under 43 & 44 Vict. c. 49, and 44 & 45 Vict. c. 43 (Que.), the trustees took possession of a railway. In actions against the trustees in possession, by appellants for the price of cars and rolling stock used for operating the road, and for work done, and materials delivered to the company after the trust deed, but before trustees took possession. *Held*, 1, affirming the judgments appealed from (M. L. R. 6 Q. B. 77, 91), that the trustees were not liable. 2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when moveables become immoveable by destination, as was the result with regard to the cars and rolling stock in this case, and the immoveable to which the moveables are attached is in the possession of a third party or is hypothecated. 3. But even considered as moveables such cars and rolling stock became affected and charged

by virtue of the statute and mortgage made thereunder as security to the bondholders, with priority over all other creditors, including the privileged unpaid vendors. — *Per* Gwynne, J., the appellants might be entitled to an equitable decree, framed with due regard to other necessary appropriations of income in accordance with the provision of the trust indenture, authorizing payment by the trustees "of all legal claims arising from the operation of the railway including damages caused by accidents and all other charges," but such a decree could not be made in the present action.—*Per* Strong, J. *Quære*, Whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses should be adopted by courts in this country? *Wallbridge v. Farwell; Ontario Car and Foundry Co. v. Farwell*, xviii, 1.

4. *Advances to get out timber—Priority—Account.*—Defendant (B.) and plaintiffs (S. & Co.) entered into a written agreement with J. G., a lumberer then manufacturing, under a contract to whom B. had already made advances of nearly \$4,000 for that purpose, and was to complete his advance to \$4,000; and to enable G. to go on S. & Co. undertook to advance him, on his own drafts, drawn on B., \$7,000, "or so much as with the \$4,000 would put the timber on track of railway free of all claims." B. was then to furnish money to convey the timber so got out to Quebec; S. & Co. to have a first lien for their advances, commission and interest. Subject to this lien, B. was to have the sale of the timber and to repay himself out of the proceeds, and the balance, if any, was to be paid over to McC. The declaration set forth 1. that there was a balance of \$8,000 due upon the whole of their advances, and that for that amount S. & Co. had a right to look to B.; 2. that B. had appropriated to his own use timber of the value of \$8,000, upon which S. & Co. under the agreement, had a first lien for \$8,000, and that B. was bound to pay S. & Co. \$8,000, of which they had been so deprived.—At the trial Meredith, C.J., found (1) that S. & Co. had made advances to G. to the extent of \$23,881.83, for manufacturing the timber and its conveyance to Quebec, for re-payment of which out of the proceeds they had a first lien. (2) That after the timber reached Quebec, part was sold by S. & Co., that they received \$18,000, and that there remained \$900 of the price due by the purchasers. (3) That thus, when action was brought, there was \$4,161 due S. & Co., balance of their advances. (4) That of the timber brought down B. received and converted to his own use timber of the value of \$4,322.93. (5) That for the value of this timber B. was accountable to S. & Co. under the agreement, there being no personal liability whatever from him to them for the advances. (6) That B. was entitled to deduct from this sum \$2,309.92, money laid out by him for S. & Co.'s benefit, and that for the balance, \$2,012, S. & Co. were entitled to judgment. (7) Further, while admitting that the conventional lien, to which B. was a party, was limited to the advances made by S. & Co. towards manufacturing the timber and its delivery on the track, the Chief Justice held that they had a common law lien for their expenditure

in bringing the timber to Quebec; and on this ground, no attempt having been made to shew what part of the advance went for one object and what part for the other, considered them entitled to priority over defendant's expenditure for the whole of their own. The Queen's Bench affirmed the judgment and, on appeal, B. contended:—1. That S. & Co. retained a portion of the timber for which they had not accounted; 2. That contrary to agreement the advances had not been made on drafts drawn on B. who was therefore prevented from establishing and controlling advances; 3. That \$3,500 had been sent by B. to G. to pay freight, and this should have been credited to B., although it appeared that G. did not account for it and S. & Co. were not aware of its having been advanced; 4. That S. & Co.'s alleged advances were not established by evidence.—The judgment appealed from was reversed, Ritchie, C.J., and Henry, J., dissenting, and it was *Held, per Strong, J.*—The advances not having been made in manner prescribed, on G.'s bills drawn on defendant, and defendant being thus deprived of the power to control the amount of advances, and there being no proof that the defendant ever acquiesced in a departure from the mode of making the advances prescribed by the agreement, or waived his strict rights under it, plaintiffs were not entitled to the prior lien which the agreement provided for in case the money to be furnished by them was advanced according to the terms of the agreement. The defendant had therefore a right to retain an amount out of the proceeds of the timber equivalent at least to his advance of \$4,000.—*Per Strong, Fournier and Gwynne, JJ.* The defendant was also entitled to the \$3,500 advanced to G. for the purpose of paying the railway charges, G. being the proper person to be entrusted with the funds, and no negligence being imputed to the defendant, who advanced the money to carry out his agreement. Further, plaintiff's action ought to be dismissed on the ground that they had failed to account for the timber which came to their hands, or to prove the advances which they claimed to have made. *Bow v. Shortreed*, Cass. Dig. (2 ed.) 500.

5. *Mechanics' lien — Lapse of time limited — Action against prior mortgagee — R. S. O. c. 120.*—The 90 days limited by the Mechanics' Lien Act (R. S. O. c. 120, s. 21) for commencement of proceedings to enforce the lien applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and it is the same whether proceedings have or have not been previously taken against the owner within the 90 days.—The assignee of a mechanics' lien brought action against the owner and a prior mortgagee, which was dismissed as against the mortgagee for non pros., and judgment recovered establishing the lien against the owner. This action was then taken, after more than 90 days from filing the lien, for declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land. *Held*, affirming the judgment appealed from (*sub-nom. Bank of Montreal v. Haffner*, 10 Ont. App. R. 592), that the lien had ceased to exist as against the mortgagee. *Bank of Montreal v. Worswick*, Cass. Dig. (2 ed.) 526.

6. *Registration — Materials supplied to contractor — Payment by promissory note — Suspension of lien — Waiver.*—E. supplied

a contractor with materials for building a house for W. and took the contractor's note for \$1,100 at thirty days, which was discounted but dishonoured at maturity. E. took it up and registered a mechanics' lien against the property of W. While the note was running, W. paid the contractor \$500 and afterwards \$600 more. In an action to enforce the lien: *Held*, affirming the judgment appealed from (2 B. C. Rep. 82), that as the lien was suspended during the currency of the note it was absolutely gone, there being nothing in the Lien Act to shew that it could be abandoned for a time only, and this result would follow even if part of the amount only had been paid to the contractor. *Edmonds v. Tiernan*, xxi, 406.

7. *Advances to insolvent railway company — Pledge of railway property — Anterior creditors — Fraudulent preference — Opposition afin de conserver — Opposition afin de charge — Registration — Priority — Arts. 419, 1972, 1977, 2015 & 2094 C. C. — Appeal — Jurisdiction.*—Respondent recovered judgment against the M. & S. Ry. Co. for \$675 and costs and issued a writ of *venditioni exponas* against the railway property. Appellants, who were in possession and working the railway, claimed possession of the railway property pledged to them by written agreement for disbursements they had made on it, and filed an opposition *afin de charge* for \$35,000 which respondent contested on grounds of fraudulent preference and informality of the lease or pledge. The agreement was between the M. & S. Ry. Co. and the appellant, and stated that "the M. & S. Ry. Co. was burthened with debts and had neither money nor credit to place the road in running order, &c." The Superior Court (affirmed by the Court of Queen's Bench), dismissed the opposition.—Respondent moved to quash an appeal on the ground that the original judgment was the only matter in controversy and was insufficient in amount. The Supreme Court without deciding the question of jurisdiction, dismissed the appeal on the merits, and *Held*, 1. That such an agreement must be deemed in law to have been made with intent to defraud and was void as to anterior creditors of the M. & S. Ry. Co.—2. That as the agreement granting the lien or pledge affected immovable property and had not been registered it was void against anterior creditors of the M. & S. Ry. Co.—3. That art. 419, C. C., does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition afin de conserver* to be paid out of the proceeds of the judicial sale. *Great Eastern Ry. Co. v. Lambie*, xxi, 431.

8. *Builder's privilege — Arts. 1695, 2013, 2103 C. C. — Expertise — Procès verbal — Error in valuation — Art. 333, et seq., C. C. P.*—An expert, appointed under art. 2013, C. C., to secure a builder's privilege on an immovable is not required to give notices of his proceedings to the proprietor's creditors, such proceedings not being regulated by arts. 333, et seq., C. C. P.—It is sufficient for such an expert to state in his second *procès verbal*, made within the six months of the completion of the works, that the works in question had been executed, and had given to the immovable the additional value fixed by him. If an expert includes in his valuation works for

which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle interested parties to a reduction of the valuation. The judgment appealed from (Q. R. 1 Q. B. 330) was affirmed. *Dufresne v. Préfontaine*; *Vallée v. Préfontaine*, xxi., 607; also *Hamilton v. Préfontaine*; *Fortier v. Préfontaine*, xxi., 630 (note.)

9. *Consignment of goods against supplies advanced — Sale of fish in storage — Part delivery — Right to hold for unpaid purchase money — Trover.*

See BAILMENT.

10. *Fraudulent foreclosure and sale — Possession — Sale to bona fide purchaser — Suit to redeem — Privilege on proceeds of sale.*

See LIMITATIONS OF ACTIONS, 24.

11. *Written contract — Parol agreement — Work and labour done — Security.*

See EVIDENCE, 221.

12. *License or lease — Working mine on royalty — 8 Anne c. 14, s. 1 — Construction of deed.*

See MINES AND MINERALS, 3.

13. *Banking Act — Warehouse receipts — Realizing collateral — Distribution of surplus.*

See BANKS AND BANKING, 115.

14. *Halifax Assessment Act, 1883 — Priority — Mortgage made before Act.*

See ASSESSMENT AND TAXES, 59.

15. *Note-holders — Insolvent bank — Claim on assets — R. S. C. c. 120.*

See CONSTITUTIONAL LAW, 80.

16. *Reversion of toll bridge — Liability of Province of Canada — B. N. A. Act, 1867, s. 111 — 8 Vict. c. 90 (Can.) — Indemnity — Remedial process — Vendor's lien.*

See STATUTE, 154.

17. *Mandate — Agency — Consignment of goods — Pledge — Factor — Right of action.*

See PARTNERSHIP, 43.

18. *Banks and banking — Advances on security — Chattel mortgage — Insolvent debtor — Bank Act, 74 — Conversion.*

See BANKS AND BANKING, 21.

AND see ASSIGNMENTS — BANKS AND BANKING — BILL OF SALE — CHATTEL MORTGAGE — MORTGAGE.

LIEUTENANT-GOVERNOR.

Representative of the Queen — Provincial Government.]—The Lieutenant-Governor of a province is as much the representative of Her Majesty the Queen for all purposes of provincial government as the Governor-General himself is for all purposes of the Dominion Government.—Judgment appealed from (4 Ex. C. R. 151) affirmed. *Attorney-General of Canada v. Attorney-General of Ontario*, xxiii., 458.

AND see CONSTITUTIONAL LAW, 44.

LIFE ESTATE.

Construction of will — Death without issue — Executory devise over — Conditional fee — Estate tail.

See WILL, 17.

LIFE INSURANCE.

See INSURANCE, LIFE.

LIGHT AND AIR.

Boundary line — Windows overlooking adjoining land — Waiver.

See TITLE TO LAND, 41.

LIMITATIONS OF ACTIONS.

1. INTERPRETATION OF STATUTE, &C., 1-5.

2. OPERATION OF STATUTE, &C., 6-20.

3. PLEADING, 21-23.

4. POSSESSION, 24-36.

5. OTHER CASES, 37-40.

1. INTERPRETATION OF STATUTE, &C.

1. *Interpretation of statute — 3 & 4 Wm. IV., c. 42 — C. S. N. B. c. 84, s. 40; c. 85, ss. 1 & 6 — Covenant in mortgage — Payment by co-obligor.*]—J. H. borrowed \$4,000 from C. on 27th September, 1850, at which date J. H. & J. W. gave their joint and several bond to C., conditioned for the re-payment in five years, with interest quarterly, and to secure payment two mortgages were given: by J. H. and wife on H.'s wife's property, and by J. W. and wife on W.'s property. Neither party executed the mortgage of the other. The mortgage from J. W. contained a provision that upon re-payment of £1,000, with interest, according to the condition of the bond, by J. W. and J. H., then said mortgage should be void; a similar provision being inserted in the other mortgage. The bond and mortgages were assigned to L. in 1870, and the principal money was never paid. J. W. died in 1858, and devised all his residuary real estate, including the lands mortgaged to G. W. and others. J. W. was, and, since his death, respondents have been, in possession of the premises so mortgaged by J. W.. Neither J. W., nor any person claiming through him, paid any interest on said bond and mortgage, nor gave any acknowledgment in writing of the title of C., or her assigns. The co-obligor paid interest on the bond from its date to the 27th March, 1870. On the 20th January, 1881, under C. S. (N. B.), c. 40, a bill for foreclosure and sale was commenced by the appellants, and the Supreme Court directed that it should stand dismissed with costs against the respondents. *Held*, affirming the judgment appealed from (23 N. B. Rep. 591), Strong, J., dissenting, 1. That all liability of J. W.'s personal representatives and of his heirs and devisees to any action whatever upon the bond was barred by ss. 1 & 6 of c. 85 C. S. (N. B.), although

payment by a co-obligor would have maintained the action alive in its integrity under 3 and 4 Wm. IV. c. 42 (Imp.)—2. That the right of foreclosure and sale of the lands included in the J. W. mortgage was barred by the Statute of Limitations in real actions, C. S. (N. B.), c. 84, s. 40.—*Per Gwynne, J.* The only person by whom a payment can be made, or an acknowledgment in writing can be signed, so as to stay the currency of the Statute of Limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor, or some person in privity of estate with him, or the agent of one of such persons, and that moneys paid by J. H. in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by W.'s mortgage. *Levin v. Wilson*, ix., 637.

[The Privy Council reversed the judgment 11 App. Cas. 639.]

2. *Settlement of accounts — Appropriation of payment — Omission of overdue note.*—A decree directed that an account should be taken of all dealings between plaintiff and defendant. The master found \$453.20 due to defendant by plaintiff; disallowed to the plaintiff the amount of a note for \$510, and interest thereon as barred by the Statute of Limitations; and reduced the interest on \$3,000 advanced from 24 per cent. to 6 per cent. after judgment. The note of \$510 was dated 18th November, 1861 and bore interest at the rate of \$10 per week from the 23rd November, 1861. On 6th March, 1867, defendant who had been sued by plaintiff for other claims, entered into an agreement with him to relieve him from pressure of execution debts, paid him \$2,000 on the indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870. *Held*, affirming the judgment appealed from (4 Ont. App. R. 213), that the evidence shewed an appropriation of the \$2,000 on account of the debts for which he was being pressed, and as the note for \$510 was not included in such debts, the master was right in treating it as barred by the Statute of Limitations. *St. John v. Rykert*, x., 278.

3. *Interruption of Statute of Limitations—Acknowledgment of debt.*—The following letters were written by a debtor to his creditor:—"Hopewell, August 9th, 1876.—Dear Uncle Finlay,—I received a letter from you some time ago about your money. I delayed writing, because I did not know what to write. I did not know but something would turn up that would enable me to pay you. I have a good deal of property—too much for these hard times—and I want to sell some of it, but cannot in the meantime, as times are that bad that people do not want to buy anything, only what they cannot do without. But this state of matters will not continue long, and when the times get better I will make some arrangement to pay you your money. Be not afraid of it, as I have but a small family and no boys, I will have plenty to pay my debts. I did get somewhat behind hand by railway affairs, but have recovered, and I am now in possession of a good deal of property and in a fair way of doing well whenever the times get better. I regret very much keeping it from you so long; however, I hope the time

will soon come when I will be able to pay you. Yours very truly, Alex McDonald."—"Hopewell, June 19th, 1875.—Dear Uncle,—I am in receipt of yours of the 31st May about your money, and must say I am not astonished at you for wanting it. You ought to have had it long ago, and you would have had it, only I was unfortunate in a railroad contract I took, on the railroad between Truro and Pictou, in which I lost considerable money, and got largely in debt besides. After giving up the work I hired with the Government to carry on part of the work. At this time James and I commenced to build a cloth factory on a small scale, in order to have some permanent work. I borrowed most of what I put in. The man who had your money on mortgage, after having it two years, left. I had to sell the property, which I took from him by deed, for one thousand dollars, losing by this likewise. I then got an offer from the Government to go to the Red River and North-West Territory to explore there for two years among the Indians, and got back last winter. I have now my debt nearly paid and the amount of your claim secure in property, viz., land property, so that you will be as sure of your money in a short time as if you had it. Do not think, Finlay, that I intend to do you, or any other body, out of one shilling. So rest assured that I have your money secured in a manner that you will get it, although I cannot send it now. You had good patience, so I hope you will have a little more, and I will put you all right. I believed I worked as hard and travelled far more than you did, and have been much more unfortunate than you since you left; but since two years I have done well, and hope soon to do well by you. Now, Finlay, rest assured that I have your money secured so that you will get it, whatever becomes of me. Very truly yours, Alex. McDonald. Mr. F. Thompson, Port Ludlow, British Columbia."—The Supreme Court of Canada affirmed the judgment appealed from (23 N. S. Rep. 50), which had held that the letters took the debt out of the operation of the Statute of Limitations. *Grant v. Cameron*, xviii., 716.

4. *Easement — Necessary way — Implied grant — User — Obstructions of way — Interruption of prescription — Acquiescence* — R. S. N. S. (5 ser.) c. 112 — R. S. N. S. (4 ser.) c. 100 — 2 & 3 Wm. IV. (Imp.) c. 71, ss. 2 & 4.] — K. owned lands over which he had for years utilized a roadway for convenient purposes. After his death defendant became owner of the middle portion, the parcels at either end passing to plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill which prevented him getting it off the wood lot to the highway. There was not any formed road across the lands, but merely a track upon the snow, during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over 20 years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when defendant built a fence across it that was allowed to remain undisturbed, and caused a cessation of the actual

enjoyment of the way, during the 15 months immediately preceding the commencement of the action in assertion of the right to the easement by plaintiff. *R. S. N. S.* (5 ser.) c. 112 provides a limitation of 20 years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same. *Held*, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. *Held*, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would, without special grant, pass by implication upon the severance of the tenements. *Knock v. Knock*, xxvii., 664.

5. *Reservation in judgment — Judicial admission — Future damages — Interruption of prescription.*

See No. 23, *infra*.

2. OPERATION OF STATUTE, &C.

6. *Malicious prosecution — Proceedings to remove commissioner — Litispendency — Libel — Slander — Prescription — Arts. 2262, 2267 C. C.—Interruption.*—An action for libel and slander taken during pendency of proceedings complained of as maliciously brought before the courts does not become subject to prescription until the termination of such proceedings. (See 6 *Legal News* 155; 27 *L. C. Jur.* 129.) *Mayor of Montreal v. Hall*, xii., 74.

7. *Action en nullité — Minority — Tutorship — Sale prior to code — Prescription — Arts. 2243, 2253 C. C.*—The right of action to annul a sale made in 1855 by an emancipated minor and her husband to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and deceased mother) of her share in her mother's succession, is prescribed by ten years from the date when the minor became of age. *Moreau v. Motz* (7 *L. C. R.* 147) followed — Judgment appealed from (*M. L. R.* 2 Q. B. 228) affirmed, *Fournier and Henry, J.J.*, dissenting. *Gregoire v. Gregoire*, xiii., 319.

8. *Moneys entrusted for investment—Condition precedent — Prescription — Art. 2262.*—H. agreed to invest trust funds of C. with M. in a land speculation, mentioning, in the letter notifying M. of the acceptance of his draft, the understanding H. had as to the share he was to get and adding: "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed and the conditions of the prospectus never carried out. *Held*, affirming the judgment appealed from (*M. L. R.* 6 Q. B. 354), that the action being for the recovery of money entrusted to defendant for a special purpose, the prescription of two years did not apply. *Moodie v. Jones*, xix., 266.

9. *Injuries to the person — Negligence of Crown servant — 50 & 51 Vict. c. 16—Arts. 2262, 2267, 2188, 2211 C. C.—R. S. C. c. 38.*—*Held*, reversing the judgment appealed from (2 *Ex. C. R.* 328), that even assuming that under the common law of Quebec, or statutes in force at the time the injury was sustained, the Crown could be held liable for an injury caused by negligence of its servants, such injury having been sustained more than a year before the filing of the petition, the action was prescribed under arts. 2262 and 2267, C. C.—*Per Patterson, J.*, the Crown is made liable for damages caused by the negligence of its servants operating Government railways by 44 *Vict. c. 25* (*R. S. C. c. 38*), but as the petition of right in this case was filed after the passing of 50 & 51 *Vict. c. 16*, the claimant became subject to the laws relating to prescription in Quebec, and his action was prescribed. *The Queen v. Martin*, xx., 240.

10. *Appearance by attorney — Instructions — C. S. L. C. c. 82, s. 44—Petition in disavowal.*—The only prescription available against a petition in disavowal is that of thirty years. *McDonald v. Dawson* (11 *Q. L. R.* 181) followed. (See *Cass. Dig.* (2 ed.) 586-589.) *Dawson v. Dumont*, xx., 709.

11. *Statute of Limitations — Criminal conversation—Damages*—The Statute of Limitations is not a bar to an action for criminal conversation where the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought.—Judgment appealed from (27 *Ont. App. R.* 703) affirmed. —*Quære*, Does the statute begin to run only when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action? *King v. Bailey*, xxxi., 338.

12. *Municipal drains — Continuing trespass — Limitation of actions ex delictu — 58 Vict. c. 4, s. 295 (N. S.)—Verdict*—Action for trespass by reason of the municipal corporation constructing and maintaining a drain through the plaintiff's land. The jury found that it had been constructed in 1886 "by virtue of the street commissioner's power of office." The plaintiff, though aware of its existence at the time, made no objection until 1896, when the land caved in. The Supreme Court affirmed the judgment of the court below (33 *N. S. Rep.* 401), which held that the jury had found that the defendant had constructed the drain by its agent, and that, the trespass being a continuing one, the action was not barred by the limitation provided in the "Towns' Incorporation Act of 1895" for action *ex delictu* against towns. *Town of Truro v. Archibald*, xxxi., 380.

13. *Péremption d'instance — Retrospective legislation—Arts. 1 and 279 C. P. Q.—Art. 454 C. C. P.*—When the period of peremption commenced after the promulgation of the new Code of Procedure of Quebec the exceptions declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at the time it came into force under the limitation provided by art. 279 C. P. Q. *Cooke v. Millar* (3 *R. L.* 446; 4 *R. L.* 240) referred to. *Schwob v. Town of Farnham*, xxxi., 471.

14. *Carriage of goods — Bill of lading — Limitation of time for suit — Damages from*

unseaworthiness — Construction of contract.] — On a shipment of goods by steamer the bill of lading provided that all claims for damages to or loss of the same should be presented within one month from its date, after which the same should be completely barred. *Held*, reversing the judgment appealed from (8 B. C. Rep. 228) Mills, J. dissenting, that this limitation applied to a claim for damage caused by unseaworthiness of the steamer. *Union SS. Co. v. Drysdale*, xxxii., 379.

15. *Promissory note — Collateral to mortgage—Prescription—Estoppel.*

See TRUSTS, 5.

16. *Escheat for want of heir—Proceedings by information—Prescription—Art. 2187 C. C.*

See TITLE TO LAND, 131.

17. *Mortgage to secure advances to pay composition—Art. 1040 C. C.—Action to set aside deed.*

See FRAUDULENT CONVEYANCES, 3.

18. *Yearly salary — Moneys paid and expended—Prescription—Arts. 2260, 2261 C. C.*

See EXECUTORS AND ADMINISTRATORS, 5.

19. *Registered deeds—Recitals in title deed — Bona fides—Presumption against purchaser.*

See No. 25, *infra*.

20. *Limitation of actions ex delicto—Continuing trespass — Municipal drain — N. S. "Towns' Incorporation Act."*

See MUNICIPAL CORPORATION, 94.

3. PLEADING.

21. *Bodily injuries^a—Right of action by deceased—Claim of widow—Prescription juris et de jure—Arts. 1056, 2261, 2262, 2267, 2188 C. C.—Arts. 431, 433 C. C. P.—Pleading—Lord Campbell's Act.*]—The husband was injured while on duty as appellant's employee, the injury resulting in death about 15 months afterwards. No indemnity having been claimed during his lifetime, the widow, for herself as well as executrix of her minor child, brought action within one year after his death. *Held*, reversing the judgment appealed from (M. L. R. 6 Q. B. 118), Fournier, J., dissenting, that at the time of the death of respondent's husband all right of action was prescribed under art. 2262 C. C., and that this prescription is one to which the tribunals are bound to give effect although not pleaded. (Compare previous report, *Canadian Pacific Ry. Co. v. Robinson*, 14 Can. S. C. R. 105). *Canadian Pacific Ry. Co. v. Robinson*, xix., 292.

[Reversed by Privy Council (1892) A. C. 481.]

22. *Prescription—Objection taken in appeal—Costs.*]—*Held*, reversing the judgment appealed from (30 L. C. Jur. 65), that although the objection that the right of action has been prescribed is taken for the first time on the argument in appeal, the court is bound to entertain it and give effect to it if properly raised. *Dorion v. Crowley*, Cass. Dig. (2 ed.) 709; Cass. S. C. Prac. (2 ed.) 144.

23. *Prescription — Arts. 2188, 2262, 2267 C. C.—Waiver—Failure to plead limitation—*

Defence supplied by the court of its own motion—Reservation of recourse for future damages — Judicial admission — Interruption of prescription.] — The prescription of actions for personal injuries established by art. 2262 C. C., is not waived by failure of the defendant to plead the limitation, but the court must take judicial notice of such prescription as absolutely extinguishing the right of action.— The reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the Civil Code. *City of Montreal v. McGee*, xxx., 582.

4. POSSESSION.

24. *Mortgage — Fraud — Foreclosure and sale—Purchase by mortgagee — Right to redeem—Possession—Statute of Limitations—R. S. O. (1877) c. 108, s. 19—Trustee for sale—Waiver — Lien on proceeds.*]—In a foreclosure suit against the heirs of a deceased mortgagor, who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee, who had not received permission from the court to bid; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to the defendant L., a *bona fide* purchaser, without notice, taking a mortgage for the purchase money. In a suit to redeem the lands by the heirs of the mortgagor some eighteen years after the sale and more than five years after some of the heirs had become of age. *Held*, reversing the judgment appealed from (9 Ont. App. R. 537), that the suit being one impeaching a purchase by a trustee for sale the Statute of Limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. c. 108, s. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L. *Held*, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants. *Faulds v. Harpur*, xi., 639.

25. *Title to land—Registered substitution—Rights of children not yet born—Revocation of deed—Prescription—Bona fides—Recital in deed—Presumption against purchaser—Arts. 930, 2191, 2193, 2202, 2207, 2251, 2253 C. C.*] — As good faith is required for the ten years' prescription under the Civil Code, that prescription cannot be invoked against a substitution which has been duly registered, such registration being sufficient to constitute any third party, who might subsequently purchase from the institute, a holder in bad faith.— Where the title deed of a purchaser of lands bears upon its face recitals which would have led upon inquiry to evidence of the defeasibility of his vendor's title, he must be presumed to have been aware of the precarious nature of the title he was purchasing and pre-

scriptive title cannot afterwards be invoked either by him or those in possession under him as holders in good faith—under translatory title.—Judgment appealed from (Q. R. 5 Q. B. 490) reversed. (Leave to appeal to Privy Council refused.) *Meloche v. Simpson*, xxix., 375.

26. *Partition of land—Tenants in common—Statute of Limitations—Possession.*—Under the Statute of Limitations, R. S. N. S. (5 ser.) c. 112, possession of land in order to ripen into a title and oust the rehl owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period the law will attribute the interruption to the person having title.—Possession by a series of persons during the period will bar the title though some of such persons were not in privity with their predecessors. — Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favour of the tenant in possession. Judgment appealed from (32 N. S. Rep. 1) affirmed. *Handley v. Archibald*, xxx., 130.

27. *Title to lands—Statute of Limitations—Possession.*—In 1892, M. obtained a grant of land from the Crown and in 1823, permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870, he deeded the land to his four sons who sold it in 1873, and by different conveyances, the title passed to P. in 1884. In 1896, the descendants of the younger children of M. gave a deed of this land to B., who proceeded to cut timber from it. In an action for trespass by P.; *Held*, affirming the judgment appealed from, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870 which had ripened into a title. If not, the deed to his sons in 1870, gave them exclusive possession and, if they had not a perfect title then, they had twenty years after, in 1890. *Bentley v. Peppard*, xxxiii., 444.

28. *Statutory title — Trespass — Plea of liberum tenementum—Possession.*

See TITLE TO LAND, 77.

29. *Tenant at will—Caretaker—Possession—New tenancy.*

See TITLE TO LAND, 78.

30. *Estate for life—Possession of tenant—Remainder—Joint tenants—Survivorship.*

See TITLE TO LAND, 79.

31. *Occupation of caretaker — Acts of ownership — Recovery of possession — Severance of title.*

See PRESCRIPTION, 16.

32. *Title by possession — Non-claim — 38 Vict. c. 16 (Ont.)*

See TITLE TO LAND, 81.

33. *Possession against assignee—Contrate of insolvent — Deed by assignee—Fraudulent conveyance.*

See TITLE TO LAND, 133.

34. *Bad faith—Evidence—Purchase of constituted land — Conversion—Revendication—Damages — Action by substitute — Art. C. C.*

See SUBSTITUTION, 4.

35. *Possession by trustee—Statute of limitations—Title to land.*

See WILL, 13.

36. *Title to lands — Sheriff's deed—N—Equivocal possession.*

See EVIDENCE, 239.

5. OTHER CASES.

37. *Renunciation of prescription—Art. C. C.—Condition of policy — Prosecution claims—Limitation of liability.*—An insured may validly stipulate that claims arising under a policy should be barred by the lapse of a shorter time than that limited by law the bringing of similar actions. (M. L. Q. B. 293 affirmed.) *Allen v. Merchants Marine Ins. Co.*, xv., 488.

38. *Seigniorial tenure — Charges run with the title — Servitude — Edits et ordonnances (L. C.)* — A servitude may run from the circumstances under which it is held and the conduct of interested parties from time immemorial. *Commune de St. Thier v. Denis*, xxvii., 147.

39. *Interruption of statute—3 & 4 Wm c. 42—C. S. N. B. c. 84, s. 40; c. 85, ss. 6—Covenant in mortgage — Payment by obligor.*

See No. 1, ante.

40. *Remedy against the Crown—Petition right—Defence open to Crown.*

See RIDEAU CANAL LANDS, 2.

AND see PRESCRIPTION.

LIQUOR LAWS.

1. LEGISLATIVE JURISDICTION, 1-12.

2. LICENSE FEES, 13-16.

3. MUNICIPAL REGULATIONS; LOCAL OPTIC PROHIBITION, 17-21.

4. PUBLIC WORKS ACT, 22.

1. LEGISLATIVE JURISDICTION.

1. *Constitutional law — Taxation — Regulation of trade and commerce—Police regulations — Local or municipal matters — Vires — Powers of Dominion and Provincial Legislatures — License — Sale of liquor; Vict. c. 8 (D.)—37 Vict. c. 32 (O.)—1 A. Act, 1867, ss. 91, 92—“Other license—Brewer's licenses.”*—After the passing of the Act to amend and consolidate the Law for the Sale of Fermented or Spirituous Liquors,

Vict. c. 32 [Ont.], the Attorney General filed an information for penalties against S., a brewer licensed by the Government of Canada under the Act, 31 Vict. c. 8 (D.), for the manufacture of fermented, spirituous and other liquors, charging him with manufacturing beer, and selling by wholesale, for consumption within the Province of Ontario, a large quantity of said fermented liquor so manufactured by him, without first obtaining a license as required by the above Act of the Legislature of Ontario. On demurrer to the information the special matter for argument was that the Legislature of Ontario had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information. On appeal from the judgment of the Court of Queen's Bench for Ontario overruling the demurrer, *Held*, that the Act of the Legislature of Ontario, 37 Vict. c. 32, is not within the legislative capacity of that legislature.—That the power to tax and regulate the trade of a brewer, being a restraint and regulation of trade and commerce, falls within the class of subjects reserved by s. 91 of the B. N. A. Act, 1867, for the exclusive legislative authority of the Parliament of Canada; and that the license imposed was a restraint and regulation of trade and commerce and not the exercise of a police power.—That the right conferred on the Ontario Legislature by s-s. 9, s. 92 of said B. N. A. Act, to deal exclusively with shop, saloon, tavern, auctioneer and "other licenses," does not extend to licenses for brewers or "other licenses" which are not of a local or municipal character. *Reg. v. Taylor*, (36 U. C. Q. B. 218) overruled, *Ritchie and Strong, J.J.*, dissenting. *Severn v. The Queen*, ii, 70.

2. *Police regulations* — 42 & 43 Vict. c. 4, s. 1 (Que.).—*Sale of liquors within prohibited hours—Costs.*—*Per Ritchie, C.J.*, and *Strong and Fournier, J.J.* The provisions of 42 & 43 Vict. c. 4 (Que.), ordering houses in which spirituous liquors are sold, to be closed on Sundays, and every other day between eleven o'clock of the night until five of the clock of the morning, are police regulations, within the power of the provincial legislature. — *Per Henry, Taschereau and Gwynne, J.J.* That the penalty imposed was not authorized by the statute, even if such statute was *intra vires*, and that the conviction had been properly quashed. The court being equally divided, the appeal was dismissed without costs and the judgment appealed from (2 Dor. Q. B. 103; 7 Q. L. R. 337) affirmed. *Poulin v. City of Quebec*, ix., 185.

3. *Jurisdiction of provincial legislature* — *Sale of liquor—License fees*—B. N. A. Act (1867) s. 91—41 Vict. c. 3 (Que.)—38 Vict. c. 76 (Que.)—20 Vict. c. 129 (Can.)—*By-law.*—The Quebec License Act, 41 Vict. c. 3, is *intra vires* of the Legislature of the Province of Quebec. (*Hodge v. The Queen*, 9 App. Cas. 117, followed), and does not interfere with existing rights and powers of incorporated cities. A by-law of the City of Three Rivers, in virtue of its charter, 20 Vict. c. 129, and 38 Vict. c. 76, imposing a license fee on the sale of intoxicating liquors, is within the powers of the corporation.—Judgment appealed from (5 Legal News 331) affirmed. *Sulte v. City of Three Rivers*, xi., 25.

4. *Writ of prohibition—Licensed brewers—Quebec License Act*—41 Vict. c. 3 (Que.).—*Constitutional law* — 43 Vict. c. 19 (D.).—*Jurisdiction of Court of Sessions.*—The inspector of licenses for Montreal charged a drayman in the employ of brewers licensed under 43 Vict. c. 19 (D.), before the Court of Special Sessions of the Peace at Montreal, with having sold beer outside the business premises, but within the revenue district, in contravention of the Quebec License Act, 1878, and its amendments, and asked a condemnation of \$95 and costs for said offence. The licensed brewers claimed that under the Dominion statute, they had a right of selling beer by and through their employees and draymen without a provincial license, and that 41 Vict. c. 3 (Que.), and its amendments were *ultra vires*, and if constitutional did not authorize the complaint and they issued a writ of prohibition enjoining the Court of Special Sessions of the Peace from further proceeding with the complaint. *Held*, *Taschereau and Gwynne, J.J.*, dissenting, that the Quebec License Act and its amendments were *intra vires*, and that the Court of Special Sessions of the Peace of Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the questions of fact and law involved, a writ of prohibition did not lie. — *Per Taschereau and Gwynne, J.J.*, that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition. — *Per Gwynne, J.* The Quebec License Act of 1878 imposes no obligation upon brewers to take out a provincial license to enable them to sell their beer, and therefore the Court of Special Sessions of the Peace had no jurisdiction, and prohibition should issue absolutely.—The appeal from the judgment of the Court of Queen's Bench (M. L. R. 2 Q. B. 381) was dismissed with costs. *Molson v. Lambe*, xv., 253.

5. *Liquor License Act, 1887 (N.B.)—Conditions in restraint of trade—Legislative jurisdiction.*—Under the "Liquor License Act, 1887" (N.B.), all applications for licenses are required to be indorsed by the certificate of one-third of the ratepayers of the district for which the license is asked. No holder of a license can be a member of the municipal council, a justice of the peace, or a teacher in the public schools. *Held*, affirming the judgment appealed from (27 N. B. Rep. 554), that the legislature could properly impose these conditions to the obtaining of a license, and the provision is not *ultra vires* of the legislature of that province as being a prohibitory measure by reason of the ratepayers' power to prevent licenses being issued; nor is it a measure in restraint of trade by affixing a stigma to the business of selling liquor. *Danaher v. Peters*; *O'Regan v. Peters*, xvii., 44.

6. *Salaries of license inspectors* — *Payment by authority of department* — *Approval of Governor-in-Council* — *Liquor License Act, 1883, s. 6—Action—Ultra vires.*—Claim by license commissioners for moneys paid to license inspectors with the approval of the Department of Inland Revenue, in excess of the salaries fixed 2 years later by order-in-council under s. 6 of the said Liquor License Act, 1883: *Held, per Fournier, Taschereau and Patterson, J.J.*, affirming the judgment appealed from (2 Ex. C. R. 293), that the Crown could not be held liable for any excess of the salary fixed and approved of by the Governor-General-in-Council.—*Per Strong, J.*

The Act under which appellant was appointed having been declared *ultra vires* the petition of right was not maintainable. *Burroughs v. The Queen*, xx., 420.

7. *Legislative jurisdiction—Liquor licenses*—"Vessel licenses"—"Wholesale licenses"—"*Canada Temperance Act, 1878*"—"License Act of 1883."—Case referred under 47 Vict. c. 32, s. 26 (D.). 1st question.—Are the following Acts, in whole or in part, within the legislative authority of the Parliament of Canada, namely:—(1) The Liquor License Act, 1883. (2) An Act to amend the Liquor License Act, 1883?—2nd question.—If the court is of opinion that a part or parts only of the said Acts are within the legislative authority of the Parliament of Canada, what part or parts of said Acts are so within such legislative authority?—Opinion.—The Acts referred to are, and each of them is, *ultra vires* of the legislative authority of the Parliament of Canada, except in so far as the said Acts respectively purport to legislate respecting those licenses mentioned in s. 7 of "The Liquor License Act, 1883," which are there denominated "vessel licenses" and "wholesale licenses," and except also, in so far as the said Acts respectively relate to the carrying into effect of the provisions of "The Canada Temperance Act, 1878." Henry, J., was of opinion that the said Acts were wholly *ultra vires*. *In re Liquor License Act, 1883*, Cass. Dig. (2 ed.) 509.

[On appeal the Privy Council held the Acts to be wholly *ultra vires*.

8. *Illegal distilleries—Penalties—Vice-Admiralty Courts—Jurisdiction—Inland revenue.*

See CONSTITUTIONAL LAW, 18.

9. *Prohibition of traffic—"Scott Act"—References—Penalties, &c.*

See CANADA TEMPERANCE ACT.

10. *Sale of liquor—Prohibition—Sale by retail—Powers of legislature.*

See CONSTITUTIONAL LAW, 45.

11. *Sale of liquor—Prohibitory laws—Powers of legislature—Local option—Canada Temperance Act.*

See CONSTITUTIONAL LAW, 46.

12. *Nova Scotia Liquor License Act, 1895—Conviction—Jurisdiction—Affidavit on certiorari—Powers of provincial legislature—Matter of procedure.*

See CERTIORARI, 4.

2. LICENSE FEES.

13. *Sale of intoxicating liquors—License law of Quebec, 1878—Omission in statute—Tender—Costs—Mandamus.*—The Quebec License Act, 41 Vict. c. 3, s. 63 enacts: "In addition to a fee of one dollar on the granting of each license, the duties comprised in the following tariff shall be payable by the applicant therefor to the license inspector, preliminary to the granting of the different licenses hereinbefore mentioned:—Tariff of duties payable for licenses under the present law; on licenses for the sale of intoxicating liquors.—1. On each license to keep an inn and for the sale of intoxicating liquors; (a) In the

City of Montreal, \$200, if the annual value or rent of the premises for which the license required is less than \$400, and \$300, if the annual value or rent is \$400 or more; (b) In the City of Quebec, \$125, if the annual value or rent is less than \$400, and \$175, if the annual value or rent is \$400 or more; (c) In every other city, \$80; (d) In every incorporated town, \$10.—By 42 & 43 Vict. c. 3, s. 11, it was enacted: Sub-sections (a), (b) and (c) of No. 1 of s. 63 of the said Act are repealed and replaced by the following: "In the Cities of Quebec and Montreal 50 % of the rental or annual value of the premises for which such license is required: Provided that in no case shall the price of the license exceed the sum of \$300 or be less than \$75.—No proviso for replacing class (c) repealed was yet enacted in May, 1880, when appellant went to the respondent, license inspector for the District of Three Rivers, to obtain a license to keep an inn at Nos. 14 and 16 Badeau street, City of Three Rivers, and produced the certificate approved by the corporation of the city necessary to get such a license. He offered at the same time the \$1 fee, according to 41 Vict. c. 3, s. 63, § 1, and requested a license, which respondent refused. Appellant obtained a writ of *mandamus* to compel respondent to grant the license.—In the Superior Court and Queen's Bench respondent urged that admitting he could not claim \$80 as originally enacted for cities other than Montreal and Quebec, and admitting he could not claim \$70 as for incorporated towns, he was at all events entitled to claim the duty of £1 16s. mentioned in 41 Vict. c. 3, ss. 66 & 67, which had never been repealed, providing as follows:—"66. The Lieutenant-Governor may, when and so often as he deems it expedient, by regulation reduce the rate of duty on licenses, as mentioned in art. 63 of this law, provided that this rate be not below the rate imposed by the 5th section of the Imperial Act, George III. c. 38."—"67. The duties imposed by this law on licenses of inns, restaurants, steamboats, bars, railway buffets, or liquor shops, include those imposed by said Imperial Act, but should the same be hereafter repealed, such repeal shall not have the effect of reducing the amount of such duties."—14 George III. c. 38, s. 5, is as follows:—"5. And be it further enacted by the authority aforesaid that there shall, from and after the 5th day of April, 1775, be raised, levied, collected and paid, unto His Majesty's Receiver-General of the said province (Quebec), for the use of His Majesty, his heirs and successors a duty of £1 16s., sterling money of Great Britain, for every license that shall be granted by the Governor, Lieutenant-Governor, or Commander-in-Chief of the said province to any person or persons, for keeping a house or any other place of public entertainment, or for the retailing of wine, brandy, rum, or any other spirituous liquors, within the said province; and any person keeping any such house or place of entertainment, or retailing any such liquors, without such license, shall forfeit and pay the sum of £10 for every such offence, upon conviction thereof; one moiety to such person, as shall inform or prosecute for the same and the other moiety shall be paid into the hands of the Receiver-General of the province, for the use of His Majesty."—The Superior Court held that the offer of \$1 was sufficient and ordered the issuing of a peremptory writ of *mandamus* enjoining the respondent to grant the license. The Queen's Bench set aside this judgment. *Held*, affirming the judgment ap-

pealed from (1 Dor. Q. B. 257), that appellant would not have been entitled to his license without offering to pay the £1 16s. sterling required by the Imperial Act in addition to the fee of \$1, even if the respondent had been authorized to issue a license, but owing to the repeal of s. 63 of 41 Vict. c. 3, s.-s. (c), without provision being made for the issue of licenses in cities other than Montreal and Quebec, under no circumstances could a license be issued for the City of Three Rivers for the year in question.—*Per* Ritchie, C.J., and Fournier, J. The *mandamus* could not go, because the period for which appellant claimed the license had expired, and a *mandamus* is never granted to compel a party to do an impossibility. If appellant had been entitled to his license and the time had expired after he had come to the court, it would have materially affected the question of costs, but not being entitled to his license the appeal must be dismissed with costs.—*Per* Henry, J. Appellant was entitled to his license upon payment of £1 16s. sterling, together with the fee of \$1, and having been misled by the respondent into making a tender of a larger sum than respondent was entitled to demand, and not of the exact sum as required by the law, respondent ought to pay the costs. *Bergeron v. Lassalle*, Cass. Dig. (2 ed.) 495.

14. *Regulation in restraint of trade—Provincial license fees—Police regulations—Local or municipal matters.*

See No. 1, *ante*.

15. *Conditions in restraint of trade—Legislative jurisdiction to impose fees—Municipal license fee.*

See No. 3, *ante*.

16. *Quebec License Act—Provincial license fee.*

See No. 4, *ante*.

3. MUNICIPAL REGULATIONS; LOCAL OPTION; PROHIBITION.

17. *Granting licenses in St. John, N. B.—New Brunswick Liquor License Act, 1887—Directory clauses.]—The Liquor License Act, 1887 (N. B.), provides that "all applications for license, other than in cities and incorporated towns, shall be presented at the annual meeting of the council of the municipality and shall then be taken into consideration, and in cities and incorporated towns at a meeting to be held not later than the 1st day of April, in each and every year." The interpretation clause provides that in the City of St. John the expression "council" means the mayor, who has the powers given to a municipal council. It is also provided that when anything is required to be done at, on or before a meeting of council, and no other date is fixed therefor, the mayor may fix the date for doing the same in the City of St. John.—*Held*, affirming the judgment appealed from (27 N. B. Rep. 554), that the provision requiring licenses to be taken into consideration not later than the 1st day of April is directory only, and licenses granted in St. John are not invalid by reason of the same being granted after that date.—*Per* Gwynne, J., that this provision does not apply to the City of St. John. *Donaher v. Peters*; *O'Regan v. Peters*, xvii., 44.*

18. *Municipal corporation—Action—Discretion of members of council—Refusal to confirm certificate—Liability of corporation.]—*

In an action against a municipal corporation for damages claimed on account of the council of the municipality having, as alleged, illegally refused to confirm a certificate to enable the plaintiff to obtain a license for the sale of liquors in his hotel. *Held*, affirming the judgment appealed from (Q. R. S. Q. B. 276), that the municipal council had a discretion under the provisions of the "Quebec License Law," R. S. Q. art. 839, to be exercised in the matter of the confirmation of such certificates for the exercise of which no action could lie, and, further, that even if the members of the council had acted maliciously in refusing to confirm the certificate there could not be on that account any right of action for damages against the corporation. *Beach v. Township of Stanstead*, xxix., 736.

19. *Jurisdiction of Provincial Legislature—License fees—Municipal by-law.*

See No. 3, *ante*.

20. *Statutory prohibition—Penal statute—Wholesale purchase—Guarantee—Validity of contract—Forfeiture—Nova Scotia Liquor License Act—Practice.*

See CONTRACT, 166.

21. *Canada Temperance Act—Police constable—Negligent performance of duty—Damages.*

See MUNICIPAL CORPORATION, 66.

4. PUBLIC WORKS ACT.

22. *Having intoxicating liquors near public works—Conviction under Ontario statutes—Destruction of liquors by order of justices—Unsealed conviction—Action for damages—Notice of action.*

See MALICE, 4.

LIS PENDENS.

Retrahit of part of claim—Reserve as to balance—Subsequent action—Adjudication in first action—Res judicata.

See PRACTICE AND PROCEDURE, 66.

LITIGIOUS RIGHTS.

1. *Forfeited shares—Illegal confiscation—Judgment in similar dispute—Arts. 1582, 1583, 1584 C. C.]—B. became holder of 40 shares of stock, which at the time of the transfers had been declared forfeited for non-payment of dues. Subsequently other shares, which had been confiscated for similar reasons, were declared, by judgment of the Superior Court, to be valid and to have been illegally forfeited. Thereupon B. by *mandamus* asked to be recognized as a member of the society and paid the amount of dividends already declared in favour of and paid to other shareholders. In defence it was pleaded that B. had acquired under the transfers in question litigious rights and was only entitled to recover the amount actually paid, with legal interest and cost of*

transfers. *Held*, affirming the judgment appealed from (M. L. R. 2 Q. B. 272), Fournier and Henry, JJ., dissenting, that at the time of the purchase of said shares, B. was a buyer of litigious rights within the provisions of art. 1583, C. C., and, under art. 1582, C. C., could only recover from the liquidators the price paid by him with interest thereon.—Also, that the exception in the fourth paragraph of art. 1584 C. C., only applies to the particular demand in litigation which had been confirmed by a judgment of a court, or which having been made clear by evidence is ready for judgment. *Brady v. Stewart*, xv., 82.

2. *Title to lands — Usurper in possession — Pleadings — Art. 1582 C. C.*—Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession, and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights. *Powell v. Watters*, xxviii., 133.

3. *Contract void — Champerty — Collusive judgment —Tierce—Opposition.*

See TITLE TO LAND, 131.

4. *Speculation in litigious rights—Estoppel —Warranty.*

See TITLE TO LAND, 111.

AND see CHAMPERTY—MAINTENANCE.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATION.

LOCATION TICKET.

Crown lands—Sales by local agent—Suspensive conditions — Timber licenses — Priority of title.

See CROWN, 95.

LOGS.

1. *Detention of saw-logs on drive—Floatable streams—R. S. O. (1887) c. 121—Construction of statute.*

See WATERCOURSES, 5.

2. *Rivers and streams — Obstruction — Dam — Driving saw-logs.*

See WATERCOURSES, 6.

AND see SAW-LOGS.

LORD CAMPBELL'S ACT.

1. *Right of action by deceased—Limitation of action — Remedy barred—Bodily injuries —Claim of widow—Extinguishment of obligation — Arts. 1056, 2261, 2262, 2267, 2188, C. C.—Arts. 431, 433, C. C. P.]—The husband was injured while on duty as appellant's employee, the injury resulting in death about 15 months afterwards. No indemnity was claimed during his lifetime. The widow, for herself as well as executrix of her minor child, brought action within one year after his death. *Held*, reversing the judgment appealed S. C. D.—26*

from (M. L. R. 6 Q. B. 118), Fournier dissenting, that respondent's right of action under art. 1056 C. C., depends not upon the character of the act from which death ensued, but upon the condition of decedent's claim at the time of his death if the claim was in such a shape that it could not then have enforced it, had death ensued, the article does not give a right of action, or impose liability on the person inflicting the injury.—That as it appears from the record that the plaintiff had no right of action, the court would grant the defendant's motion for judgment *non obstante veredicto*.—That at the time of the death of respondent's husband all right of action was prescribed under art. 2262, C. C., and that prescription is one to which the tribunals are bound to give effect although not pleaded. *Canadian Pacific Ry. Co. v. Robinson* 292.

[Reversed by Privy Council (1892) 481.]

See LIMITATIONS OF ACTIONS, 21.

2. *Government railway — Injury to employee—Lord Campbell's Act—Art. 10, C.—Exonerated from liability — R. S. 38, s. 50.]—Art. 1056 C. C. embodies the principle previously given by a statute of the province of Canada re-enacting Lord Campbell's Act. *Robinson v. Canadian Pacific R.* ([1892] A. C. 481) distinguished.—A man may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would answer to an action under Lord Campbell's Act. *Griffiths v. Earl Dudley* (9 Q. B. 357) followed. *The Queen v. Grenier*, 42. See *foot-note vol. 96*.*

3. *Damages for death of servant—Jurisdiction of Maritime Court of Ontario—Exonerated—Right of action.*

See ACTION, 42.

4. *Art. 1056 C. C.—Moral wrong—So—Assessment of damages—Misdirection—Trial.*

See DAMAGES, 2.

5. *Death of parent — Negligence—Biment—Solatium—Art. 1056 C. C.—Pecuniary loss.*

See DAMAGES, 4.

6. *Actio personalis moritur cum per Abatement of appeal—C. S. N. B. c. 81*

See APPEAL, 1.

7. *Action by widow—Previous action ceased in his lifetime — Different cause of action—Identity of material issues—Effect in first action—Subsequent use of.*

See EVIDENCE, 19.

LOTTERY.

1. *Constitutional law — Legislative —B. N. A. Act, 1867—Criminal Code —R. S. C. c. 159—R. S. Q. art. 2920—5 c. 36 (Que.)—Indictable offences — C —Illegal consideration — Co-relative matters—Nullity—Invalidity judicially —Arts. 13, 14, 989, 990 C. C.]—The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.—A case in connection with a scheme for the op*

of a lottery forbidden by the criminal statutes of Canada is unlawful and cannot be enforced in a court of justice. The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted and it is the duty of the courts *ex mero motu*, to notice the nullity of such contracts at any stage of the case and without pleading. Judgment appealed from reversed, Girouard, J., dissenting.—*Per* Girouard, J., (dissenting.) In Canada before the Criminal Code, 1892, lotteries were mere offences or contraventions and not crimes, and consequently the Act of the Quebec Legislature was constitutional. *L'Association St. Jean-Baptiste v. Brault*, xxx., 598.

2. *Illegal consideration of contract — Co-relative agreements.*

See CONSTITUTIONAL LAW, 31.

MACHINERY.

Nuisance — Operation of electric railway — Power house machinery — Vibration, smoke and noise — Injury to adjoining property — Evidence — Assessment of damages — Reversal on questions of fact.

See NUISANCE, 6.

AND see IMMOVEABLE PROPERTY—MASTER AND SERVANT—MOVEABLES—NEGLIGENCE.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MAGNA CHARTA.

*Canadian waters — Property in beds — Public harbours — Erections in navigable waters — Interference with navigation — Right of fishing — Power to grant — Riparian proprietors — Great lakes and navigable rivers — Operation of Magna Charta — Provincial legislation — R. S. O. (1887) c. 24, s. 47—55 Vict. 10 s.-ss. 5 to 13, 19 and 21 (O.) R. S. Q. arts. 1375 to 1378.]—Where the provisions of Magna Charta are not in force, as in Quebec, the Crown, in right of the province, may grant exclusive rights of fishing in tidal waters, except in tidal public harbours, in which, as in public harbours, the Crown, in right of the Dominion, may grant the beds and fishing rights. Gwynne, J., dissenting.—*Per* Strong, C.J., and King and Girouard, JJ. The provisions of Magna Charta relating to tidal waters would be in force in the provinces (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various Provincial Legislatures and these provisions of the charter, so far as they affect public harbours, have been repealed by Dominion legislation.—(See [1898] A. C. 700.) *The Fisheries Case*, xxvi., 444.*

MAILS.

See POSTAL SERVICE.

MAINTENANCE.

1. *Reversion in lands not used for canal purposes — Purchase in conflict with public use—Trust.*

See RIDEAU CANAL LANDS, 1.

2. *Fiduciary agent of Crown—Purchase in conflict with public use—Ordinance lands — Trust estate.*

See RIDEAU CANAL LANDS, 2.

3. *Will — Sheriff's deed — Proof of heirship—Rejection of evidence—New trial.*

See EVIDENCE, 171.

AND see CHAMPERTY—LITIGIOUS RIGHTS.

MALICE; MALICIOUS PROSECUTION.

1. *Libel — Slander — Interruption of prescription — Arts. 2262, 2267 C. C.—Pendency of proceedings.]—Action by S., in his lifetime, civil engineer, for \$20,000 damages, in consequence of unjust removal from the position of commissioner of expropriations. The respondents became plaintiffs *par reprise d'instance*.—On 14th April, 1868, B. and M. were named joint commissioners to determine the amount to be accorded to Wilson for expropriation of part of his property. S. and B., after valuing the compensation at \$19,500, on objections made, reduced the amount to \$13,666. M., in his report, declared \$7,500 sufficient.—Thereupon, on 7th August, 1868, the city council passed a resolution charging S. and B. with fraud and partiality, and applied to the Superior Court to have them removed from office.—On 17th September, 1870, the application was granted on the ground that they had committed an error of judgment and proceeded on a wrong principle, the charges of fraud and partiality being held unfounded.—On 20th September, 1873, the Court of Queen's Bench reinstated S. and B. as commissioners and on 4th November, 1876, this judgment was affirmed by the Privy Council. (2 App. Cass. 168.)—In May, 1871, S. brought the action, and in answer the appellants submitted:—That the action was barred under arts. 2262 & 2267 C. C.; that they had not been actuated by malice, and they considered it a duty to adopt proceedings for the redress of grievances complained of by interested parties, that there was reasonable and probable cause for their acts, and that S. had suffered no damage for which they were amenable. The Superior Court dismissed the action as barred, without entering into the merits, but the Court of Queen's Bench reversed the judgment and allowed \$3,000 damages, being of opinion that, as the matter was still in course of litigation, arts. 2262 & 2267 C. C., did not apply, and the action was not prescribed; that there was no proof of fraud and misconduct; that the proceedings were without reasonable and probable cause, and malice should be inferred. *Held*, affirming the judgment appealed from (6 Legal News 155; 27 L. C. Jur. 129), Fournier, J., dissenting, that the action was not merely for the libel contained in the resolution of the 7th August, 1868, but for malicious prosecution, following up that resolution by proceedings instituted in the courts, maliciously and without any reasonable and just cause, and prescription did not begin to run until the termination of such proceedings.*

The action, therefore, and judgment for damages should be sustained, no objection having been raised that the action was prematurely brought. *Mayor of Montreal v. Hall*, xii., 74.

2. *Reasonable and probable cause — Inferences — Functions of judge—Questions for jury—Nonsuit.*—In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the judge. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred, but the inferences must be drawn by the judge. *Lister v. Perryman* (L. R. 4 H. L. 521) followed; *Abraham v. North Eastern Ry. Co.* (11 Q. B. D. 79, 140; 11 App. Cas. 247) considered. *Archibald v. McLaren*, xxi., 588.

3. *Insolvent Act — Demand of assignment — Reasonable and probable cause — Order of judge annulling demand — Evidence.*—In 1874 the firm of D. & Co. was composed of J. D. and J. S.; and the firm of E. & G. was then composed of J. F. E. and the plaintiff. The latter firm carried on business then, in Saint John, as dealers in flour, meal, &c., and there had been dealings between the firms for about two years previously, but not, so far as appeared, to any very large extent.—In the fall of that year, three promissory notes, made by E. & G. in favour of D. & Co., which had been indorsed by the latter firm, and which had been discounted for them by the Bank of Montreal, were lying in that bank when they matured. The first for \$409.81, fell due 23rd November, 1874; the second for \$109.71, due 7th December, and the third for \$137.13, due 14th December.—On 23rd November, when the first note became due, plaintiff called at the office of D. & Co., where he saw S., and told him that he was unable to pay the note in full that day, but he offered S. 25% on account, and asked to be allowed to renew for the difference. S. promised to speak to the defendant on the subject, and requested plaintiff to call again and get his reply. Plaintiff accordingly called again shortly afterwards and found both S. and D. in their office. Defendant then at once refused peremptorily to accept the offer which plaintiff had made to S., or to accept 50% and to renew for the balance for one month.—After three o'clock on the same day, defendant called at the office of E. & G. and told plaintiff that if the note was not taken up by one o'clock the following day, an attachment would be issued against the firm of E. & G. Plaintiff urged him not to issue any attachment, assuring him that, not only D. & Co., but every one of the creditors of E. & G. should be paid in full. Defendant, however, refused to listen to these assurances.—The note for \$409.81 was not then retired, neither was the next one, for \$109, when it became due; but the third was paid in full at maturity.—Some time in December (the plaintiff thought about the 7th), E. & G. received a letter from B., as solicitor, on behalf of D. & Co., intimating that D. & Co.'s claim must be paid, or that E. & G. must go into liquidation.—As the solicitor of D. & Co., B., on 16th December issued an attachment against E. & G., but which was never executed. The sheriff testified that no property was pointed out to him, and that he found none to attach under it.—On 12th January, 1875, a demand was served on E. & G. at the instance of D. & Co., requiring E. & G. to assign under the Insolvent Act of 1869.—Within five

days after service a petition, under s. 15 of the Act, signed by E. & G. individually, was presented, praying that no further proceedings should be taken under it, and the judge proceeded to inquire into the subject matter of it, and ordered, "After hearing the parties, &c., and it appearing to me that E. & G. have not ceased to meet their liabilities generally at the time of such demand, I do order that the prayer of the petitioners be granted, and that no further proceedings be taken on such demand, with costs, &c."—E. & G. arranged with D. & Co. for the debt for which the demand had been made by giving them an indorsed note, payable, with interest, in 12 months; which was subsequently paid in full.—Plaintiff brought action on the ground "that the defendant falsely and maliciously, and without reasonable and probable cause, made, or procured to be made, a demand . . . requiring plaintiff and E. to assign for the benefit of creditors, and falsely and maliciously, and without reasonable or probable cause, caused the same to be served . . . and the plaintiff and E. presented their petition praying that no further proceedings, under the demand, should be had, and the judge granted the petition and thereby such demand became and was of no force, &c., and the proceedings thereon were determined; and by reason whereof plaintiff was put to inconvenience and anxiety, and was prevented from transacting his business and carrying on his said trade with the said E., and was injured in his credit and incurred expense in procuring the said demand to be annulled," &c.—At the trial Duff, J., directed the jury that the annulling of the demand by the order of Judge Watters was *prima facie* evidence of the absence of reasonable and probable cause, and threw upon the defendant the burthen of proving the affirmative. *Held*, reversing the judgment appealed from (3 Pugs. & Bur. 77), that such order was not in itself even *prima facie* evidence of the absence of reasonable and probable cause; but, further, the evidence sufficiently established the existence of reasonable and probable cause for making the demand of assignment. *Domville v. Gleeson*, Cass. Dig. (2 ed.) 343.

4. *Arrest—Imprisonment — Justice of the peace— Having liquors near public works— Destruction of liquors — Notice of action— Necessity of quashing—Unsealed conviction— Affixing seal— Venue— New trial—R. S. O. (1877) c. 32, ss. 2, 6, 7—R. S. O. (1887) c. 35, ss. 2, 6, 7—R. S. O. (1887) c. 73—R. S. O. (1877) c. 73.*—B. was convicted on a charge of having intoxicating liquors aboard a schooner in the Michipicoten River "for the purposes of sale on or near the works of the Canadian Pacific Railway, contrary to law." His stock of liquors was destroyed and, in default of payment of a fine purported to be imposed under R. S. O. (1877) c. 32, s. 2, he was imprisoned at Port Arthur, Ont., for about six weeks, when he was discharged under a writ of *habeas corpus*. The conviction as returned was not under seal; neither the conviction nor the order for destruction of the liquors was formally quashed; the notice of action for damages for malicious arrest and imprisonment and destruction of the liquors was served upon one of the convicting justices personally and a copy left at the residence and with the solicitors of the other convicting justice who admitted having seen a copy of the notice, but it did not appear where or at what time. The venue was laid in Toronto and

changed by consent to Port Arthur where the trial took place. B. recovered damages and the Divisional Court affirmed the trial court judgment (15 O. R. 716). The Supreme Court (Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.), affirmed the judgment of the Court of Appeal for Ontario (16 Ont. App. R. 398), dismissing an appeal from the Divisional Court judgment. *Connec v. Bond*, 1890, Cass. Dig. (2 ed.) 511.

5. *Malice—Libellous resolution—Summary dismissal of municipal official.*—A resolution by which a municipal council summarily dismissed an official without any previous notice recited that he had committed a serious fault by making unfounded charges against his assistant; that he was charged with negligence towards his committee; that he, without cause, refused to recognize his assistant, and by his conduct tended to render the administration of his department inefficient. No malicious motive was shewn to have actuated the council in passing the resolution. *Held*, that there was nothing in the resolution of a nature to injure the official character or reputation of the official so dismissed.—Judgment appealed from (Q. R. 6 Q. B. 177) affirmed. *Davis v. City of Montreal*, xxvii., 539.

6. *Probable cause—Forgery.*—An action by S., holder of a note indorsed to him by the payees, was dismissed upon evidence that it had never been signed by the person named as maker, nor with his knowledge or consent, but had been signed by his son without authority. The son deposed that he never intended to sign the note, and if he had actually signed it with his father's name, it was because he believed that it was merely a receipt for goods delivered by express. Immediately after dismissal of the suit, S. wrote payees asking information to help him in laying a criminal charge to force payment of the note and costs. He also applied to the agent, by whom the goods were delivered and note procured, and was informed that there was a receipt for the goods in the delivery-book, but that the signature was denied and could not be proved. Without further inquiry, and notwithstanding a warning against criminal proceeding, S. laid information against the son for forgery. Upon investigation the charge was declared unfounded. *Held*, reversing both courts below, that, under the circumstances, the prosecution was without reasonable or probable cause, and plaintiff entitled to substantial damages. *Charlebois v. Surveyer*, xxvii., 556.

7. Slander—Privileged communication.

See PUBLIC OFFICER, 1.

8. *Arrest on capias—Want of probable cause—Affidavit*—Art. 798 C. C. P.—*Damages.*

See CAPIAS.

9. *Damages—Evidence—Favourable termination of proceedings.*

See ACTION, 43.

10. *License by-law—Commercial traveller—Selling without license—Action for illegal arrest.*

See TORT, 4.

11. *Privileged communication—Evidence—Charge to jury—Unfriendly.*

See LIBEL, 7.

MANDAMUS.

1. *Discretionary order—Appellate jurisdiction—County school rates*—R. S. N. S. (4th ser.) c. 32, s. 52.—A mandamus was applied for to compel the Town of Dartmouth to assess \$16,976 for its proportion of county school rates under R. S. N. S. c. 32, s. 52. The court below, without determining whether or not the assessment was possible and obligatory, made the rule absolute, leaving the questions to be determined on the return of the writ. *Held*, affirming the judgment appealed from (1 Russ. & Geld. 402), Strong and Gwynne, JJ., dissenting, that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion cannot at present be questioned.—*Per Ritchie, C.J.* That the Town of Dartmouth is not, but that the City of Halifax is, exempted by R. S. N. S. c. 32 from contribution to county school rates. (See 5 Russ. & Geld. 402). *The Queen v. Town of Dartmouth*, ix., 509.

2. *Appeal—Jurisdiction—Final judgment—Judgment on demurrer—Supreme and Exchequer Courts Act*, ss. 24 (g), 28, 29, 30.—Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under s. 24 (g) of the Supreme and Exchequer Courts Act. The word "judgment" in that sub-section means the final judgment in the case. Strong and Patterson, JJ., dissented. *Langevin v. Commissaires de St. Marc*, xviii., 599.

3. *School corporation—Decision of superintendent of public instruction—Appeal—Final judgment—Practice*—R. S. Q. arts. 2055, 2056—55 & 56 Vict. c. 24, ss. 18 and 19 (Que.)—Under the provisions of art. 2055 of the Revised Statutes of Quebec, as amended by 55 & 56 Vict. c. 24, ss. 18 and 19, certain rate-payers of a school district appealed to the superintendent of public instruction for the Province of Quebec, who thereupon rendered a decision and gave orders and directions respecting the erection of a school house, which, however, the school commissioners neglected to perform. *Held*, affirming the judgment appealed from (Q. R. 3 Q. B. 500), that in such cases, the decision of the superintendent of public instruction was final; that no appeal therefrom would lie to the Superior Court, and that the proper remedy to enforce the execution of the orders and directions of the superintendent was by mandamus. *Commissaires de St. Charles v. Cordeau*, 9th December, 1895.

4. *Appeal—Special leave—60 & 61 Vict. c. 34, s. 1 (e)—Error in judgment—Concurrent jurisdiction—Procedure.*—Special leave to appeal from a judgment of the Court of Appeal for Ontario, under s. 1 (e) of 60 & 61 Vict. c. 34, will not be granted on the ground merely that there is error in such judgment.—Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.—The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S. having been refused such fiat applied for a writ of mandamus which the Divisional Court granted and its judgment was affirmed by the Court of Appeal. *Held*, that the mandamus having been granted the public interest did not require special leave to be given for

an appeal from the judgment of the Court of Appeal, though it might have had the writ been refused. — The question raised by the proposed appeal is, if not one of practice, a question of the control of provincial courts over their own records and officers with which the Supreme Court should not interfere. *Attorney-General of Ontario v. Scully*, xxxiii., 16.

5. *Final judgment — Decision — Highest court of final resort*—38 *Vict. c. 11*.

See *APPEAL*, 159.

6. *By-law—Railway bonus—Validating Act—Remedy at law*.

See *MUNICIPAL CORPORATION*, 37.

7. *School taxes in county of Halifax—Assessment of present ratepayers for previous years—Jurisdiction*.

See *ASSESSMENT AND TAXES*, 62.

8. *Remedy for wrongful dismissal—Physician engaged by Board of Health—Charge on municipality—Damages—Reasonable expenses—Action*.

See *MUNICIPAL CORPORATION*, 158.

9. *Drainage — Injuring liability—Right of action—Notice—R. S. O. (1887) c. 184*.

See *DRAINAGE*, 2.

10. *Municipal drains — Negligence — Non-completion—Action—Maintenance and repair*.

See *DRAINAGE*, 3.

11. *Return to writ—Demurrer—Practice in court below*.

See *APPEAL*, 344.

12. *Appeal—Jurisdiction—Court of Review—54 & 55 Vict. c. 25, s. 3 (D.)—Costs*.

See *APPEAL*, 113.

13. *Construction of contract—Construction of 12 Vict. c. 183, s. 20—Notice to cancel contract—Gas supply shut off for non-payment of gas bill on other premises*.

See *CONTRACT*, 28.

MANDATE.

1. *Termination — Partnership moneys—Sequestration of—Contre-lettre.*]—In November, 1886, G. B. by means of a *contre-lettre* became interested in real estate transactions in Montreal, effected by P. S. M. In December, 1886, G. B. brought action against P. S. M., to have a sale made by the latter to one Barsalou declared fraudulent and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was filed and, pending action, a sequestrator appointed, to whom Barsalou paid the money. In September, 1887, another action was instituted by G. B. against P. S. M. for an account of real estate transactions conformably to the *contre-lettre*. A plea of compensation was filed. The Superior Court dismissed the first action on the ground that G. B. had no right of action, but maintained the second ordering an account to be taken. The Queen's Bench affirmed the Superior Court in dismissing the first action and P. S. M. acquiesced in the judgment on

the second action.—On appeal from the judgment dismissing the first action: *Held*, reversing the judgment appealed from, that the plea of compensation was unfounded, G. B. having the right to put an end to P. S. M.'s mandate by a direct action, and therefore until the account which had been ordered in the second action had been rendered, the moneys should remain in the hands of the sequestrator appointed with the consent of the parties. *Bury v. Murphy*, xxii., 137.

2. *Partnership — Division of assets — Art. 1898 C. C.—Debtor and creditor account.*]—In Quebec, where there is no other arrangement between partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the Civil Code in relation to the partition of successions, in so far as they can be made to apply.—Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the mandatary of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or as for money had and received. *Lefebvre v. Aubry*, xxvi., 602.

3. *Pledge of stock — Notice of trust—Pre-carious title — Possession of shares — Insolvency—Arts. 1755, 2268 C. C.*

See *TRUSTS*, 2.

4. *Statement—Reddition de compte—Errors and omissions—Réformation de compte*.

See *ACTION*, 2.

5. *Negotiorum gestor — Action—Account—Release—Purchase of trust estate—Will*.

See *ACCOUNT*, 4.

6. *Power of attorney—Authority to adjust and settle claim—Right to receive award*.

See *ATTORNEY*.

7. *Insolvency — Purchase by inspector — Trusts—Arts. 1484, 1706 C. C.—Art. C. P. Q.*

See *TRUSTS*, 23.

AND see *BROKER — PRINCIPAL AND AGENT — TRUSTS*.

MANITOBA.

1. *School law — Rights "by practice" — Legislative jurisdiction—Denominational education*.

See *CONSTITUTIONAL LAW*, 69.

2. *Constitutional Act — Legislation in respect to education—Legislative powers—Right to repeal — Appeal to Governor-General-in-Council—33 Vict. c. 3, s. 22, s.s. 2—B. N. A. Act, s. 93, s.s. 3.*

See *CONSTITUTIONAL LAW*, 2.

AND see *HOUSE OF COMMONS*.

MARCHANDE PUBLIQUE.

See *HUSBAND AND WIFE—MARRIED WOMAN*.

MARINE INSURANCE.

See INSURANCE, MARINE.

MARITIME LAW.

1. *Deviation—Putting into port over night—Stress of weather.*—On appeal from a judgment of the Supreme Court of Nova Scotia (24 N. S. Rep. 205), which held that it was not a deviation for a coasting vessel on a voyage from Mahone Bay, N. S., to Fortune Bay in Newfoundland, and thence, &c., to put into an intermediate port over night to escape threatened bad weather, the Supreme Court of Canada affirmed the decision of the court appealed from, and dismissed the appeal with costs. *Nova Scotia Marine Ins. Co. v. Eisenhauer*, 6th November, 1894.

2. *Collision—Negligence—Rule of the road—Steamer—Sailing vessel—Opinion of assessors—Delegation of judicial functions.*—Action for damages by collision between plaintiff's schooner and defendant's steamer. In the marine protest by the captain of the schooner the cause of action alleged was that the steamer's wheel was put to port when it should have been put to starboard, just before collision. The action was twice tried, the first trial having been set aside on the ground that the judge, by adopting the opinion of assessors, had delegated his judicial functions (19 Ont. App. R. 298). The second trial resulted in a verdict for plaintiff, which was affirmed by the Court of Appeal.—The Supreme Court affirmed the Court of Appeal, and dismissed the appeal with costs. *Collier v. Wright*, 6th May, 1895; xxiv., 714.

3. *Collision—Rules of road—Narrow channel—Navigation rules—R. S. C. c. 79, s. 2, arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" ships—"Meeting" ships—"Passing" ships—Breach of rules—Presumption of fault—Contributory negligence—Moiety of damages—36 & 37 Vict. (Imp.) c. 85, s. 17—"Agony of collision."*—If two vessels approach each other in the position of "passing" ships, (with a side light of one dead ahead of the other) where unless the course of one or both is changed, they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship.—If one of two "passing" ships acts consistently with good seamanship, and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding her helm when it was seen that the helm of the other was hard to port, and the vessels are rapidly approaching; and, after signalling that she was going to port, in reversing her engines and thereby turning her bow to starboard, she is to blame for a collision which follows.—The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse if necessary when approaching another ship, so as to involve risk of collision, is not to be considered as a fact contributing to a collision, providing the same could have been avoided by the impinging vessel by reasonable care exerted up to the time of the accident.—Excusable manoeuvres executed in "agony of collision" brought about by another vessel, cannot be imputed as contributory negligence on the part of the vessel collided with.—The rule that in narrow channels steamships shall, when safe and

practicable, keep to the starboard (art. 21), does not override the general rules of navigation. *The Leverington* (11 P. D. 117) followed. Judgment appealed from (5 Ex. C. R. 135) affirmed. *The "Cuba" v. McMillan*, xxvi., 651.

4. *Afreightment—Carriers—Charter party—Contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Arts. 1674, 1675, 1676 C. C.—Contract against liability—Fault of servants—Arts. 2383 (8), 2390, 2409, 2413, 2424, 2427 C. C.*—The chartering of a ship with its company for a particular voyage by a transportation company, does not relieve the owners and master from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners, and the contract had been made with them only.—The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse ship-owners from liability for damages caused through improper or insufficient stowage.—A condition of a bill of lading, providing that the ship-owners shall not be liable for negligence on the part of the master or mariners, or their other servants, or agents, is not contrary to public policy nor prohibited by law in the Province of Quebec.—Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect, or error in judgment of the pilot, master, mariners, or other servants of the ship-owners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions apply only to loss or damage resulting from acts done during the carriage of the goods, and do not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.—Judgment appealed from (Q. R. 6 Q. B. 95, 294) affirmed. *Glengoil SS. Co. v. Pilkington*, and *v. Ferguson*, xxviii., 146.

5. *Appeal—Certiorari—Merchants' Shipping Act, 1854—Distressed seaman—Recovery of expenses—"Owner for time being"—Proof of ownership and payment.*—An appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute a rule nisi for a certiorari to bring up proceedings before a police magistrate under the Merchants' Shipping Act with a view to having the judgment thereon quashed. Section 213 of The Merchants' Shipping Act, 1854, makes the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being." *Held*, affirming the Supreme Court of New Brunswick (34 N. B. Rep. 449), that the latter words mean the owner at the time of action brought. *Held*, further, that a certificate of the assistant secretary of the Board of Trade that such expenses were incurred and paid is sufficient proof of pay-

ment under the Act though the above section does not provide for a mode of proof by certificate.—Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under The Merchants' Shipping Act of 1854, proof of ownership of a ship may be made according to the mode provided in The Merchants' Shipping Act, 1894, by which the former Act is repealed. *Held*, also, reversing the judgment appealed from (34 N. B. Rep. 449), that under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the Registrar-General of Shipping at London, is sufficient proof of ownership. *Quere*. Where the Merchants' Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will *certiorari* lie to remove the proceedings into a Superior Court? *The Queen v. S. S. "Troop" Co.*, xxix., 662.

6. *Jurisdiction of Maritime Court of Ontario—Action for negligence—Death of servant—Lord Campbell's Act.*

See ACTION, 42.

7. *Appeal from Maritime Court—Rules—Notice—Date of pronouncing judgment—Entry by registrar—R. S. C. c. 137, ss. 18, 19.*

See APPEAL, 381.

8. *Collision at sea—Negligence—Defective steering gear—Question of fact—Interference with decision of local judge in admiralty.*

See APPEAL, 226.

9. *Foreign vessel fishing within British waters of Canada—Three-mile limit—License—R. S. C. c. 94, s. 3—Evidence—Onus probandi.*

See FISHERIES, 6.

AND see ADMIRALTY LAW—SHIPPING.

MARRIAGE.

Conditions in restraint of—“Dying without issue”—“Revert”—Contingencies—Annuity—Dower—Election by widow—Devolution of Estates Act, 49 Vict. (O.) c. 22—“The Wills Act of Ontario,” R. S. O. (1889) c. 109, s. 30.

See WILL, 15.

MARRIAGE LAWS.

1. *Interdiction—Authorization by interdicted husband—Dower—Sheriff's sale—Registry laws—Warranty—Succession—Renunciation—Donation by interdict*—The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed and must also contain a description sufficient to identify the lands sought to be affected. A sale by a sheriff against a debtor in possession of an immoveable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of art. 2116 of the Civil Code.—*Semble*, that voluntary interdiction, even prior to the promulgation

of the Civil Code of Lower Canada, was an absolute nullity and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization. *Rousseau v. Burland*, xxxii., 541.

2. *Marriage covenant—Universal community—Don mutuel—Registry laws—Arts. 807, 819, 1411 C. C.—Construction of contract.*—A marriage contract contained the following clause:—“Les futurs époux se sont faits et se font par ces présentes au survivant d'eux, ce acceptant, donation viagère, mutuelle, égale et réciproque de tous les biens meubles et immeubles, acquêts, conquêts propres et autres biens généralement quelconques qui se trouveront être et appartenir au premier mourant au jour de son décès, de quelque nature qu'ils soient, et à quelque lieu qu'ils soient situés, pour par le dit survivant en jouir en usufruit sa vie durant, à sa caution juratoire et gardant viduité.” It was admitted that the only thing affected consisted of property belonging to the community. *Held*, affirming the judgment appealed from, that the donation was one within the provisions of art. 1411 C. C. and, as such, did not require registration, as the clause is divisible and the stipulation in question as to universal community is merely a marriage covenant and not subject to the rules and formalities applicable to gifts. *Huot v. Bienvenu*, xxxiii., 370.

3. *Will—Condition of legacy—Religious liberty—Restriction as to marriage—Education—Exclusion from succession—Public policy.*

See PUBLIC POLICY, 1.

AND see COMMUNITY—DIVORCE—DOWER—HUSBAND AND WIFE—MARRIED WOMAN.

MARRIED WOMAN.

1. *Dissolution of partnership—Benefit conferred during marriage—Simulation—Fraud.*—On 10th April, 1886, J. S. M., a retired partner of the firm McL. & B., composed of himself and W. M., his brother, agreed to leave his capital, for which he was paid interest, in the new firm constituted of W. M. and R., and that such capital should rank after the creditors of the old firm had been paid in full. The new firm was to carry on business under the same firm name to 31st December, 1889. J. S. M. died 18th November, 1886. His wife, separate as to property, had an account in the books of both firms. On 16th April, 1890, an agreement was entered into between the new firm and the estate of J. S. M. and his widow, by which a large balance was admitted to be due by them to the estate and the widow. The new firm was declared insolvent in January, 1891. Claims were filed by the widow, and the estate of J. S. M. against the insolvents. The bank contested on grounds, *inter alia*, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886, that the widow's moneys formed part of the capital of J. S. M., and that the dissolution was simulated.—The Supreme Court reversed the judgment appealed from (Q. R. 2 Q. B. 431) and restored that of the Superior Court, Fournier and King, JJ., dissenting, and *Held*, that the dissolution was simulated; that the

moneys which appeared to be owing to the widow, after having credited her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her, during marriage, benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors. *Merchants Bank of Canada v. McLachlan, and v. McLaren*, xxiii., 143.

2. *Don mutuel* — *Property excluded from settlement but acquired after marriage—Rescission for value.*]—Where by the terms of a *don mutuel* by marriage contract a farm in the possession of one of the sons of the husband under a deed of donation was excluded from the *don mutuel*, and subsequently the farm in question became the absolute property of the father, the deed of donation having been for value, it was held that by reason of the rescission the husband had acquired an independent title to the farm, and it thereby became charged for the amount due under the *don mutuel* by marriage contract, viz., \$5,000, and that after the husband's death the wife (the respondent in this case) was entitled, until a proper inventory had been made of the deceased's estate, to retain possession of the farm. *Taschereau and Gwynne, JJ.*, dissenting.—Judgment appealed from (Q. R. 1 Q. B. 144) affirmed. *Martindale v. Powers*, xxiii., 597.

3. *Constitutional law* — *Marital rights* — *Separate estate* — *Legislative jurisdiction* — 40 Vict. c. 7, s. 3—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.]—The provisions of ordinance No. 16 of 1889, respecting personal property of married women, are *intra vires* of the Legislature of the N.-W. Territories of Canada, as affecting property and civil rights, upon which the Lieutenant-Governor-in-Council was authorized to legislate by the order of the Governor-General-in-Council passed under the provisions of "The North-West Territories Act."—Its provisions are consistent with ss. 36 to 40 of "The North-West Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.—The words "her personal property" used in the ordinance are unconfined by any context, and must be interpreted, not as having reference only to the "personal earnings" mentioned in s. 36, but to all personal property belonging to a woman, married subsequently to the ordinance, as well as all personal property acquired since then by women married before it was enacted. *Brittlebank v. Gray-Jones* (5 Man. L. R. 33) distinguished. *Conger v. Kennedy*, xxvi., 397.

4. *Mortgage* — *Implied covenant* — *Disclaimer.*]—Where a deed of lands to a married woman, but which she did not sign, contained a recital that, as part of the consideration, the grantee should assume and pay off a mortgage debt thereon, and a covenant to the same effect with the vendor, his executors, administrators and assigns, and she took possession of the lands and enjoyed the same, and the benefit thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that in assenting to take under the deed she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, and an assignee of the covenant could enforce it against her separate estate. *Small v. Thompson*, xxviii., 219.

5. *Separate property* — *Conveyance—Contracts*—C. S. N. B. c. 72.]—Section 1 of C. S. N. B. c. 72, which provides that the property of a married woman shall vest in her as her separate property, free from control of her husband and not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power for disposing of such property, or allow her to enter into contracts which at common law would be void. *Moore v. Jackson* (22 Can. S. C. R. 310) referred to. *Lea v. Wallace* (33 N. B. Rep. 492) reversed. *Wallace v. Lea*, xxviii., 595.

6. *Renunciation of community* — *Marchande publique—Possession—Prescription—Estoppel* — Arts. 1379, 2191 C. C.

See TITLE TO LAND, 75.

7. *Lands expropriated* — *Compensation* — R. S. N. S. c. 36, s. 40.

See ADMINISTRATION, 1.

8. *Estoppel* — *Conveyance by married woman—Agreement* — *Recital* — *Bona fides.*

See FRAUDULENT CONVEYANCES, 5.

MARTIAL LAW.

See MILITARY LAW.

MASTER AND SERVANT.

1. EMPLOYER AND EMPLOYEE, 1-6.
2. ENGAGEMENT AND DISMISSAL, 7-11.
3. LIABILITY OF EMPLOYER FOR INJURIES TO WORKMEN, 12-37.
 - (a) *For Cause Unknown*, 12-14.
 - (b) *Common Employment*, 15-20.
 - (c) *Contributory Negligence*, 21-24.
 - (d) *Dangerous Material*, 25-27.
 - (e) *Dangerous Way; Works and Plant*, 28-31.
 - (f) *Defective Construction and Machinery*, 32-36.
 - (g) *Exonerating Circumstances*, 37.

1. EMPLOYER AND EMPLOYEE.

1. *Collector of taxes* — *Warrant upon void assessment* — *False imprisonment* — 41 Vict. c. 9 (N. B.) — "*Respondent superior*" — *Damages.*]—41 Vict. c. 9 (N. B.) authorized the assessment of owners of land benefited by the widening of streets in St. John, N. B., and in their report on one street, the commissioners assessed benefit to a lot at \$419.46, in the name of appellant as owner, although as it appeared afterwards he was not the owner of the land in question. The assessment, if not paid, was to be levied upon execution, and S., the receiver of taxes, on default, issued execution, and for want of goods appellant was arrested and imprisoned until he paid the amount. The action was against the city and the receiver for arrest and false imprisonment, and for money had and received. The jury found a verdict against both

defendants, which was set aside. *Held*, reversing the judgment appealed from (20 N. B. Rep. 479), Ritchie, C.J., and Taschereau, J., dissenting, that the receiver had issued the warrant upon a void assessment and caused the arrest to be made, and was guilty of a trespass, being at the time a servant of the corporation, under their control, specially appointed to collect and levy the amount so assessed, that the maxim of *respondent superior* applied, and therefore the verdict against both respondents should stand.—*Per* Gwynne, J. That the corporation had adopted the act of their officer as their own by receiving and retaining the money paid and authorizing the appellant's discharge from custody only after such payment. *McSorley v. City of St. John*, vi., 531.

2. *Negligence of servant — Deviation from employment — Resumption — Contributory negligence — Infant—Evidence.*—A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work, and in doing so ran over and injured a child. *Held*, affirming the decision appealed from (33 N. B. Rep. 91), that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to his master's store and made a fresh start. *Merritt v. Hepenstal*, xxv., 150.

3. *Tortious act — Public work — Contractor — Liability of railway company.*—A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract. *Kerr v. Atlantic & N. W. Ry. Co.*, xxv., 197.

4. *Railway company — Loan of cars — Reasonable care — Breach of duty — Negligence — Risk voluntarily incurred.*—"Volenti non fit injuria."—A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway, with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard and bringing away the cars to be dispatched from their depot as directed by the bills of lading. *Held*, affirming the judgment appealed from (22 Ont. App. R. 292), that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that when the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk and injury to them. *Canada Atlantic Ry. Co. v. Hurdman*, xxv., 205.

5. *Hiring of servant by third party—Control over service — Negligence.*—A plate glass company hired by the day the general servant and horse and waggon of another company for use in its business, and while so hired the servant in carrying a load of glass

knocked a man down and seriously injured him. *Held*, reversing the judgment appealed from (26 Ont. App. R. 63), that the plate glass company was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired and not that of the plate glass company. *Consolidated Plate Glass Co. v. Caston*, xxix., 624.

6. *Negligence — Damages for death of servant — Right of action — Jurisdiction of Maritime Court of Ontario — Lord Campbell's Act.*

See ACTION, 42.

2 ENGAGEMENT AND DISMISSAL.

7. *Contract for service — Arbitrary right of dismissal — Forfeiture — Notice.*—By agreement under seal between M., the inventor of a machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements and assign them to McR., who in consideration thereof agreed to employ M. for 2 years to place the patents on the market, paying him salary and expenses, and a percentage on profits by sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of 6 months from its date by paying M. his salary and share of profits, if any, to date of cancellation.—Employer was to be absolute judge of the manner in which employed performed his duties, and was given the right to dismiss employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal, but to have no claim whatever against employer.—M. was summarily dismissed within 3 months from date of agreement for alleged incapacity and disobedience to orders. *Held*, reversing the judgment appealed from (17 Ont. App. R. 139), that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, and without specifying any particular act calling for such dismissal.—*Per* Ritchie, C.J., Fournier, Taschereau and Patterson, JJ., that such dismissal did not deprive M. of his claim for a share of the profits of the business.—*Per* Strong and Gwynne, JJ., that the share of M. in the profits was only a part of his remuneration for his services which he lost by being dismissed equally as he did his fixed salary. *McRae v. Marshall*, xix., 10.

8. *Contract — Proprietor of newspaper — Engagement of editor — Dismissal — Breach of contract.*—A. B. and C. D., who had published a newspaper as partners or joint owners, entered into a new agreement, by which A. B. assumed payment of all the debts of the business and became from that time sole proprietor of the paper, binding himself to continue its publication, and, in case he wished to sell out, to give C. D. the preference. The agreement provided that: "3. Le dit Charles Bélanger devient, à partir de ce jour, directeur et rédacteur du dit journal, son nom devant paraître comme directeur en tête du dit journal, et pour ses services et son influence comme tel, le dit Arthur Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, &c., qu'en argent jusqu'au montant de cette somme, et

le dit Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger." The paper was published for some time under this agreement as a supporter of the Liberal party, when C. B., without instruction from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election, and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "*rédauteur et directeur*" of the newspaper and claiming damages. *Held*, reversing the Queen's Bench, that C. B., by the agreement, had become the employee of A. B., the owner of the paper; that he had no right to change the political colour of the paper without the owner's consent; and that he was rightly dismissed for so doing. *Bélanger v. Bélanger*, xxiv., 678.

9. *Principal and agent — Master and servant — Insurance agent — Duty — Appointment—Acting for rival company — Divided interests — Dismissal.*—To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal.—Judgment of the Court of Appeal for Ontario (22 Ont. App. R. 408) affirmed. *Eastmure v. Canada Accident Assur. Co.*, xxv., 691.

10. *Hiring of personal services — Municipal corporation — Appointment of officers—Summary dismissal — Libellous resolution — Statute, interpretation of — Difference in text of English and French versions—52 Vict. c. 79, s. 79 (Q.) — "à discrétion" — "At pleasure."*—The charter of the City of Montreal, 1889, 52 Vict. c. 79, s. 79, gives power to the city council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*." *Held*, affirming the judgment appealed from (Q. R. 6 Q. B. 177), that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the city council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. *Davis v. City of Montreal*, xxvii., 539.

11. *Contract of hiring — Duration of service — Evidence — Dismissal — Notice.*—Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year, is a question of fact to be decided upon the circumstances of the case.—A business having been sold, the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but he was then informed that if he desired to remain his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms.

Held, affirming the judgment appealed from (24 Ont. App. R. 296), which reversed that of Meredith, C.J., at the trial (27 O. R. 369), that as it appeared the foreman knew that the business, before the sale, had been losing money and could not be kept going without reductions of expenses and salaries, that he had been informed that the contracts with the employees had not been assumed by the purchaser and that upon his own evidence there was no hiring for any definite period, but merely a temporary arrangement, until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed. *Bain v. Anderson*, xxviii., 481.

3. LIABILITY OF EMPLOYEE FOR INJURIES TO WORKMEN.

(a) For Cause Unknown.

12. *Negligence — "Quebec Factories Act" R. N. Q. arts. 3019-3053—C. C. art. 1053—Civil responsibility — Accident, cause of — Conjecture — Evidence — Onus of proof — Statutable duty, breach of — Police regulations.*—The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture. *Held*, that, in order to maintain the action it was necessary to prove by direct evidence or by weighty, precise and consistent presumptions arising from the fact proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed. The provisions of "The Quebec Factories Act," (R. S. Q. arts. 3019 to 3053, inclusive) are intended to operate only as police regulations, and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees, as provided by the Civil Code. *Montreal Rolling Mills Co. v. Corcoran*, xxvi., 595.

13. *Master and servant — Negligence — Evidence — Probable cause of accident.*—Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant, and the actual cause of the accident is purely a matter of speculation or conjecture. *Canada Paint Co. v. Trainor*, xxviii., 352.

14. *Accidental injury — Unknown cause—Negligence — Employer's liability — Arts. 1053, 1056 C. C.*—Defendant manufactured detonating caps made by charging copper shells with a highly explosive mixture, requiring great care in manipulation. When dry it was liable to explode easily by friction or contact with flame, but burnt slowly without exploding when saturated with moisture. It was the duty of defendant's foreman, twice a day, to provide a sufficient quantity of the mixture for use in his special compartment during the morning and in the afternoon, and to keep it properly dampened with water, for which purpose he was furnished with a

sprinkler; to fill empty shells with the fulminating mixture as handed to him set on end in wooden plates, and then pass them on, properly moistened, through a slot in his compartment, to a shelf whence they were removed by another employee and the charges pressed by means of a machine worked by C., at a table near by. An explosion originated at the pressing machine, and might have occurred either through the fulminate in the shells having been allowed to become too dry through carelessness in sprinkling, or from an accumulation of the mixture adhering to and drying upon the metal portions of the pressing machine. It was the duty of C. to keep the machine clean and prevent the mixture from accumulating and drying there in dangerous quantities. When the explosion occurred, the foreman and C. and another employee were killed, but a fourth employee, who was blown outside the wreck of the building and survived, stated that the first flash appeared to come from the pressing machine, and the explosion followed immediately. The theory propounded by plaintiff, father of C., assumed that nothing was known of the actual cause of the explosion, nor where it in point of fact originated, but inferred, from a supposed condition of things, that the fulminate had not been sufficiently dampened, and, that this indicated carelessness of the foreman, and raised a presumption that the explosion originated through his fault. The evidence of the survivor led to the conclusion that the explosion originated through C.'s neglect to clean the pressing machine. The defendant had taken all reasonable precautions to diminish risk of injury to employees in the event of an explosion, and there was evidence which shewed that conformity with the rules prescribed and instructions given to employees for the purpose of securing their safety would be sufficient to secure them from injury. *Held*, *Taschereau and King, J.J.*, dissenting, that as it appeared that the cause of the accident was either unknown or else that it could fairly be presumed to have been caused by the fault of a fellow-servant, as the whose personal representative brought the action, there could not be any such fault imputed to the defendants as would render them liable in damages. *Dominion Cartridge Co. v. Cairns*, xxviii., 361.

[Leave to appeal refused by the Privy Council.]

(b) Common Employment.

15. *Common employment — Negligence — Questions of fact — Finding of jury on.*—A gas company, engaged in laying a main in a public street, procured from a plumber the services of H., one of his workmen, for such work, and while engaged thereon H. was injured by the negligence of the servants of the company.—In an action for damages for such injury:—*Held*, affirming the decision appealed from (32 N. B. Rep. 100), that by the evidence at the trial negligence against the company was sufficiently proved. *Held*, further, that whether or not there was a common employment between H. and the servant of the company was a question of fact, and it having been negatived by the finding of the jury, and the evidence warranting such finding, an appellate court would not interfere. *St. John Gas Light Co. v. Hatfield*, xxiii., 164.

16. *Negligence of servants of the Crown — Common employment — Law of Quebec.*—It is no answer to a petition of right for injuries to a servant of the Crown while in discharge of his duty in the Province of Quebec to say that the injuries complained of were caused by the fault of a fellow-servant, as the doctrine of common employment does not prevail in that province.—Judgment appealed from (4 Ex. C. R. 134) affirmed. *The Queen v. Filton*, xxiv., 482.

17. *Common employment — Law of Quebec.*—The doctrine of common employment does not prevail in the Province of Quebec.—*The Queen v. Filton* (24 Can. S. C. R. 482) followed. *The Queen v. Grenier*, xxx., 42.

18. *Common employment — Doctrine in Quebec — Employer's liability for act of servant.*—As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow-servants do not exonerate employers from liability for injuries caused through negligence of a servant. *Asbestos and Asbestic Co. v. Durand*, xxx., 285.

19. *Public work — Negligence of servants of Crown — Common employment — Law of Quebec.*

See NEGLIGENCE, 29.

20. *Negligence of loom fixer — Defective machinery — Fault of fellow-servant.*

See NEGLIGENCE, 97.

(c) Contributory Negligence.

21. *Negligence — Injuries sustained by servant — Responsibility — Contributory negligence — Protection of machinery.*—Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shewn that the accident by which the injuries were caused was directly due to his neglect. (Q. R. 9 S. C. 506 reversed.) *Tooke v. Begeron*, xxvii., 567.

22. *Negligence — Accident, cause of — Contributory negligence — Evidence.*—In an action for damages by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle needed to be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed, but it was proved that the speed had been increased to that extent at the instance of the employee himself, who was a skilled workman. *Held*, reversing the Court of Queen's Bench, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable. *Burland v. Lee*, xxviii., 348.

23. *Working on tramway — Reasonable care.*

See NEGLIGENCE, 42, 237.

24. *Negligence — Common fault — Inconsistent findings—New trial.*

See NEGLIGENCE, 141.

(d) *Dangerous Material.*

25. *Negligence — Employer's liability — Use of dangerous material—Insulation of electric wires—Cause of death—Findings of fact—Arts. 1053, 1054 C. C.*—Persons dealing with dangerous material are obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end, and where there is evidence that there was a precaution which might have been taken by a company making use of electrical currents to prevent live wires causing accidents, and that this precaution was not adopted, the company must be held responsible for damages. *Citizens Light & Power Co. v. Lepitre*, xxix., 1.

26. *Negligence — Use of dangerous materials — Cause of accident — Arts. 1053, 1056 C. C.—Common employment — Employer's liability.*—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on the part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. Gwynne, J., dissenting.—As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow-servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *The Queen v. Eilon* (24 Can. S. C. R. 482), and *The Queen v. Grenier* (30 Can. S. C. R. 42) followed. *Asbestos and Asbestic Co. v. Durand*, xxx., 255.

27. *Workman in factory — Use of dangerous machinery — Orders of superior—Reasonable case.*

See NEGLIGENCE, 96.

(e) *Dangerous Way, Works and Plant.*

28. *Negligence — Employer's liability — Concurrent findings of fact — Contributory negligence.*—Action by employee for damages for injuries. There was some evidence of neglect on the part of employers which, in the opinion of both courts below, might have been the cause of the accident through which the injuries were sustained, and both courts found that the accident was due to the fault of defendants either in neglecting to cover a dangerous part of a revolving shaft temporarily with boards, or to disconnect the shaft or stop the whole machinery while the plaintiff was required to work over or near the shaft. *Held*, *Taschereau, J.*, dissenting, that although the evidence on which the courts below based their findings of fact might appear weak, and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the court would not, on appeal, reverse any such concurrent findings of fact. *George Matthews Co. v. Bouchard*, xxviii., 580.

29. *Workman using machinery — Guarding dangerous parts—Reasonable care.*

See NEGLIGENCE, 96.

30. *Workman in factory — Accident — Negligence of master—Evidence.*

See NEGLIGENCE, 86.

31. *Negligence — Employer's liability—Evidence—New trial—Imprudence.*

See NEGLIGENCE, 87.

(f) *Defective Construction and Machinery.*

32. *Negligence — Employer's liability—Defective system of using machinery—Injury to workman—Notice.*—F. was employed in a sawmill as a chainer, and worked on a rollway, along which the logs were brought to the saw carriage. One of his duties was to put a chain under the log and roll it on to the carriage, and while doing so a log rolled down the rollway and against one behind him and crushed him against the carriage causing severe injuries for which he brought an action against the owners of the mill.—It was shewn that chock blocks were used to check the log in its course down the rollway, which had a slope of from 5 to 7 inches in its length of 12 feet, and that the blocks were only sufficient to hold one log. The jury found that the accident was due to the slope of the rollway and defective chock blocks; that F. could not have avoided the injury by exercise of proper care and skill in discharging his duties; that he had complained of the chock blocks to the proper persons, who promised to make them good; that the owners were not aware of the defects, but that the manager and foreman should have taken cognizance of the matter and did not appear to have exercised due care; and they assessed damages to F. at \$5,000, for which a judgment was entered which was sustained by the court *in banc*. *Held*, affirming the judgment appealed from (2 B. C. Rep. 137), that the employers were no less responsible for the injuries occasioned to F. by the defective system of using their machinery than they would have been for a defect in the machinery itself. *Held*, further, that there being no *Employers' Liability Act* in force in British Columbia when the injury happened, F. was not precluded from obtaining compensation by failure to give notice to his employers of the defect in the chock blocks. *Webster v. Foley*, xxi., 580.

33. *Negligence — Electric railway—Motorman—Injury to conductor—Workmen's Compensation Act — Person in charge.*—An electric tramway company is responsible for injuries occasioned through the fault of a motorman in negligently allowing an open car to come in contact with a passing vehicle whereby the conductor was injured, as the motorman had "charge and control" of the car within the meaning of the *Ontario Workmen's Compensation Act* (27 Ont. App. R. 151, affirmed). *Toronto Ry. Co. v. Snell*, xxxi., 241.

34. *Quebec Factories Act — Civil responsibility—Statutable duty.*

See No. 12, ante.

35. *Defect in working of loom—Repairs to machinery—Fault of fellow-servant.*

See NEGLIGENCE, 97.

36. *Negligence—Defective machinery—Evidence for jury.*

See EVIDENCE, 97.

(g) *Exonerating Circumstances.*

37. *Government railway — Injury to employee—Lord Campbell's Act—Art. 1056 C. C.—Exoneration from liability—R. S. C. c. 38, s. 50—Common employment.*—A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. *Griffiths v. Earl Dudley* (9 Q. B. D. 357) followed.—In s. 50 of the Government Railways Act (R. S. C. c. 38) providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister," the words "notice, condition or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow-servants. *Grand Trunk Railway Co. v. Vogel* (11 Can. S. C. R. 612) disapproved.—An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually \$6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow-servant, *Held*, reversing the judgment of the Exchequer Court (6 Can. Ex. C. R. 276), that the rule of the association was sufficient answer to an action by his widow under art. 1056 C. C. to recover compensation for his death.—The doctrine of common employment does not prevail in the Province of Quebec. *The Queen v. Filion* (24 Can. S. C. R. 482) followed. *The Queen v. Grenier*, xxx., 42.

MECHANICS' LIEN.

See LIEN.

MEDIATORS.

Setting aside award—Art. 1346 C. C. P.

See ARBITRATION AND AWARD.

MERCANTILE AGENCY.

Confidential report—Negligence—False information.

See LIBEL, 3.

MERGER.

Mortgage — Leasehold estate—Assignment of equity of redemption—Acquisition of reversion by assignee—Priority.—The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquires the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emmett v. Quinn*

(7 Ont. App. R. 306) distinguished.—Judgment of the Court of Appeal (24 Ont. App. R. 509) affirmed. *Mackenzie v. Building and Loan Association*, xxviii., 407.

(Leave to appeal refused by Privy Council.)

METES AND BOUNDS.

See BOUNDARY.

METHODIST CHURCH.

Decision of domestic tribunal—Conference of Methodist church—Church discipline.

See APPEAL, 138.

MILITARY LAW; MILITIA.

1. 31 Vict. c. 40, s. 27—36 Vict. c. 46—42 Vict. c. 35—*Disturbance anticipated—Requisition calling out militia—Sufficiency of form—Suit by commanding officer—Death of commanding officer pending suit—Right of administration to continue proceedings.*—The Act, 31 Vict. c. 40, s. 27 (D.), as amended by 36 Vict. c. 46 and 42 Vict. c. 35, requires that a requisition calling out the militia in aid of the civil power to assist in suppressing a riot, shall be signed by three magistrates, of whom the warden, or other head officer of the municipality, shall be one; and that it shall express on its face "the actual occurrence of a riot, disturbance or emergency, or the anticipation thereof, requiring such service."—*Held*, that a requisition in the following form is sufficient:—"Charles W. Hill, Esq., Captain No. 5 Company, Cape Breton, Militia: Sir,—We, in compliance with c. 46, s. 27 Dominion Acts of 1873, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power to suppress. You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed. A. J. McDonald, Warden: R. McDonald, J.P.: J. McNarish, J.P.: Angus McNeil, J.P."—The statute also provides that the municipality shall pay all expenses of the service of the militia when so called out, and in case of refusal that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses. *Held*, Strong, J., dissenting, that where the commanding officer died pending such action the proceedings could be continued by his personal representative. Judgment appealed from (19 N. S. Rep. 260) reversed. *Crewe-Read v. County of Cape Breton*, xiv., 8.

2. "Public work" — *Negligence — Militia class firing—Government rifle range—Officers and servants of the Crown—Injury to the person—50 & 51 Vict. c. 16, s. 16 (c) (D.)—R. S. C. c. 41, ss. 10, 69.*—A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16 (c).—The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the militia. *Girouard, J.*, dissented. *Judge*

ment appealed from (6 Ex. C. R. 435) affirmed. *Larose v. The King*, xxxi., 206.

AND see RIFLE RANGES.

MINES AND MINERALS.

1. *Mining lease—Application for—Right of entry—Conditions precedent—Conflicting titles.*—*Held*, affirming the judgment appealed from (6 Russ. & Geld. 339), that where a mining lease is obtained over private lands in Nova Scotia the lessees must obtain from the owners of the land permission to enter either by special agreement or in accordance with the provisions of the Mining Act.—Mining leases may be granted in all districts whether proclaimed or unproclaimed.—A mining lease is not invalid because it includes a greater number of areas than is provided by the statute (R. S. N. S. (4 ser.) c. 9), such provision being only directory to the commissioner.—The issue of a lease cures any irregularities in the application for a license or in the license itself in the absence of fraud on the part of the licensee. *Fielding v. Mott*, xiv., 254.

2. *Admission of British Columbia into Union—Public lands—Transfer—Dominion—Precious metals*—B. N. A. Act, s. 92, s.-s. 5, ss. 109 & 146—47 Vict. c. 14, s. 2 (B.C.)—By s. 11 of the order-in-council passed in virtue of B. N. A. Act, s. 146, under which British Columbia was admitted into the Union, it was provided as follows:—And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway (C. P. R.), a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed however 20 miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba. By 47 Vict. c. 14, s. 2 (B.C.), it was enacted as follows:—From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government, for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located to a width of 20 miles on each side of the said line, as provided in the order-in-council, s. 11, admitting the Province of British Columbia into Confederation. A controversy having arisen in respect to the ownership of the precious metals in and under the lands so conveyed, the Exchequer Court, upon consent and without argument, gave judgment in favour of the Dominion Government. *Held*, affirming the judgment of the Exchequer Court, Fournier and Henry, JJ., dissenting, that under the order-in-council admitting British Columbia into Confederation and the statutes transferring the public lands described therein, the precious metals in, upon, and under such public lands are now vested in the Crown as represented by the Dominion Government. *Attorney-General of B. C. v. Attorney-General of Can.*, xiv., 345.

The Privy Council reversed this decision. (14 App. Cas. 295.)

3. *Construction of deed—Lease or license—Mines—Authority to work on royalty*—8 Anne c. 14, s. 1—*Lien.*—In an indenture describing the parties as lessor and lessees respectively the grant was: "Doth give, grant, demise and lease unto the said (lessees) the exclusive right, liberty and privilege of entering at all times for and during the term of ten years from 1st January, 1879, in and upon (describing the land) and with agents, labourers and teams to search for, dig, excavate, mine and carry away the iron ores in, upon and under said premises, and of making all necessary roads, &c., also the right, liberty and privilege to erect on the said premises the buildings, machinery and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores." There was a covenant by the grantees not to do unnecessary damage and a provision for taking away the erections made and for the use of timber on the premises and such use of the surface as might be needed. The grantees agreed to pay twenty-five cents for every ton of ore mined, in quarterly payments on certain fixed days, and it was provided how the quantity should be ascertained. It was also agreed that the royalty should not be less than a certain sum in any year. The grantees also agreed to pay all taxes and not to allow intoxicating drinks to be manufactured on the premises or to carry on any business that might be deemed a nuisance. There were provisions for terminating the lease before the expiration of the term and covenant by the lessor for quiet enjoyment. In an interpleader issue, where the lessor claimed a lien on the goods of the lessees for a year's rent due under the said indenture by virtue of 8 Anne, c. 14, s. 1: *Held*, per Ritchie, C.J., and Henry and Taschereau, JJ., that this instrument was not a lease but a mere license to the grantee to mine and ship the iron ores, and the grantor had no lien for rent under the statute. Strong, Fournier and Gwynne, JJ., *contra*. Judgment appealed from (12 Ont. App. R. 525) affirmed. *Lynch v. Seymour*, xv., 341.

4. *Mining lease—Covenants—Rent—Quantity and quality of ore found—Right of lessee to determine lease.*—In a lease of mining lands the *reddendum* was:—"Yielding and paying therefor unto the party of the first part \$1 per gross ton of 2,240 lbs. of the said iron, stone or ore for every ton mined and raised from the said lands and mine, payable quarterly on the first days of March, June, September and December in each year."—The lease contained, also, the following covenants by the lessee:—"The parties of the second part for themselves, their executors, &c., covenant and agree to and with the party of the first part, her heirs, &c., that they will dig up and mine and carry away, in each and every year during the said term, a quantity of not less than 2,000 tons of such stone or iron ore for the first year, and a quantity of not less than 5,000 tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of \$1 per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid."—"And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment

of the first quarter thereafter, in which more than the said quantity shall be taken, and that they will protect such openings as they shall make so as to insure the same against accident, and will indemnify the party of the first part in the event of the same happening and against all costs of prosecution and defence thereof."—There was a provision that the lessor should be at liberty to terminate the lease in case of non-payment of rent for a certain period, and if the iron ore or iron stone should be exhausted, and not to be found or obtained by proper and reasonable effort in paying quantities, then the lessee should be at liberty to determine the lease. *Held*, affirming the judgment appealed from (14 Ont. App. R. 440, *sub nom.* *Wallbridge v. Gaujot*), Ritchie, C.J., and Fournier, J., dissenting, that this lease contained an absolute covenant by the lessee to pay the rent in any event, and not having terminated the lease under the above proviso, he was not relieved from such payment in consequence of ore not being found in paying quantities. *Palmer v. Wallbridge*, xv., 650.

5. *Lease of mining areas — Rental agreement—Payment of rent—Forfeiture—R. S. N. S. (5 ser.) c. 7—52 Vict. c. 23 (N. S.)*—By R. S. N. S. (5 ser.) c. 7, the lessee of mining areas in Nova Scotia was obliged to perform certain work thereon each year on pain of forfeiture which, however, could only be effected through certain formalities. By 52 Vict. c. 23, the lessee is permitted to pay in advance an annual rental in lieu of work, and by s. 1, s.-s. (c), the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by s. 8, said s. 7 was to come into force in two months after the passing of the Act. Before 52 Vict. c. 23 passed a lease issued to E. dated 10th June, 1889, for 21 years from 21st May, 1889. On 1st June, 1891, a rental agreement under the amending Act was executed, under which E. paid rent for his areas for 3 years, the last payment being in May, 1893. On 22nd May, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on 9th June, 1894, and an action was afterwards taken by the Attorney-General, on relation of E., to set aside the license as illegal and improvident.—*Held*, affirming the judgment appealed from (29 N. S. Rep. 279), that the phrase "nearest recurring anniversary of the date of the lease" in 52 Vict. c. 23, s. 1 (c), is equivalent to "next or next ensuing anniversary," and the lease being dated 10th June, no rent for 1894 was due on 22nd May of that year, at which date the lease was declared forfeited, and E.'s tender on 9th June was in time. *Attorney-General v. Sheraton* (28 N. S. Rep. 492) approved and followed. *Held*, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities

prescribed by the original Act. *Temple v. Attorney-General of N. S.*, xxvii., 355.

6. *Mining claim—Invalid location—Location in foreign territory.*—If the initial part of a mining claim is in the United States territory the claim is utterly void. (6 B. C. Rep. 531 affirmed). *Madden v. Connell*, xxx., 109.

7. *Negligence—Use of dangerous materials—Cause of accident—Arts. 1053, 1056 C. C.—Employer's liability.*—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on the part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. Gwynne, J., dissenting. *Asbestos and Asbestos Co. v. Durand*, xxx., 285.

8. *Mining claim—Registered description—Error—Certificate of improvements—Adverse action—R. S. B. C. c. 155, s. 28.*—If the description of a mining claim as recorded is so erroneous as to mislead parties locating other claims in the vicinity the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims. (6 B. C. Rep. 523 affirmed.) *Coplen v. Callahan*, xxx., 555.

Followed in *Collom v. Manley* (No. 10 *infra*), and in *Clary v. Boscowitz* (No. 11, *infra*).

9. *Negligence—Work in mine—Entering shaft—Code of signals—Disregard of rules—Damages.*—A miner was getting into the bucket by which he was to be lowered into the mine when owing to the chain not being checked his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine owners the jury found that the system of lowering the men was faulty; the man in charge of it negligent; and that the engine and brake by which the bucket was lowered were not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing among other things that signals should be given, by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual in descending to signal with the bells; and that the injured miner knew of the rules but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for plaintiff and ordering a new trial. *Held*, reversing said judgment (8 B. C. Rep. 344) and restoring the judgment of the trial judge (7 B. C. Rep. 414), that there was ample evidence to support the findings of the jury that defendants were negligent; that there was no contributory negligence by non-use of the signals, the rules having, with consent of the employees and of the persons in charge of the men, been disregarded, which indicated their abrogation; the new trial should therefore not have been granted. *Held*, further, that as the negligence causing the accident was not that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the

amount of damages, but the latter must be assessed under the Employers' Liability Act ([1897] R. S. B. C. c. 69.) *Warmington v. Palmer*, xxxii., 126.

10. *Mining law — Location of claim—Approximate bearing—Mis-statement—Minerals in place—B. C. "Mineral Act."*—Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other.—A prospector in locating and recording his location line between stakes No. 1 and No. 2 as running in an easterly direction, whereas it was nearly due north, does not comply with the statute requiring him to state the approximate compass bearing and his location is void. *Coplen v. Callahan* (30 Can. S. C. R. 555) followed.—Before a prospector can locate a claim he must actually find "minerals in place." His belief that the proposed claim contains minerals is not sufficient.—Judgment appealed from (8 B. C. Rep. 153) reversed. *Collom v. Manley*, xxxii., 371. Followed in *Cleary v. Boscowitz*, No. 11, *infra*.

11. *Mining law — Location—Certificate of work—Evidence to impugn—R. S. B. C. c. 135.*—A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent and can only be impugned by the Crown. *Coplen v. Callahan* (30 Can. S. C. R. 555) and *Collom v. Manley* (32 Can. S. C. R. 371) followed.—C. believing that the statutory work had not been done on mining claims, and that they were, therefore, vacant, located and recorded them under new names as his own and brought an action claiming an adverse right thereto. *Held*, affirming the judgment appealed from (8 B. C. Rep. 225), that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial. *Cleary v. Boscowitz*, xxxii., 417.

12. *Negligence—Working of mines—Statutory mining regulations—R. S. N. S. (5 ser.) c. 8—Fault of fellow-workmen.*—The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected and an explosion of gas occurred from the effects of which he died. In an action for damages by his widow, *Held*, reversing the judgment appealed from, Taschereau and Sedgewick, J.J., dissenting, that as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen. *Grant v. Acadia Coal Co.*, xxxii., 427.

13. *Mining law — Royalties — Dominion Lands Act—Publication of regulations—Renewal of license — Payment of royalties — Voluntary payment — R. S. C. c. 54, ss. 90, 91.*—The Dominion Government, by regulations made under the Dominion Lands Act, may validly reserve a royalty on gold produced by placer mining in the Yukon though the miner, by his license, has the exclusive right to all gold mined. Taschereau and Sedgewick, J.J., dissenting.—The "exclusive right" given by the license is exclusive only against quartz or hydraulic licenses or owners of sur-

face rights and not against the Crown. Taschereau and Sedgewick, J.J., dissenting.—The provision in s. 91 of the Dominion Lands Act that regulations made thereunder shall have effect only after publication for four successive weeks in the *Canada Gazette*, means that the regulations do not come into force on publication in the last of the four successive issues of the *Gazette*, but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of 4th September they were not in force until the 11th and did not affect a license granted on 9th September.—Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment.—One of the regulations of 1889 was that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year." *Held*, per C. J. and Girouard and Davies, J.J., reversing the judgment of the Exchequer Court (7 Ex. C. R. 414), Sedgewick, J., *contra*, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only, but he did so subject to the terms of any regulations made since such grant was issued.—The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1890, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.—Regulations in force when a license issued were shortly after cancelled by new regulations imposing a smaller royalty. *Held*, that the new regulations were substituted for the others and applied to said license. *The King v. Chappelle; The King v. Carmack; The King v. Tweed*, xxxii., 586.

The Privy Council granted leave for an appeal and a cross-appeal, 4th March, 1903. See Can. Gaz. vol. xl., p. 569.

14. *Mines and minerals — Placer mining—Hydraulic concessions—Staking claims—Annulment of prior lease—Volunteer plaintiff—Right of action—Status of adverse claimants—Trespass.*—In an action by free miners, who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease on the ground that it had been illegally issued and was null and of no effect; *Held*, that where there was a hydraulic lease of mineral lands in existence, the mere fact of free miners "staking" on the lands included within the leased limits did not give them any right or interest in the lands nor did they thereby acquire such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the lease. *Hartley v. Matson*, xxxii., 644.

15. *Adverse claim—Form of plan and affidavit—Right of action—Condition precedent—Necessity of actual survey—Blank in jurat—R. S. B. C. (1897) c. 135, s. 37—61 Vict. c. 33, s. 9 (B. C.)—R. S. B. S. c. 3, s. 16—B. C. Supreme Court Rule 415 of 1890.*—The plan required to be filed in an action to adverse a mineral claim under the provisions of s. 37 of the "Mineral Act" of British Columbia as amended by s. 9 of the "Mineral

to Amendment Act, 1898," need not be based on an actual survey of the location made by the Provincial Land Surveyor who signs the affidavit.—The filing of such plan and the affidavit required under the said section as amended, is of a condition precedent to the right of the adverse claimant to proceed with his adverse action.—The jurat to an affidavit filed pursuant to the section above referred to did not entitle the date upon which the affidavit had been sworn. *Held*, that the absence of the date was not a fatal defect, and that, even if it could be so considered at common law, such defect would be cured by the "British Columbia Oaths Act" and the British Columbia Supreme Court Rule 415 of 1890. Judgment appealed from (9 B. C. Rep. 184) reversed, *aschereau, J.*, dissenting. *Paulson v. Beaman et al.*, xxxii., 655.

16. *Free miner's certificate — Annual renewals — Special renewals — Vesting of interest in co-owners — Sheriff — Levy under execution — R. S. B. C. c. 135, ss. 2, 3, 9, 34-62 Vict. c. 45, ss. 2, 3, 4—R. S. B. C. c. 72, ss. 12, 24.*—The sheriff seized the interest in mineral locations held by an execution debtor in co-ownership with another free miner and, prior to sale under the execution, the debtor allowed his free miner's license to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under the provisions of the fourth section of the "Mineral Act Amendment Act, 1899," and it was intended that the debtor's interest had thus been revived and re-vested in him subject to the execution. *Held*, that upon the lapse of a free miner's certificate the interest in the location had, under the statute, become absolutely vested in the co-owner and could not thereafter be revived and re-vested in the judgment debtor by the issue of a special certificate.—Judgment appealed from (9 B. C. Rep. 31) affirmed, *Sedgewick, J.*, dissenting. *Arvey Van Norman Co. et al. v. McNaught*, xxii., 690.

17. *Placer mining regulations — Staking aims — Overlapping locations — Renewal grant — Unoccupied Crown lands.*—In August, 1899, M. staked and received a grant for a placer mining claim on Dominion Creek, Yukon, which, however, actually included part of an existing creek claim previously staked by W.. In 1900 he applied for and obtained a renewal grant for the same area, M.'s claim having lapsed in the meantime, and was continuously in undisputed possession of that area, with his stakes standing from the time of his original location until March, 1901, when S. and T. staked bench claims for lands embraced in W.'s expired location which had been overlapped by M.'s claim, as being unoccupied Crown land. *Held*, affirming the judgment appealed from, *Davies and Armour, JJ.*, dissenting, that the application for the renewal grant by M., after W.'s claim had lapsed, for the identical ground he had originally staked and continuously occupied, gave him a valid right to the location without the necessity of a formal re-staking and without application and that, following the rule in *Osborne v. Morgan* (13 App. Cas. 227), the possession of M. under his renewal grant could not be disturbed. *St. Laurent v. Merz*, xxxiii., 314.

18. *Lease of mining rights — Option as to location — Adoption of boundary.*—McA. leased a portion of a lot of land for mining s. c. d.—27

purposes described by metes and bounds with the option: "Pourra le dit acquéreur changer la course des lignes et bornes du dit lopin de terre sans en augmenter les bornes, l'étendue ou superficie en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit, après que lui, le dit bailleur, aura prospecté le dit lopin de terre susbailé," adopted lines of survey made by P. as containing the vein. B. leased another portion of the same lot. In an action *en bornage* the court appointed three surveyors to fix the boundaries. Each surveyor made a separate report, and the report and plan of the surveyor L., adopting P.'s lines, was adopted and homologated by the court.—*Held*, affirming the judgment appealed from (13 Q. L. R. 168), *Gwynne, J.*, dissenting, that McA. having located the claim in accordance with the terms of the deed was estopped from claiming that the property should be bounded according to the true course of the vein of quartz, and that the judgment homologating the survey adopting P.'s lines and survey was right and should be affirmed. *McArthur v. Brown*, xvii., 61.

19. *Sale of phosphate mining rights — Option to purchase other minerals found while working — Exercise of option.*—M. by deed sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind he shall have the privilege of buying the same from the said vendor or representative by paying the price set upon the same by two arbitrators, appointed by the parties." W. worked the phosphate mines for five years, and then discontinued it. Two years later he sold his mining rights in the land, and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B. the original vendor, M., granted the exclusive right to work mines and veins of mica on said land to W. & Co., who proceeded to develop the mica. B. then claimed an option to purchase the mica mines, under the original agreement, and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator and for damages.—*Held*, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica, as to which B. claimed the option. *Baker v. McLelland*, xxiv., 416.

20. *Crown grant — Reservation of coal — Order-in-council — Supplementary grant.*—Certain Crown lands in Quebec had been granted to the suppliants, as assignees of one Kaye, the applicant for said lands, from which the Crown contended the coal thereon was reserved, which was the sole question in issue. The Exchequer Court (3 Ex. C. R. 157), held that there being no express or implied agreement to the contrary the suppliants were entitled to a grant conveying such mines and minerals as would pass without express words.—The Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the appeal with costs. *The Queen v. Canadian Agricultural Coal, and Colonization Co.*, xxiv., 713.

21. *Contract — Mining claim — Agreement for sale — Construction—Enhanced value.*—By agreement in writing signed by both parties B. offered to convey his interest in certain mining claims to N. for a price named with a stipulation that, if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should immediately be formed and that B. should have a reasonable amount of stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims or that the agreement should be specifically performed. — *Held*, reversing the judgment of the Supreme Court of British Columbia, that the dual agreement above mentioned was for a transfer at a nominal price in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon; and that, on breach of said trust, B. was entitled to a re-conveyance of his interest in the claims and an account of moneys received or that should have been received from the working thereof in the meantime. *Briggs v. Newswander*, xxxii., 405.

22. *Mortgage — Registration — Fixtures— Interpretation of terms — Bill of sale — Personal chattels — Delivery.*

See MORTGAGE, 43.

23. *Sale of land — Agreement for sale — Mutual mistake — Reservation of minerals— Specific performance.*

See SALE, 89.

24. *Indian lands — Treaties with Indians— Surrender of Indian rights — Crown grant— Constitutional law—43 Vict. c. 28 (D.).*

See TITLE TO LAND, 141.

25. *Decisions of Yukon gold commissioner — Appeals—Legislative jurisdiction.*

See APPEAL, 294.

26. *Negligence — Defective works, ways and machinery — Proximate cause of injury — Fault of fellow-workman — Mining regulations.*

See VERDICT, 3.

MINORITY.

1. *Doctrine of contributory negligence — Child of tender age.*—The doctrine of contributory negligence does not apply to an infant of tender age.—(*Gardner v. Grace*, 1 F. & F. 359, followed.)—Judgment appealed from (33 N. B. Rep. 91) affirmed. *Merritt v. Hepenstal*, xxv., 150.

2. *Loan to minor—Misconduct of tutor — Remedy — Ratification — Account.*

See MORTGAGE, 11.

3. *Administration — Emancipation by marriage — Deed to tutor — Action to annul — Prescription — Arts. 2243, 2253 C. C.*

See LIMITATION OF ACTIONS, 7.

4. *Sale of minor's property—Shares held "in trust"—Purchase for value — Notice — Obligation to account.*

See TRUSTS, 7.

5. *Discharge of administration—Constructive trust—Débats de compte.* ¶

See TUTORSHIP, 2.

6. *Universal legatee — Succession — Acceptance by, after action — Operation of.*

See SUCCESSION, 1.

7. *Appeal — Jurisdiction — Matter in controversy—R. S. C. c. 135, s. 29 (b)—Tutorship — Petition for cancellation of appointment — Arts. 249 et seq. C. C.—Tutelle proceedings.*

See APPEAL, 87.

MISDESCRIPTION.

Railways — Expropriation—Title to lands — Propriétés par indivis — Plans, surveys, books of reference — Estoppel—Satisfaction of condition as to indemnity — Application of statute—Registry laws — Construction of agreement.

See RAILWAYS, 32.

AND see TITLE TO LAND.

MISDIRECTION.

See NEW TRIAL.

MISE EN DEMEURE.

Municipal corporation — Waterworks — Rescission of contract — Notice — Long user — Waiver — Art. 1067 C. C.

See CONTRACT, 29.

MISREPRESENTATION.

See CONDITIONS, AND ACCIDENT, FIRE, LIFE, AND MARINE INSURANCE.

MISTAKE.

1. *Vendor and purchaser — Principal and agent — Mistake — Contract — Agreement for sale of land — Agent exceeding authority — Findings of fact.*—Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her and under the mistaken impression that the offer was for the purchase of certain swamp lots only, whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent is not binding upon her and will be set aside by the court, on the ground of error, as the parties were not *ad idem* as to the subject matter of the contract, and there was no actual consent by the owner to the agreement so made for the sale of her lands—Judgment

ppealed from (31 N. S. Rep. 172) reversed. *Murray v. Jenkins*, xxviii., 565.

2. *Sale of land — Agreement for sale — Intual mistake — Reservation of minerals — [specific performance].*—The E. & N. Ry. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept as it reserved the minerals on the land while the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning and minus the minerals. *Held*, reversing the judgment of the Supreme Court of British Columbia (6 B. C. Rep. 228), Taschereau, J., dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance. *Hobbs v. The Esquimalt and Nanaimo Ry. Co.*, xxix., 450.

(Leave to appeal to Privy Council refused.)
3. *Error as to fact — Répétition de l'indu — Actio conductio indebiti — Duress — Transaction — Payment under threat of criminal prosecution — Ratification — Arts.* 1047, 1049, 1140 C. C.]—About the time a dissolution of partnership was imminent one of the partners was accused of embezzlement of funds and, supposing that he was liable for an alleged shortage and under threat of criminal prosecution, he signed a consent that the amount should be deducted from his share as a member of the firm. He was denied access to the books and vouchers and, some weeks afterwards, upon settlement of the affairs of the partnership, the amount so charged to him was paid over to the other partners. It was subsequently shewn that this partner had made his returns correctly and had not appropriated any part of the missing funds. *Held*, that he was entitled to recover back the amount so paid in an action *condictio indebiti* as both the consent and the payment had been made under duress and in error and, further, that there had been no ratification of his consent to the deduction of the amount by the subsequent payment, because the denial of access to the books and vouchers caused him to continue in the same error which vitiated his consent in the first place, and, further, that, even if the consent given could be regarded as amounting to transaction, it could be voidable on account of error as to fact. *Migner v. Goulet*, xxxi., 26.

4. *Marked cheque — Fraudulent alteration — Payment by third party — Liability for loss — Negligence — Recovery of sum paid through error.*—B. having an account in the Bank of I. had a cheque for \$5 marked "good," and, altering it so as to make it read as a cheque for \$500, he had it cashed by the Imperial Bank. The same day it went through the clearing house and was paid by the Bank of H. to the Imperial Bank. The error was discovered next day by the Bank of I., and re-payment demanded from the Imperial Bank and refused. The Bank of H. brought an action to recover from the Imperial Bank \$495, overpaid on the cheque. Defendant contended that the note as presented to be marked good was so drawn as to make the subsequent alteration an easy mat-

ter, and the plaintiff's act in marking it in that form was negligence which prevented recovery. *Held*, affirming the judgment appealed from (27 Ont. App. R. 590), which affirmed that at the trial (31 O. R. 100), that there was nothing in the circumstances to take the case out of the rule that money paid by mistake can be recovered back, and the Bank of H. was therefore entitled to judgment. *Imperial Bank of Canada v. Bank of Hamilton*, xxxi., 344.

Affirmed on appeal by the Privy Council, [1903] A. C. 49.

5. *Action for account — Agent's returns — Compromise — Subsequent discovery of error — Ratification — Prejudice.*—P. was agent to manage the wharf property of W., and receive the rents and profits thereof, being paid by commission. When his agency terminated W. was unable to obtain an account from him and brought an action therefor which was compromised by P. paying \$375, giving \$125 cash and a note for the balance and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that, on one of the accounts assigned to him, \$100 had been paid and demanded credit on his note for that sum. This W. refused, and in an action on the note P. claimed that the error avoided the compromise and that the note was without consideration or, in the alternative, that the note should be rectified. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, that as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by the compromise, W. was prevented from going fully into the accounts and perhaps establishing greater liability on the part of P., W. was entitled to recover the full amount of the note. *Peters v. Worralh*, xxxii., 52.

6. *Insurance — Application — Beneficiary not named in policy — Right to proceeds.*—Where through error and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy he is, nevertheless, entitled to the benefit of the insurance.—Judgment appealed from reversed, *Davies and Mills, J.J.*, dissenting. *Cornwall v. Halifax Banking Co.*, xxxii., 442.

7. *Debtor and creditor — Payment — Accord and satisfaction — Mistake — Principal and agent.*—On being pressed for payment of the amount of a promissory note, the defendant offered to convey to the plaintiffs a lot of land, then shewn to the plaintiffs' agent, in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been pointed out and inspected at the time the offer was made. More than a year afterwards, the plaintiffs sued the defendant on the note and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them and, at the trial, the plaintiff recovered judgment. The full court reversed the trial court judgment and dismissed the action.

Held, affirming the judgment appealed from (9 B. C. Rep. 257) that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt and could not recover on the promissory note. *Pither & Leiser v. Manley*, xxxii., 651.

8. Amount insured — Death or endowment policy — Parol evidence.

See INSURANCE, LIFE, 28.

9. Survey of boundaries — Conventional line — Courses and distances — Equitable relief.

See BOUNDARY, 1.

10. Reddition de compte — Settlement without vouchers — Omissions — Réformation de compte.

See ACTION, 2.

11. Policy of insurance — Misdescription of risk — Representation by insured — Contract — Waiver.

See INSURANCE, FIRE, 93.

12. Wrong principle of award — Final by submission — Setting aside.

See ARBITRATIONS, 47.

13. Receipt — Mistake — Parol testimony — Art. 1234 C. C. — Nullité d'ordre publique.

See EVIDENCE, 222.

14. Misrepresentation — Quality of masonry — Instructions to follow specifications — Increased price of works.

See CONTRACT, 177.

15. Error in mortgage — Rectification — Registered judgment — Priority.

See REGISTRY LAWS, 24.

16. Fraud — Coercion — Compromise — Duress — False inventory.

See PARTITION, 1.

17. Contract — Rescission — Innocent misrepresentation — Common error — Sale of land — Failure of consideration.

See CONTRACT, 120.

18. Debtor and creditor — Appropriation of payments — Error in appropriation — Arts. 1160, 1161.

See PAYMENT, 2.

19. Scire facias — Title to land — Annulment of letters patent — Tender on taking action — Sale of pledge — Vente à réméré — Concealment of material facts — Arts. 1274-1279 R. S. Q. — Registration — Transfer of Crown lands — Art. 1007 C. P. Q. — Art. 1553 C. C.

See CROWN, 93.

20. Sale of land — Misrepresentation by vendor — Estoppel.

See ESTOPPEL, 16.

21. Mining claim — Error in description — Registration.

See MINES AND MINERALS, 8.

22. Rescission of contract — Misrepresentation — Artifice — Consideration.

See VENDOR AND PURCHASER, 26.

23. Customs duties — *Lex fori* — *Lex loci* — Interest on duties improperly levied — Mistake of law — Repetition — Presumption of good faith — Arts. 1041, 1049 C. C.

See CUSTOMS DUTIES, 5.

24. Construction of written contract — Specifications — "From" and "to" streets — Reference to annexed plan — Mistake — Apportionment of costs.

See CONTRACT, 179.

MIS-TRIAL.

New trial — Answers by jury — Final judgment — Jurisdiction.

See APPEAL, 174.

AND see NEW TRIAL.

MITOYENETE.

See PARTY WALL.

MONEY PAYMENT.

Insolvency — Assignment — Preference — Payment in money — Cheque of third party — R. S. O. (1887) c. 124, s. 3.

See INSOLVENCY, 23.

AND see PAYMENT.

MONOPOLY.

1. Contract for exclusive rights. — Operation of telegraph lines — Restraint of trade — Public policy.

See COMPANY LAW, 2.

2. Construction of statute — By-law — Exclusive rights — Statute confirming — Extension of privilege — C. S. C. c. 65—45 Vict. (Q.) c. 79, s. 5.

See STATUTES, 144.

3. Constitutional law — Municipal corporation — Powers of legislature — License — Monopoly — Highways and ferries — Navigable streams — By-laws and resolutions — Intermunicipal ferry — Tolls — Disturbance of licensee — North-West Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act, s. 92 ss. 8, 10 and 16—Rev. Ord. N. W. Ter. (1888) c. 28—Ord. N. W. T. No. 7 of 1891-92, s. 4—Companies, club associations and partnerships.

See CONSTITUTIONAL LAW, 27.

4. Trade combination — Public policy — Unlawful consideration — Malum prohibition — Matters judicially noticed.

See CONSPIRACY.

MORTGAGE.

1. ASSIGNMENT AND TRANSFER, 1-4.
2. CONTRACT, 5-24.
 - (a) *Construction of Terms*, 5-8.
 - (b) *Fraudulent Circumstances*, 9-15.
 - (c) *Parties to Deed*, 16-18.
 - (d) *Property Affected*, 19-24.
3. EQUITABLE CHARGE, 25.
4. FORECLOSURE, SALE AND HYPOTHECARY RECOURSE, 26-31.
5. LIMITATION OF ACTIONS, 32-33.
6. NOTICE, 34-40.
7. REGISTRY LAWS, PRIORITY AND PRIVILEGES, 41-48.
8. RELEASE OF CHARGES, 49-55.
9. RIGHTS AND REMEDIES, 56-81.
10. SALE OF MORTGAGED PROPERTY, 82, 83.

1. ASSIGNMENT AND TRANSFER.

1. *Assignment as collateral — Duty of assignee as to collecting — Bond, action on — Equitable plea — Taking accounts.*—Action on a bond to pay £18,250 on 1st July, 1863, with interest at 6% half yearly in advance. Plea upon equitable grounds, in substance, that before the making of the bond the plaintiffs through their trustee and manager, agreed to advance defendants £18,250 by transferring debentures of the Town of St. Catharines to that amount, for which defendants should give to plaintiffs good mortgages upon real estate to be approved by plaintiffs' manager, and that in the meantime defendants should execute said bond, but that the debentures should only be handed over to defendants as and when such approved mortgages should be delivered to plaintiffs; that defendants assigned certain mortgages and executed others upon their own real estate, which were accepted and approved by plaintiffs' manager, who handed over debentures amounting at par value to £14,000; that plaintiffs realized upon some, if not all, the mortgages, and defendants also paid large sums on account and defendants believed their bond was fully paid, but had received no account, and as the payments were numerous and extended over many years and the accounts were complicated, they prayed that the suit should be transferred under the Administration of Justice Act to the Court of Chancery and the accounts there taken. The case was transferred accordingly, and by consent of parties, a decree was made referring it to the master to take accounts, who made his report, and defendants appealed from it on three grounds. 1. Because the master had not charged plaintiffs with a draft of \$1,697 with interest.—2. Because the master ought to have charged plaintiffs with the difference between £2,000 in sterling debentures and \$8,000 currency, the amount due on a mortgage, referred to as the "Ross" mortgage. 3. Because the master ought to have charged plaintiffs with interest on \$6,484 (amount of a mortgage by McQ. assigned to plaintiffs) from 10th August, 1859.—The first ground of appeal turned entirely on the weight to be given to evidence on one

side or the other respecting the draft in question, which the plaintiffs contended was an accommodation draft given by one of the defendants to their manager, the defendants alleging that it was given in payment of an instalment of interest. Proudfoot, V.-C., allowed the appeal on this ground, and his judgment was upheld by the Court of Appeal.—As to the second ground, it appeared that among the mortgages assigned to plaintiffs was one for \$6,484, bearing interest at 6 per cent., executed by McQ. upon land sold to him by one of defendants to secure balance of purchase money. The land was subject to a mortgage for \$8,000, called the "Ross Trust Mortgage," and, at the time of the sale to McQ., it was agreed defendants should pay off this prior mortgage. At the time of the assignment of the mortgage to plaintiffs they were informed of this agreement, and to secure the plaintiffs, their manager retained two of the sterling debentures amounting to £2,000 to pay this mortgage for \$8,000. Defendants claimed that plaintiffs were responsible for the application of the \$8,000 out of the proceeds of the debentures from 9th March, 1860, date of the assignment of the mortgage, or that they should only be charged with \$8,000 of the £2,000 sterling. The plaintiffs contended that nothing should be allowed, because their manager was also the manager of the Ross estate, and that defendants consented to his retaining the two debentures in his character as agent of the Ross estate to be applied in satisfaction of the Ross mortgage, which was not satisfied until 1875.—Proudfoot, V.-C., held, that the *onus* lay upon plaintiffs to establish clearly that the debentures passed from them to defendants, and were held by Cameron as agent of the Ross trust and not as their agent, and as the evidence was insufficient to support this contention plaintiffs should bear the loss.—This holding was also upheld by the Court of Appeal.—As to the third ground — although plaintiffs took proceedings on the McQ. mortgage, the suit was conducted in such a dilatory manner that the final order of foreclosure was not obtained till 2nd April, 1875, and the property was then sold by plaintiffs to McQ. at a price much less than the principal and interest upon the original mortgage amounted to.—Proudfoot, V.-C., held, that defendants were not merely in the position of sureties for the assigned mortgages, who could not make plaintiffs liable for mere delay in proceeding upon the mortgages, but that when mortgages, or judgments, or securities of these kinds are assigned, the assignees are affected with a trust in regard to them, which imposes upon them the duty of diligence in their management; the assignment moving the property from the control of the debtor, and placing it within the control of the creditor, imposes upon him the duty of using proper exertions to render it effectual for the purpose for which it was assigned. Plaintiffs were therefore liable for not having collected the interest in question; it having been lost by the wrongful act of themselves, or their manager, for whose conduct they were responsible.—The Court of Appeal affirmed the judgment of Proudfoot, V.-C.—An appeal to the Supreme Court of Canada was dismissed with costs. *Synod of Toronto v. De Blaquièrre*, Cass Dig. (2 ed.) 537.

2. *Assignment of equity — Covenant of indemnity—Assignment of covenant—Right of mortgagee on covenant in mortgage.*—C. mortgaged his lands in favour of B., with the

usual covenant for payment. He afterwards sold the equity of redemption to D., who covenanted to pay off the mortgage and indemnify C. against all costs and damages in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers assuming payment of his proportion of the mortgage debt, and assigned the three respective covenants to the mortgagee, who agreed not to make any claim for the said mortgage money against D. until he had exhausted his remedies against the said three purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgage.—*Held*, reversing the judgment appealed from (24 Ont. App. R. 492), that the mortgagee being the sole owner of the covenant of D. with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage. *McCuaig v. Barber*, xxix., 126.

3. *Transfer of hypothec—Advances by bank*—34 Vict. c. 5, s. 40—Nullity.

See BANKS AND BANKING, 14.

4. *Right of action by mortgagee—Condition precedent—Notice of assignment—Transfer of mortgage—Assignment of rights under fire insurance policy after loss.*

See INSURANCE, FIRE, 72, 73.

2. CONTRACT.

(a) *Construction of Terms*, 5-8.

(b) *Fraudulent Circumstances*, 9-15.

(c) *Parties to Deed*, 16-18.

(d) *Property Affected*, 19-24.

(a) *Construction of Terms.*

5. *Rate of interest—Fixed time for repayment—Contract—Rate after maturity.*

See INTEREST, 3.

6. *Deed absolute—Declaration to operate as mortgage—Evidence.*

See DEED, 14.

7. *Deed in absolute form—Effect as security only—Parol testimony.*

See EVIDENCE, 225.

8. *Corporation—By-law—Bonus to mortgagors—Conditions of—Construction of terms.*

See BY-LAW, 13.

(b) *Fraudulent Circumstances.*

9. *Security for advances—Acts in contemplation of bankruptcy—Insolvent Act of 1875—Fraudulent preference—Onus of proof.*—W. was a private banker who discounted at an

exorbitant rate notes received by D. in the course of his business. D.'s indebtedness on new transactions amounted to a large sum of money, but he entered into new business, after obtaining goods on credit to the amount of \$4,000 or \$5,000, upon a representation to the suppliers that, although without any available capital, he had experience in business. About twelve days after he commenced his new business, being threatened with foreclosure proceedings, he applied to W., who advanced \$300, part of which was applied in paying overdue interest on the mortgage, and the surplus in retiring a note held by W.; he executed a mortgage to W., was granted a reduced rate of interest, and told he would have to work carefully to get through. D. became insolvent about four months afterwards, and a suit was brought by the assignee, impeaching the mortgage. *Held*, affirming the judgment appealed from (7 Ont. App. R. 103), that the plaintiff had not satisfied the *onus* cast upon him by the Insolvent Act of shewing that the insolvent, at the time of the mortgage, contemplated that his embarrassment must of necessity terminate in insolvency. *McCrae v. White*, ix., 22.

10. *Fraud against creditors*—13 Eliz. c. 5—*Right of creditor of mortgagor to redeem—Evidence.*—Plaintiffs recovered judgment against H. and issued execution under which the sheriff professed to sell goods of H., and gave a deed to plaintiffs conveying all the "share and interest" of H. in the goods. Six months before plaintiff's judgment, H. had executed a mortgage covering all the goods proposed to be sold by the sheriff. The plaintiffs filed a bill to set this mortgage aside as fraudulent under the Statute of Eliz., and fraudulent in fact. *Held*, affirming this judgment appealed from, that no fraud being shewn and the plaintiffs not offering to redeem the mortgage, the action was rightly dismissed. *Halifax Banking Co. v. Matthew*, xvi., 721.

11. *Nullity—Loan to minor—Arts. 297, 298 C. C.—Obligation—Personal remedy—Moneys used for benefit of minor—Hypothecary action—Costs.*—Where a loan of money is improperly obtained by a tutor for his own purposes and the lender, through his agent who was also the subrogate tutor, has acknowledged that the judicial authorization to borrow has been obtained without the tutor having first submitted a summary account as required by art. 298 C. C., and that such authorization is otherwise irregular on its face, the obligation given by the tutor is null and void.—The ratification by the minor after becoming of age of such obligation is not binding if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor.—If a mortgage, granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action by the lender against a subsequent purchaser of the property mortgaged will not lie.—A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor when of age for the amount so loaned and used. *Davis v. Kerr*, xvii., 235.

[NOTE.—Two actions were instituted and appeals taken in both. Three appeals were taken to the Supreme Court of Canada from the judgments below (M. L. R. 5 Q. B. 156; 17 Rev. de Leg. 620, 622). The judgment in the personal action was reversed, with costs

of appeal only; that in the hypothecary action was affirmed.]

12. *Debtor and creditor — Mortgage—Preference — Pressure — R. S. O. (1887) c. 124, s. 2.*] — A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors if given as a result of pressure and for a *bonâ fide* debt, and if the mortgagee is not aware of the debtor being in insolvent circumstances. *Molsons Bank v. Halter* (18 Can. S. C. R. 88), and *Stephens v. McArthur* (19 Can. S. C. R. 446) followed. Judgment appealed from (18 Ont. App. R. 159) affirmed. *Gibbons v. McDonald*, xx, 587.

13. *Preference — Prejudice of creditors—Notorious insolvency of mortgagors — Art. 2023 C. C.*]—About 28th February, 1883, "E. Piché et fils" made a voluntary assignment for the benefit of their creditors, in the hands of T. The Union Bank, on 13th March, issued an attachment, on the affidavit of their agent on the faith of the assignment, that E. P. et fils were notoriously insolvent and in bankruptcy and seized their personal property. On 27th March, 1883, the appellants obtained from the assignee a document by which he bound himself to grant *mainlevée* of a hypothec given 17th November, 1882, by E. P. et fils to him to secure him against indorsements of \$5,000, on promissory notes for advances to E. P. et fils, \$3,000 by the Hochelaga Bank and \$2,000 by Banque Ville Marie; and to allow the Union Bank to take a first hypothec on the immovable hypothecated for \$2,500. The Union Bank agreed to obtain for E. P. et fils a composition for 20c. in the \$ and a discharge from certain Montreal creditors.—Upon obtaining this document appellants discontinued proceedings under the attachment, and on 29th of same month, the Montreal creditors of E. P. et fils signed a transfer of their respective claims to appellants; the latter fulfilling thereby the condition imposed upon them by the document of 27th March. On 13th April T., who had signed the document, gave a discharge of the mortgage for \$5,000; and E. P. et fils consented in favour of appellants to the mortgage for \$2,650. The mortgaged property having been sold six months afterwards, appellants were collocated for the amount of their claim.—Respondents contested this collocation, alleging the notorious insolvency of E. P. et fils at the time of granting the mortgage.—The Superior Court rejected the contestation on the grounds: 1. that by acceptance of the composition of 20c. on the \$ by the Montreal creditors the Pichés had been placed in a position to resume their business; 2. that respondents had acquiesced in the agreement between T. and appellants.—This judgment was reversed by the Queen's Bench on the grounds that the Pichés were notoriously insolvent when the hypothec was given; that appellants were aware of the insolvency as proved by the affidavit for the attachment; and that therefore under art. 2023 C. C., the hypothec in question could not be invoked against appellants and the other creditors of the insolvents.—The Supreme Court concurred in the judgment appealed from and dismissed the appeal with costs, Gwynne, J., dissenting. *Union Bank of Lower Canada v. Hochelaga Bank*, Cass. Dig. (2 ed.) 350.

14. *Contract in fraud of creditors—Action to annul—Art. 1040 C. C.—Limitation of ac-*

tion—Security for advances to pay composition.

See FRAUDULENT CONVEYANCES, 3.

15. *Consideration partly bad — Bonâ fide advance — Statute of Elizabeth — R. S. O. (1887) c. 124, s. 2.*

See FRAUDULENT PREFERENCE, 7.

(c) *Parties to Deed.*

16. *Fiduciary substitution—Mortgage by institute—Preferred claim—Vis Major—16 Vict. c. 25—Registry laws—Practice—Sheriff's sale —Parties—Estoppel—Improvements on substituted property—Grosses reparations—Art. 2172 C. C.—29 Vict. c. 26 (Can.)*]—The institute, *grevé de substitution*, in possession and the curator to the substitution, upon judicial authority, mortgaged land under the Act for relief of sufferers by the Montreal Fire of 1852 (16 Vict. c. 25), for a loan expended in reconstructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in a suit to which the curator had not been made a party. *Held*, that, as the mortgage had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale in execution discharged the lands from the substitution not yet open and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution.—An institute, *grevé de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major* in order to make necessary and extensive repairs (*grosses reparations*), upon obtaining judicial authorization, and in such case the substitution is charged with the cost of the *grosses reparations*, the judicial authorization operates as *res judicata*, and the substitute called to the substitution is estopped from contestation of the necessity and expense of the repairs.—The sheriff seized and sold lands under a writ of execution against a defendant, described therein, and in the process of seizure, and also in the deed by him to the purchaser, as *grevé de substitution*. *Held*, that the term used was merely descriptive of the defendant and did not limit the estate seized, sold or conveyed under the execution.—Judgment appealed from affirmed, Taschereau and King, JJ., dissenting. *Held*, per Taschereau, J., that art. 2172 C. C., as interpreted by 29 Vict. c. 26 (Can.), applies to hypothecs and charges only and does not require renewal of registration for the preservation of rights in and titles to real estate. *Chef dit l'adebon-cœur v. City of Montreal*, xxix., 9.

17. *Hypothecary action — Res judicata—Statement of balance due—Notice.*

See SALE, 75.

18. *Implied covenant — Married woman—Disclaimer.*

See DEED, 45.

(d) *Property Affected.*

19. *Statutory powers to borrow, &c.—Mortgage by railway company—Sale of rights—Power to mortgage road—Ultra vires—Objection taken in master's office and on appeal.*

—The G. J. Ry. Co., having statutory power to borrow money, issue debentures, bonds, or other securities for the sums borrowed, to sell, hypothecate or pledge its lands, tolls, revenues and other property, to purchase, hold and take land or other property for the construction, maintenance, accommodation and use of the railway, and to alienate, sell or dispose of the same, entered into a contract with Brooks for the construction of their road. When Brooks required the necessary iron, he was unable to purchase it without the assistance of the company, and he authorized the officers of the company to negotiate for its purchase. In consequence a solicitor of the company, as agent of Brooks, and with the approval, in writing, of the president of the company, entered into a written agreement, dated Toronto, 9th June, 1874, with the defendants (Bickford and Cameron) for the purchase of the iron, to be paid for as delivered at Belleville by the promissory notes of Brooks, and a credit for six months was to be given from the time of the several deliveries of the iron. Brooks thereby agreed to obtain from the company an irrevocable power of attorney enabling the Bank of Montreal (which advanced Bickford the money to buy the iron) to receive the bonuses, and to procure from the company a mortgage for \$200,000 on that portion of their road (44 miles) on which the iron was to be laid—the mortgage to be sufficient in law to create a lien on the 44 miles of railroad, as security for payment of such notes, but not to contain a covenant for payment by the company. On the 30th June, 1874, an agreement, under seal, was executed, which did not vary these terms in any material respect. On the same day, a power of attorney (indorsed by Brooks with a request to the company to give it), and a mortgage (also indorsed by Brooks with a request to grant it), were executed by the company under their corporate seal to the manager of the bank in Toronto, as a trustee. The bank having made advances to Bickford in the ordinary course of their business dealings to enable him to purchase the iron, it was all consigned to their order by the bills of lading, and, when delivered on the wharf at Belleville, was held by the wharfingers subject to the order of the bank, the whole quantity stipulated for by the contract being so delivered ready for laying on the track as required. The bank and Bickford caused to be delivered from time to time to Brooks, by the wharfingers at Belleville, all the iron he required to lay, being about 2,000 tons, and about an equal quantity remained on the wharf unused. Brooks having failed to meet his notes for the price of the iron, Bickford recovered judgment at law against him for \$164,852.96. The bank then sold the iron remaining on the wharf for the purpose of realizing their lien, when Bickford became the purchaser thereof at \$33.50 for the rails and \$50.50 for track supplies. Bickford was removing the iron when the company filed a bill for an injunction to restrain the removal. A motion to continue the injunction was refused on the 11th October, 1875. The defendants (Bickford, Cameron and Buchanan) then answered the bill, and on 18th January, 1876, by consent, a decree was made referring it to the master to take the mortgage account, to ascer-

tain and state the amount due to Bickford and Cameron for iron laid or delivered to or for plaintiff's use on the track, and also the amount due (if any) in respect of iron delivered at Belleville, but since removed, and to report special circumstances, if requisite. The master found due upon the mortgage \$46,841.10, the price of iron actually laid on the track, and interest; and that nothing was due in respect of the iron delivered at Belleville but subsequently removed. On appeal to Vice-Chancellor Proudford the master's report was affirmed, and on an appeal to the Court of Appeal for Ontario, it was held that the mortgage was *ultra vires*, and the master's report was affirmed. *Held*, reversing the judgment appealed from (23 Gr. 302), that the proviso in the mortgage was in its terms wide enough to sustain the contention of the mortgagee claiming the price of all the iron delivered on the wharf at Belleville, and that the memorandum indorsed by Brooks on the mortgage should not be construed as cutting down the terms of the proviso, but was intended as written evidence of Brooks' consent to the mortgage and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract. *Held*, also, reversing the Court of Appeal, that the statutory power to borrow money and secure loans cannot be considered as implying that the company's powers to mortgage are to be limited to that object; and, therefore, that the mortgage executed by the company on a portion of their road in favour of the trustee Buchanan, being given within the scope of the powers conferred upon the company to "alienate, sell, or dispose" of lands for the purpose of constructing and working a railway, was not *ultra vires*. *Held*, also, that under the pleadings and decrees in the cause, the objection that the mortgage was *ultra vires* was not open to the company in the master's office, or on appeal from the master's report.—*Quære*. Whether the rights of a public corporation to take lands, operating the railway, taking tolls, &c., are susceptible of alienation by mortgage in this country? *Bickford v. Grand Junction Ry. Co.*, i., 696.

20. *Leasehold premises — Terms of mortgage — Assignment or sub-lease.*—A lease of real estate for 21 years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was: "To have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, &c." *Held*, reversing the judgment appealed from (23 Ont. App. R. 602), that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the expression "lease-

hold premises" was quite sufficient to carry the whole term, the word "premises" not meaning lands or property, but referring to the recital which described the lease as one for a term of 21 years. *Held*, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease. *Jameson v. London & Canadian Loan & Agency Co.*, xxvii., 435.

21. *Insurance against fire — Condition in policy — Interest of insured — Mortgagor as owner.*—By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property . . . or if the interest of the assured in the property whether as owner or trustee . . . mortgagee, lessee or otherwise is not truly stated." *Held*, that a mortgagor was sole and unconditional owner within the terms of said condition. *Western Assur. Co. v. Temple*, xxxi., 373.

22. *Mining machinery — Fixtures — N. S. "Bills of Sale Act" — Registration.*

See No. 43, *infra*.

23. *Property, real and personal — Immoveables by destination — Moveables incorporated with freehold — Severance from realty — Contract — Resolutive condition—Conditional sale — Hypothecary creditor — Unpaid vendor — C. C. arts.*, 379, 2017, 2083, 2085, 2089.

See CONTRACT, 66.

24. *Trade fixtures — Chattels — Tools and machinery of a "going concern" — Constructive annexation.*

See IMMOVEABLE PROPERTY.

3. EQUITABLE CHARGE.

25. *Agreement to charge lands — Statute of Frauds — Registry.*—The owner of an equity of redemption in mortgaged lands, called the "Christopher farm," signed a memo. as follows:—"I agree to charge the E. ½ of lot No. 19, in the 7th concession of Loughborough, with the payment of two mortgages held by G. M. G. and Mrs. R. respectively, upon the 'Christopher farm' . . . amounting to \$750 . . . and I agree on demand to execute proper mortgages of said land to carry out this agreement, or to pay off the said Christopher mortgages." *Held*, affirming the judgment appealed from (22 Ont. App. R. 175), that this instrument created a present equitable charge upon the east half of lot 19, in favour of the mortgagees named therein. *Rooker v. Hoofstetter*, xxvi., 41.

4. FORECLOSURE; SALE, AND HYPOTHECARY RECOURSE.

26. *Assignment of equity of redemption in trust — Reconveyance — Foreclosure against trustee — Subsequent sale — Power of sale — Deed after foreclosure.*—K. mortgaged leasehold premises to respondents, with covenant authorizing them to sell on default, with

or without notice at public or private sale. The mortgage conveyed the unexpired portion of the current term and "every renewed term." Afterwards K. conveyed the equity of redemption to O. upon trusts, and left the country. During his absence the lease expired, and was renewed in the name of O.. On default in payment of interest suit was brought against O. for foreclosure, prior to which O., being threatened with such suit, re-conveyed the equity to K., but the deed was never delivered. O. filed an answer and disclaimer of interest, which he afterwards withdrew and consented to a decree, and the mortgagees subsequently sold the mortgaged premises to D. for less than the amount due on the mortgage; the deed to D. recited the proceedings in foreclosure and purported to be made under the decree. K. sought to have the decree of foreclosure opened and cancelled, the deed to D. set aside, and to be allowed to come in and redeem. *Held*, affirming the judgment appealed from (11 Ont. App. R. 526), Strong and Henry, JJ., dissenting, that even if the decree of foreclosure were improperly obtained, and consequently void, yet the sale to D. was a proper exercise of the power of sale in the mortgage and should be sustained, and that it passed the renewed term which was included in the mortgage. *Kelly v. Imperial Loan Co.*, xi., 516.

27. *Foreclosure — Practice — Adding parties — Lease by mortgagor — Stay of proceedings — Sale of mortgaged lands — Conditions of sale.*—In an action for foreclosure of mortgage, defendants were administrators and heirs-at-law of the mortgagor and devisees in trust of deceased heirs. Subsequent incumbrancers, judgment creditors of some of the heirs, and the lessee of the "Queen Hotel," part of the mortgaged premises under lease from some of the heirs, were not made parties. None of the defendants appeared and the equity of the mortgagor and those claiming under him was foreclosed, and the lands ordered to be sold on the day named for the sale, on application of the lessee of the hotel, an *ex parte* order was made directing that on payment into court of \$37,019 proceedings should be stayed until "further order and that plaintiffs should convey the mortgaged lands and the suit and benefit of proceedings therein to S. & K., which direction was complied with.—On 26th December, 1889, defendant's motion to rescind this motion was refused and the order amended by a direction that the lessee should be made a defendant and S. & K. joined as plaintiffs, and that the stay of proceedings be removed. On 4th January, 1890, a further order was made directing that the hotel property be sold subject to the rights of the lessee. From the two last mentioned orders defendants appealed to the full court which affirmed the former and set aside the latter.—Both parties appealed to the Supreme Court of Canada. *Held*, that the order of 26th December, 1889, was rightly affirmed. The stay of proceedings under the order affirmed by it was no more objectionable than if effected by injunction to stay a sale under a writ of *fi. fa.*, and being made at the instance of a lessee, and as such a purchaser *pro tanto*, of the mortgaged lands who had a right to redeem, it was in the discretion of the judge so to order. To the direction that plaintiffs should convey the lands to S. & K. defendants had no *locus standi* to object, and they were not prejudiced by the addition of parties made by the order. Nor

had defendants a right to object to the removal of the stay of proceedings and rights of subsequent incumbrancers not before the court would not be affected by the order made in their absence. Moreover, between the date of the order and the appeal to the full court the property having been sold under the decree, the purchaser not being before the court was a sufficient ground for dismissing the appeal. *Held*, further, that the order of January 4th, 1890, should also have been affirmed by the full court. In selling the mortgaged property the court ought to have protected the rights of the lessee by selling first the proportion in which she had no interest.—Judgment appealed from (23 N. S. Rep. 350) varied. *Collins v. Cunningham*; *Cunningham v. Drysdale*, xxi, 139.

28. *Sale under powers — Authority of agent to give credit — Inquiry by purchaser — Payment.*

See PRINCIPAL AND AGENT, 5.

29. *Déclaration d'hypothèque — Service of judgment — Absentee — Surrender of mortgaged lands — Personal consideration.*

See PRACTICE AND PROCEDURE, 131.

30. *Suit against mortgagor — Hypothecary action against subsequent purchaser — Statement of balance due — Payment — Notice — Res judicata.*

See SALE, 75.

31. *Sheriff's sale — Substitution — Parties to mortgage suit — Preferred claim — Estoppel.*

See No. 16, ante.

5. LIMITATION OF ACTIONS.

32. *Interruption of prescription — Payment by co-obligor.*

See LIMITATION OF ACTIONS, 1.

33. *Fraudulent sale — Foreclosure — Purchase by mortgagee — Trustee for sale — Possession — Statute of Limitations — Redemption — Lien on proceeds — R. S. O. (1877) c. 108, s. 19—Waiver.*

See LIMITATION OF ACTIONS, 24.

6. NOTICE.

34. *Security for loan — Deed absolute in form — Purchase for value without notice — Registration — Purchase with agreement to re-sell — Practice — Amendment under A. J. Act (O.)—Vict. c. —, s. 50.]—Plaintiff alleging ownership of lands, filed her bill alleging that she conveyed the lands on the 31st August, 1866, to McK., deceased, by deed absolute in form, but intended as security only for re-payment of \$500, then advanced by McK. to her; that subsequently McK. by deed absolute in form, dated 13th June, 1871, conveyed the lands to defendants R. and McK.; that R. and McK. had at the time of the conveyance notice of plaintiff's rights; that subsequently and on 21st June, 1872, R. and McK. conveyed the lands, by deed absolute in form, to defendant B.; that B. had, before the conveyance to him, notice of the plaintiff's rights; that to secure payment of part*

of his purchase money to R. and McK., B. mortgaged the lands to them by mortgage dated 12th July, 1872, which they subsequently assigned to one Watson; and she prayed that it might be declared that the deed to McK. was intended to operate only as a security and that the plaintiff might be let in to redeem the lands; that B. might be restrained from cutting timber and ordered to account for timber cut; and that the defendants might be ordered to remove the mortgage made to R. and McK., and for other relief.—Defendants R., McK., and B. while admitting that the conveyance to McK. was intended only to operate as a security, denied that they had any notice of that fact, and claimed the lands as purchasers for value without notice. The Chancellor heard evidence on 5th May, 1875. Before the evidence had all been adduced, or any argument of the case, an application made on behalf of defendant B., for leave to file a supplemental answer setting up the registry laws as a defence to the claim was refused, and a decree made declaring the conveyance to McK. only security for payment of the \$500; that R. and McK. bought with actual knowledge of the plaintiff's claim, and that B. bought from them with actual notice.—On appeal by B. the court held that the evidence did not shew that B. had actual notice when he purchased, that the amendment should have been allowed, and that the court had power then to allow it under the Administration of Justice Act, s. 50, but as it would not be proper to conclude plaintiff without allowing him an opportunity of producing further evidence, the case was sent down for another hearing. (See *McFarlane v. Peterkin*, 4 Ont. App. R. 25.)—*Held*, Ritchie, C.J. and Henry, J., dissenting, that the judgment refusing the amendment was properly appealable to the Court of Appeal for Ontario, but when that court had made an order allowing the amendment in the exercise of its discretionary power, it might be doubted whether the Supreme Court had jurisdiction to entertain an appeal from such order. Assuming the Supreme Court to have such jurisdiction, it should be chary in exercising it, lest by so doing it should injuriously fetter the very extensive discretion in matters of amendment with which the Legislature had invested all courts in Ontario.—The doctrine that where a purchaser without notice had paid a portion of the purchase money and had given a mortgage for the balance, and before payment of this mortgage he becomes affected with notice of an equitable title in plaintiff, who subsequently files a bill to set aside the sale, the purchaser shall be entitled to no relief or consideration whatever in a court administering equity in respect of the purchase money paid before he became affected with notice, was questioned in *Totten v. Douglas* (18 Grant, 352), and the assertion of it in this case for the purpose of supporting the decree was also a reason for affirming the allowance of the amendment. Transfers of the legal estate to relatives upon alleged verbal promise to hold as mortgages subject to redemption or to recovery upon re-payment ought to be strictly scrutinized, especially when the rights of third persons who have paid money upon faith of title are in question, and it might promote the ends of justice to allow the proposed amendment and give further opportunity for the consideration of this point.—Further, the decree took no notice of the interests of Watson, the assignee of the mortgage, who could not be deprived of the estate by anything done in the suit as

instituted. — *Per Ritchie, C. J., dissenting.*—The Supreme Court should determine whether or not the Chancellor was right in his opinion that the amendment would not on the facts as proved be of any avail to defendants if it had been on the record at the time of his decision; and if not the amendment should not have been allowed, but the judgment of the Chancellor affirmed.—Appeal dismissed with costs, *Ritchie, C. J., and Henry, J., dissenting.*—(21st June, 1880.)—B. subsequently put in a supplemental answer denying notice of plaintiff's claim, claiming protection of registry laws, and that he was purchaser for value without notice. On 31st March, 1881, Spragge, C. held that defendant had notice of plaintiff's claim at the time he purchased, and was not a *bonâ fide* purchaser for value without notice.—On appeal, the court was equally divided. (*McFarlane v. Peterkin*, 9 Ont. App. R. 429.)—*Held, Gwynne, J., dissenting*, that the redeemable character of the transaction being admitted on the pleadings, was not open to discussion. The only point to consider was whether or not the Chancellor was wrong in finding as matter of fact that defendant had actual notice. If they had actual notice this would defeat the registered title. The court being unable to say the Chancellor was wrong, thought the appeal should be dismissed.—*Per Gwynne, J., dissenting*, that the transaction was a sale of the land to McF., and the evidence only established that McF. verbally and voluntarily, and so in a manner not binding upon him, promised J. P., plaintiff's agent, whom McF. regarded as selling the land although the deed was made by the plaintiff, that he might repurchase the land, and that he (McF.) would re-sell and re-convey it to him upon re-payment of the \$500 at any time during his (McF.'s) lifetime; and further, that there was no evidence establishing any notice whatever binding upon B., or which could have any effect to defeat his purchase. *Rose v. Peterkin*, Cass. Dig. (2 ed.) 535.

35. *Sale of mortgaged land for taxes — Purchase by mortgagor — Action to foreclose — Pleading.*—Lands under mortgage were offered for sale by the municipality for arrears of taxes and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife and L. for foreclosure, the mortgagee alleged that the purchase at the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage, and the trial judge so held in giving judgment for the mortgagee. The Court of Queen's Bench did not pronounce on the question of fraud but affirmed the judgment on other grounds.—*Held*, affirming the decision appealed from (12 Man. L. R. 290), that L. could not claim to have been a purchaser for value without notice as such defence was not pleaded, and it was not a case in which leave to amend should be granted.—*Held*, further, that the facts proved on the trial were sufficient to put L. on inquiry and so amounted to constructive notice. *Lawlor v. Day*, xxix., 441.

36. *Hypothecary action — Subsequent purchaser — Statement of balance—Res judicata — Notice.*

See SALE, 75.

37. *Purchase of land — Agreement to assign mortgage as part payment — Negotiable instrument — Second mortgage—Specific performance.*

See CONTRACT, 244.

38. *Error in description — Omission by mistake—Rectification—Notice—Estoppel.*

See VENDOR AND PURCHASER, 19.

39. *Charge on land — Legacy — Priority—Notice.*

See EXECUTORS AND ADMINISTRATORS, 4.

40. *Conveyance in absolute form — Resulting trust — Notice to equitable owner — Estoppel.*

See SALE, 111.

7. REGISTRY LAWS; PRIORITY AND PRIVILEGES.

41. *Agreement to postpone — Assignment — Notice — Registration — Priority.*—In 1861, W. M. mortgaged lands for \$4,000, and subsequently mortgaged the same lands to the appellant, both mortgages being duly registered. In 1866, W. M. executed another mortgage to the respondent intended to be substituted for the first mortgage, and the money was applied in payment thereof, the second mortgagee consenting that the mortgage to respondent should have priority over his. The second mortgage was afterwards assigned, without notice of this agreement. The assignment was registered, and this obtained priority over the agreement, which had not been registered. The Court of Chancery (26 Gr. 280), held that the respondent was not entitled to relief upon the facts as shewn, and dismissed the bill. The Court of Appeal (5 Ont. App. R. 503) affirmed the decree except as to the second mortgagee, who was ordered to pay off the respondent's mortgage, principal and interest, but without costs. *Held*, affirming the judgment appealed from, Strong, J., dissenting, that the appellant was bound both at law and in equity to indemnify the respondent for any loss sustained by reason of breach of the agreement, but that no relief could be decreed against the assignee who had acquired the second mortgage in good faith without notice of the unregistered agreement. *McDougall v. Campbell*, vi., 502.

42. *Postponement — Priority of lien—Halifax Assessment Act, 1883—Mortgage made before statute — Construction of Act.*—The Halifax City Assessment Act, 1883, made the taxes assessed on real estate in said city a first lien thereon except as against the Crown. *Held*, affirming the judgment appealed from *sub-nom. Cogswell v. Holland* (21 N. S. Rep. 155, 279), that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed. *O'Brien v. Cogswell*, xvii., 420.

43. *Mining machinery — Registration — Fixtures — Interpretation of terms — Bill of sale — Personal chattels — R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (bills of sale)—55 Vict. (N. S.) c. 1, s. 143 (The Mines Act)—41 & 44 Vict. (N. S.) c. 31, s. 4.*—The "fixtures" included in the meaning of the expression "Personal Chattels" by s. 10, N. S. "Bills of Sale Act," are only such articles as

are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.—An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the "Bills of Sale Act" (R. S. N. S. [5 ser.] c. 92), and there is no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage, and those covered by a mortgage made by the owner of the fee.—Judgment appealed from (28 N. S. Rep. 202) affirmed. *Warner v. Don*, xxvi., 388.

44. *Error as to amount — Rectification — Registered judgment—Priority.*

See REGISTRY LAWS, 24.

45. *Priority — Legacy — Charge on lands — Notice.*

See EXECUTORS AND ADMINISTRATORS, 4.

46. *Priority — Proceedings on mechanics' lien.*

See LIEN, 5.

47. *Title to land — Sheriff's sale — Deed—Action to vacate—Petition—Exposure to eviction — Actio conductio indebiti — Refund of price paid—Substitution not yet open—Prior incumbrance—Arts. 706, 710, 714, 715 C. C. P.—Arts. 1511, 1535, 1586, 1591, 2060 C. C.*

See SUBSTITUTION, 7.

48. *Substituted property — Preferred claim—Relief of sufferers by Montreal fire, 1852—Registry laws—Sheriff's sale—Estoppel.*

See No. 16, ante.

8. RELEASE OF CHARGES.

49. *Estate tail—Mortgage in fee—Release—Re-conveyance—Bar of entail—Legal estate of mortgagee—Statutory discharge—R. S. O. (1877) c. 111, ss. 9, 67.]—The execution and registration, in accordance with the R. S. O. (1877) c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail re-conveys the land to the mortgagor barred of the entail. Judgment of the Court of Appeal for Ontario (6 Ont. App. R. 312) reversed, Henry, J., dissenting. *Lawlor v. Lawlor*, x., 194.*

50. *Action hypothécaire—Delegation of payment of hypothecary obligation—Délaissement en justice by part owner—Joint debt—Joint and several hypothecs — Personal recourse—Acceptance of delegation—Eviction from part of property.]—R. sold to Q. the S. $\frac{1}{2}$ lot 4679, Montreal, and C. on the same day sold him the N. $\frac{1}{2}$ of the same lot. Q. sold to G., L. and R. $\frac{3}{4}$ of both properties *en bloc* and received \$22,246.87, leaving due \$27,365.63, which the purchasers promised to pay for Q. to R. to meet Q.'s liability. R. was not a party, but subsequently served notice of acceptance of the delegation of payment. Prior to such acceptance R. sued the joint proprietors hypothecarily for Q.'s debt, and they made a *délaissement* of the portion of the lands sold by her to Q. Subsequently R. sued G. under the delegation for $\frac{1}{2}$ of the \$27,365.63. G. contended that having been obliged*

to surrender a portion of the property, he could not be sued for any portion of the money, and the judgment appealed from (2 Legal News 67), sustained this contention. *Held*, that if G. in the hypothecary action had been evicted from the whole of the property hypothecated he would have been relieved from personal responsibility under the delegation; but having been evicted from only a part interest in said property he was freed from liability under the delegation merely to the extent to which the eviction might be considered to have paid his share of the debt to R. *Reeves v. Perrault*, x., 616.

[NOTE from Cass. Dig. (2 ed.) 335.—The court therefore ordered that, upon payment, as a condition precedent, of the costs incurred by plaintiff in the Supreme Court and the Court of Queen's Bench, together with costs incurred by plaintiff in the Superior Court since the filing of defendant's pleas on record, the defendant be allowed to amend his pleas and to plead that he had been evicted from a part of the property sold to G. by Q., and that what had been paid by G. to Q. at the time of said sale paid, and even over paid, for the part of said property which G. detained, and that the cause be thereupon proceeded with in the Superior Court in the ordinary course, and that in default of said amendment within three months the Superior Court, on motion to that effect, should enter judgment against defendant for \$3,281.25 with interest, and all the costs.]

51. *Policy of fire insurance — "Mortgage clause" — Payment to mortgagee — Subrogation — Discharge of mortgage.] — Where a policy of insurance against fire contains the "mortgage clause," payment by the insurer to the mortgagee in the case of loss, when the insured has forfeited his rights under the policy, does not operate as a discharge of the mortgage but simply substitutes the insurer to the mortgagee's rights as a remedy in such a case. *Per Taschereau, J., In re Guerin v. Manchesster Fire Assur. Co.*, xxix., 139, at p. 156.*

(NOTE.—Compare *Imperial Fire Ins. Co v. Bull*, xviii., 697; 15 Ont. App. R. 421; 14 O. R. 322.)

52. *Mortgage of trust estate—Equity running with estate—Recourse—Construction of deed—Falsa demonstratio—Water lots—Accretion—After acquired title—Contribution to redeem—Discharge — Parol evidence—Estoppel.]—On dissolution of A. & Co. by retirement of C. D. A., business was carried on by remaining partners T. A. and B. A. on same premises, the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay and the property was sold under foreclosure, when they purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by same description adding a further or alternative description, and, at the end:—"Also all and singular the water lots and docks in front of the said lots,"—although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving him*

a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant other water lots in front of the mortgaged property, and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage, and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying \$8,000, and obtained their discharge. Upon proceedings by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due, and the foreclosure proceedings were continued for their benefit. *Held*, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding incumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands. *Per Gwynne, J.*—The mortgagors were only entitled to foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond.—*Held*, further, that as the construction of the mortgage depended upon the state of the property at the time it was made parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected; that as there were no specific descriptions or recitals tending to shew that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "stone ballast heap," the after acquired water lots would not be charged or liable to contribute ratably towards redemption of the mortgage; that even admitting that the description was sufficient to include the after acquired property, such property was not liable to contribute towards payment of the mortgage debt. *Imrie v. Archibald*, xxv., 368.

53. *Mortgage — Assignment of lease—Discharge — Abandonment of security.*—The mortgagee of a lease may relieve himself from liability to the lessor on the assignment by way of mortgage with the latter's consent, by releasing his debt and re-conveying the security.—Judgment appealed from (26 Ont. App. R. 116) affirmed. *Jamieson v. London and Canadian Loan and Agency Co.*, xxx., 14.

54. *Fire insurance — "Mortgage clause"—Payment to mortgagee—Liability of insurer to insured — Subrogation in rights of mortgagee—Release of mortgage.*

See INSURANCE, FIRE, 71.

55. *Suretyship—Appropriation of payments—Reference to take accounts.*

See PRINCIPAL AND SURETY, 2.

9. RIGHTS AND REMEDIES.

56. *Attornment — Tenancy at will — Rent equivalent to interest—Distress for arrears of interest—Landlord's privilege.*—A mortgage in pursuance of the Act respecting Short Forms of Mortgages, R. S. O. (1877) c. 104, contained the usual clauses as to entry, &c., on default, with power to distrain for arrears of interest, and that until default, the mortgagors should have quiet possession and, in addition, the following provision and varia-

tion: "And the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the company, subject to the said proviso." *Held, per Strong, Fournier and Henry, JJ.*, affirming the judgment appealed from (6 Ont. App. R. 286), *Ritchie, C.J.*, and *Taschereau and Gwynne, JJ.*, *contra*, that upon the proper construction of the deed there was no reservation of rent entitling the mortgagee to claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mortgage before removal of goods on mortgaged premises by the sheriff. The court being equally divided the appeal was dismissed without costs. *Trust and Loan Co. v. Lawra-son*, x., 679.

57. *Assignment—Purchase of equity—Sale—Liability to account.*—The assignee of a mortgage obtained a release of the equity of redemption which he sold for a sum considerably in excess of his claim against the assignor. In a suit to foreclose,—*Held*, reversing the judgment appealed from (13 Ont. App. R. 467) and restoring that of the Common Pleas Division (10 O. R. 58), that he was bound to account for the proceeds of such sale. *McLean v. Wilkins*, xiv., 22.

58. *Registration — Priority of subsequent mortgage—Surplus proceeds of sale—Bar of dower.*—Land devised was charged with an annuity to testator's widow who also had her dower therein. The devisees mortgaged the land to C. in March, 1879, and the mortgage was not registered until January, 1880. In November, 1879, a second mortgage to M. was registered in which the widow joined barring her dower and releasing her annuity for the benefit of M. She had had knowledge of the prior mortgage and had refused to join in it. The second mortgagee, not being aware of the prior incumbrance when the mortgage was executed, gained priority, and the land was sold to satisfy his mortgage; the proceeds of the sale being more than sufficient for that purpose the surplus was claimed both by the widow and by C. *Held*, reversing the Court of Appeal (Ont.), *Gwynne and Patterson, JJ.*, dissenting, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was entitled to the fund in court as representing her interest in the land in priority to C. *Gray v. Coughlin*, xviii., 553.

59. *Foreclosure — Sale of land — Suit for residue of debt—Prohibition.*—A testator had given a mortgage on lands to secure \$7,000 due to plaintiff, and had also given to plaintiff a bond conditioned for due payment according to the terms of the mortgage. The mortgagor made default, the mortgage was foreclosed, the mortgaged premises were sold by the sheriff, according to the usual practice, and bought in by plaintiff for \$4,000. The sheriff's report of proceedings under the decree and sale and application of proceeds, was confirmed by the court, and there being still \$3,000 due, plaintiff brought action on the bond. The special case admitted that the proceedings in the foreclosure suit were regular, and that plaintiff had since the sale conveyed the lands to a third party. Defendant applied for prohibition to restrain plaintiff from proceeding with the action, claiming that it opened up the foreclosure, and plaintiff, not being in a position to re-convey the mortgaged premises to defendant, or the heirs of the mortgagor, his remedy on the bond was barred.

—The Supreme Court (N. S.) held that the English rule did not apply, as the practice was different in Nova Scotia, the sale of the mortgaged lands not being the act of the mortgagee but of the court, and refused the writ.—*Held*, affirming the judgment appealed from (7 Russ. & Geld. 497), that the mortgagee was not prohibited from proceeding on the bond to recover the residue of his debt. *Chisholm v. Kenny*, Cass. Dig. (2 ed.) 539.

60. *Practice—Parties to action—Trespass to mortgaged property—First and subsequent mortgages—Owner of equity of redemption—Transfer of interest before action.*—Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, though after the trespass and before action brought he has parted with his equity. Gwynne, J., dissenting.—Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title.—Judgment appealed from (24 N. S. Rep. 476) affirmed. *Per Gwynne, J.* A mortgagee in possession at the time the trespass and injury is committed is the only person damaged thereby, and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed.—The tortfeasors could not set up such estoppel even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt. *Brookfield v. Brown*, xxii., 398.

61. *Sale of land—Sale subject to mortgage—Indemnity of vendor—Special agreement—Purchaser trustee for third party.*—L. F. agreed to sell land to C. F. and others subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. It was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated, and L. F. became a member receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. In an action against L. F. for interest due on a mortgage C. F. was brought in as third party to indemnify L. F., his vendor. *Held*, reversing the decision of the Supreme Court (N. S.), Taschereau and King, JJ., dissenting, that the evidence shewed that the sale was not to C. F. as a purchaser on his own behalf but for the company and that the company and not C. F. was liable to indemnify the vendor. *Fraser v. Fairbanks*, xxiii., 79.

62. *Mortgage—Discharge—Action on joint note—Security for mortgage debt.*—A. and B., partners in business, borrowed money from C. giving their joint and several note and a mortgage on partnership property. The partnership dissolved, A. assumed all liabilities and continued the business alone. After dissolution C. gave A. a discharge of the mortgage, but without receiving payment, and afterwards sued B. on the note. *Held*, affirming the decision appealed from (20 Ont. App. R. 695), that the note having been given for the mortgage debt, C. could not recover without being prepared, upon payment, to convey to B.

the mortgaged lands which he had incapacitated himself from doing.—*Held*, also, that by the terms of the dissolution of partnership the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change his release of the principal discharged the surety. *Allison v. McDonald*, xxiii., 635.

63. *Chattel mortgage—Mortgagee in possession—Negligence—Sale under powers—"Slaughter sale."*—A mortgagee in possession who sells mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives, but for what he might have obtained had he acted with proper regard for the interests of the mortgagor. *Rennie v. Block*, xxvi., 356.

64. *Mortgage loan to pay off prior incumbrances—Increased rate of interest—Assignment of mortgage—Purchaser of equity of redemption—Accounts.*—The Supreme Court of Canada affirmed the judgment appealed from (23 Ont. App. R. 139), which decided as follows:—When a loan is effected for the purpose of paying off incumbrances, at once or as they become due, at the option of the new mortgagees, and an incumbrance at lower interest than the new mortgage is not due, and the prior mortgagee refuses to accept prepayment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the prior incumbrance and notified the mortgagor to that effect, but must, until the prior mortgage is fully paid, charge interest at the increased rate only on the amount actually paid to the prior mortgagees.—An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee, and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, in such a case as the present, charge the mortgagor with the increased rate.—The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself does not make him liable to pay that sum to the mortgagees. *London Loan Co. v. Manley*, xxvi., 443.

65. *Leasehold estate—Assignment of equity of redemption—Acquisition of reversion by assignee—Priority—Merger.*—The assignee of a term, who takes the assignment subject to mortgage and afterwards acquired the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emmett v. Quinn* (7 Ont. App. R. 306) distinguished. Judgment appealed from (24 Ont. App. R. 599 affirmed.) *Mackenzie v. Building and Loan Association*, xxviii., 407.

(Leave to appeal to Privy Council refused).

66. *Appeal—Jurisdiction—Matter in controversy—Interest of second mortgagee—Surplus on sale of mortgaged lands—Practice.*—While an action to set aside a second mortgage on land for \$2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the

proceeds of the sale, amounting to \$270, to the defendant as subsequent incumbrancer. Judgment afterwards rendered declared the second mortgage void, and ordered defendant to pay plaintiff, as assignee for creditors, the \$270 so received by him thereupon, and this judgment was affirmed on appeal.—Upon application for leave to appeal, objections taken for want of jurisdiction under 60 & 61 Vict. c. 34 (D.), were overruled by a judge of the Court of Appeal for Ontario, who held that an interest in real estate was in question. The appeal was proceeded with, and case and factums printed and delivered.—On motion to quash for want of jurisdiction when called for hearing; *Held*, that the case did not involve a question of title to real estate or any interest therein, but it was merely a controversy in relation to an amount less than \$1,000, and that the Act prohibited an appeal. *Jermyn v. Tew*, xxviii., 497.

67. *Assignment of equity—Covenant of indemnity—Assignment of covenant—Right of mortgagee on covenant in mortgage.*—C. executed a mortgage on his lands in favour of B., with the usual covenant for payment. He afterwards sold the equity of redemption to D. who covenanted to pay off the mortgage and indemnify C. against all costs and damages in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers, assuming payment of his proportion of the mortgage debt, and he assigned the three respective covenants to the mortgagee who agreed not to make any claim for the mortgage money against D. until he had exhausted his remedies against the purchasers and the lands. The mortgagee having sued C. on his covenant. *Held*, reversing the judgment appealed from (24 Ont. App. R. 492), that the mortgagee being the sole owner of the covenant of D. with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage. *McQuaig v. Barber*, xxix., 126.

68. *Voluntary conveyance of land—13 Eliz. c. 5 (Imp.)—Solvent vendor—Action by mortgagee.*—A voluntary conveyance of land is void under 13 Eliz. c. 5 (Imp.), as tending to hinder and delay creditors, though the vendor was solvent when it was made, if it results in denuding him of all his property and so rendering him insolvent thereafter.—A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and may do so without first realizing his security.—Judgment appealed from (7 B. C. Rep. 189) reversed, *Gwynne, J.*, dissenting. *Sun Life Assur. Co. v. Elliott*, xxxi., 91.

69. *Default clause—Principal falling due—Rate of interest—Installments.*—A mortgage to secure \$20,000 with interest at 9 % payable half yearly, provided "that on default of payment for 2 months of any portion of the money secured the whole of the instalments . . . shall become payable . . . that on default of payment of any of the instalments, &c., at the times provided, interest at the rate above mentioned shall be paid on all sums so

in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid." *Held*, reversing the judgment appealed from (26 Ont. App. R. 232) that the principal sum becoming due for non-payment under the first of the above provisos was not an instalment in arrear under the second on which the mortgagee was entitled to interest at the rate of 9 % per annum. *Biggs v. Freehold Loan and Savings Co.*, xxxi., 136.

70. The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, &c.," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy *Quære*, Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy? *London and Liverpool and Globe Ins. Co. v. Agricultural Savings and Loan Co.*, xxxiii., 94.

71. *Suit for redemption or foreclosure—Action for specific performance—Joint hearing—Consolidation of suits—Frame of decree.*

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72. *Charge on railway—Receiver in possession—Priority—Privilege of material men—Immoveables by destination—Unpaid vendor.*

See LIEN, 3.

73. *Mortgagor and mortgagee—Mortgage by trustee—Personal liability—Enforcement of equitable rights.*

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74. *Attornment by mortgagor—Demise by mortgagee—Statute of Frauds—Distress for rent—Statute of Anne—Colourable process—Tenancy at will—Remedy of execution creditor.*

See LANDLORD AND TENANT, 1.

75. *Security for advances—Hypothecation of bonds—Collateral—Sale of securities—Purchase by mortgagee—Trust.*

See PLEDGE, 6.

76. *Foreclosure—Order for possession—Illegal or immoral consideration—Purchaser of equity of redemption—Right to set up defence.*

See PLEADING, 31.

77. *Action for redemption—Foreign lands—Lex rei sitæ—Action in personam—Jurisdiction of court.*

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78. *Jurisdiction to set aside mortgage on foreign lands—Secret trust—Lex rei sitæ.*

See LEX REI SITÆ.

79. *Obligation to indemnify grantor against mortgage—Conveyance subject to mortgage—Assignment of right of action—Principal and surety—Implied covenant.*

See ACTION, 137.

80. Title to land — Life estate — Construction of statute—Preferred claim—Improvements made on lands grevé de substitution — Charge on lands.

See SUBSTITUTION, 6.

81. Debtor and creditor — Preference — Collusion — Pressure — R. S. B. C. cc. 86, 87 — The Bank Act, s. 80—Company law — Mortgage by directors — Ratification — B. C. Companies Acts, 1890, 1892, 1894.

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10. SALE OF MORTGAGED PROPERTY.

82. Hypothecary debts — Bequest of mortgaged lands — Charge upon the estate — Art. 889 C. C.

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83. Devise of mortgaged land—Action to eject purchaser under decree for sale—Statutory title.

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MORTMAIN ACTS.

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MOVEABLES.

1. Unpaid vendor — Conditional sale—Suspensive condition — Moveables incorporated with freehold — Immoveables by destination—Hypothecary charges—Arts. 375 et seq., C. C.]—A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.—In order to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveables with the immoveables should be, at the time, owner both of the moveables and the real property with which they are so incorporated. *Lainé v. Béland* (26 Can. S. C. R. 419), and *Filiatrault v. Goldie* (Q. R. 2 Q. B. 368), distinguished.—Decision of the Court of Queen's Bench affirmed, *Girouard, J.*, dissenting. *Banque d'Hochelaga v. Waterous Engine Works Co.*, xxvii., 406.

2. Property, real and personal — Immoveables by destination — Moveables incorporated with freehold — Severance from realty — Contract — Resolatory condition — Conditional sale — Hypothecary creditor — Unpaid vendor — C. C. arts. 379, 2017, 2083, 2085, 2089.

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MUNICIPAL CORPORATIONS.

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1. ASSESSMENT AND TAXES.

1. License tax on merchants, traders, &c.—Discrimination between residents and non-residents—33 Vict. c. 4 (N. B.)—By-law.]—Action against the police magistrate for wrongful arrest and imprisonment, for violation of a by-law of the City of St. John, under 33 Vict. c. 4 (N. B.). Section 3 of the Act authorized the licensee to use any art, trade, &c., within the city of St. John, and s. 4 gave power to fix the sums of money that should from time to time be paid for such license fees, to declare how fees should be recoverable, and to impose penalties. The by-law discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of \$20 on the former and \$40 on the latter. *Held*, reversing the judgment appealed from (4 P. & P. 61, 64), that assuming the Act, 33 Vict. c. 4, to be *intra vires* of the Legislature, the by-law made under it was invalid, because the Act gave no power of discrimination between residents and non-residents, such as had been exercised in this by-law. *Jonas v. Gilbert, v.*, 356.

2. Taxation — Penalty for non-payment of tax — Interest — Legislative powers — B. N. A. Act, 1867, ss. 91, 92 — Constitutional law — 49 Vict. c. 52, s. 626 (Man.) — 50 Vict. c. 43 (Man.)—The Manitoba Mun. Act, 1886, provides for a 10% discount on taxes promptly paid and for an addition, after a fixed time, of 10% upon delinquent taxes. On appeal from the Queen's Bench, Man. (6 M. L. R. 515); *Held*, reversing the judgment appealed from (6 Man. L. R. 515), Gwynne, J., dissenting, that the 10% added to delinquent taxes was only imposed as a penalty for non-payment which the Legislature had power to impose in legislating with respect to municipal institutions and that it was not "interest" within the meaning of s. 91 of the B. N. A. Act, 1867. *Ross v. Torrance* (2 Legal News, 186) overruled. *Lynch v.*

Canada North-west Land Co., xix., 204; *South Dufferin v. Morden*, xix., 204; *Gibbins v. Barber*, xix., 204.

3. *Ontario Assessment Act, R. S. O. (1887) c. 193, ss. 15, 65—Illegal assessment—Court of revision—Business carried on in two municipalities.*—Section 65 of the Ont. Assessment Act, does not enable the Court of Revision to make valid an assessment which the statute does not authorize.—Section 15 of the Act provides that "where any business is carried on by a person in a municipality in which he does not reside or in two or more municipalities, the personal property belonging to such persons shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandise in London stored in a public warehouse, the warehouse being used by other persons as well as W. He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse-keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into London.—*Held*, affirming the decision appealed from (19 Ont. App. R. 675), that W. did not carry on business in London within the meaning of the section, and his merchandise in the warehouse was not liable to be assessed at London. *City of London v. Watt*, xxii., 300.

4. *Business tax — Quebec License Laws—55 & 56 Vict. c. 11, s. 26—City of Sherbrooke—Charter — 55 & 56 Vict. c. 51, s. 55—Powers of taxation.*—By virtue of the first clause of a by-law, passed under 55 & 56 Vict. c. 51, an Act Consolidating the Charter of the City of Sherbrooke, appellant was taxed five cents on the dollar on the annual value of premises in which he traded in spirituous liquors, and in addition, under clause three of the same by-law, a special tax of \$200 was imposed for the same business. The Act, 55 & 56 Vict. c. 51, s. 55, enumerates in sub-sections a to j the taxes to be imposed, sub-section (b) authorizing a business tax on all trades, occupations, &c., based on annual value of premises, and sub-section (g) providing for a tax on persons, among others, of the occupation of the petitioner. Sub-section (g) provides: "The whole, however, subject to the provisions of the Quebec License Act." That Act (art. 927 R. S. Q.) limits municipal powers of taxation of a city to \$200 upon holders of licenses. *Held*, affirming the judgment appealed from, Taschereau and Gwynne, JJ., dissenting, that the power granted by 55 & 56 Vict. c. 51, to impose the several taxes was independent and cumulative, and as the special tax did not exceed \$200, the by-law was *intra vires*, the proviso of sub-section (g) not applying to the whole section. *Webster v. City of Sherbrooke*, xxiv., 268.

5. *Ont. Assessment Act — Directory or imperative statute — Collection of taxes — Delivery of roll to collector — 55 Vict. c. 48 (O.)*—The Ontario Assessment Act, s. 119, provides for the preparation every year by municipal clerks of a "collector's roll," containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect s. c. d.—28

to taxes payable to the treasurer of the province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the 1st day of October." *Held*, affirming the decision appealed from (21 Ont. App. R. 379), that the provision as to delivery of the roll to the collector was imperative and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes. *Held*, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes. *Town of Trenton v. Dyer*, xxiv., 474.

6. *Special tax — Local improvement — Double taxation.*—Two taxes cannot exist for the same purpose at the same time. *Banque Ville Marie v. Morrison*, xxv., 289.

7. *Assessment and taxation — Exemptions—Real property — Chattels — Fixtures — Gas pipes — Highway — Title to portion of streets—Legislative grant of soil—55 Vict. c. 48 (Ont.)*—Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the "Ontario Assessment Act of 1892," and liable to assessment as such, as they do not fall within the exemptions mentioned in s. 6 of that Act.—The enactment by the 1st and 13th clauses of the company's Act of incorporation (11 Vict. c. 14 (Can.)), operated as a legislative grant to the company of so much of the land of the streets squares, and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and where the openings where pipes may be laid are made at the place designated by the city surveyor, as provided in the said charter, and the pipes are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation.—The proper method of assessment of the pipes so laid and fixed in the soil of the streets squares and public places in a city ought to be separately in the respective wards of the city in which they may be actually laid, as in the case of real estate.—Judgment appealed from (23 Ont. App. R. 551) affirmed. *Consumers' Gas Co. v. City of Toronto*, xxvii., 453.

8. *Expropriation — Widening streets — Assessment — Excessive valuation — 52 Vict. c. 79, s. 223 (Que.)*—The Queen's Bench (Q. R. 7 Q. B. 214) reversed the judgment of the Superior Court, District of Montreal, and held that the commissioners had acted illegally in an attempt to correct an error in assessment by imposing an excessive assessment upon a particular lot, instead of making a new roll dividing the assessment equally among adjacent owners, and quashed the assessment roll. The Supreme Court, on appeal affirmed the Queen's Bench judgment. *City of Montreal v. Ramsay*, xxix., 298.

9. *Municipal assessment — Domicile — Change of domicile — Intention — 59 Vict. c. 61 (N. B.)*—By the St. John City Assessment Act (59 Vict. c. 61) s. 2 "for the purposes of assessment any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment or profession, within the City of Saint John shall be deemed

. . . an inhabitant and resident of the said city." J. carried on business in St. John as a brewer up to 1893, when he sold the brewery to three of his sons and conveyed his house and furniture to his adult children in trust for them all. He then went to New York where he carried on the business of buying and selling stocks and securities, having offices for such business and living at a hotel paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John visiting his children and taking recreation. He had no business interests there but attended meetings of the directors of the Bank of New Brunswick, as a director of the bank, during his yearly visits. He was never personally taxed in New York and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John he appealed against the assessment unsuccessfully and then applied for a writ of certiorari with a view to having it quashed. *Held*, reversing the judgment appealed from, that as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his *bona fide* intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicile and that his domicile in St. John had been abandoned within the meaning of the Act. *Jones v. City of St. John*, xxx., 122.

10. *Assessment and taxes — Exemption from municipal rates — School taxes.*—By-law No. 148 of the City of Winnipeg, passed in 1881, exempted forever the C. P. R. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind." *Held*, reversing the judgment appealed from (12 Man. L. R. 581), that the exemption included school taxes.—The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 Vict. c. 64, it was provided that by-law 148 authorizing the issue of debentures granting by way of bonus to the C. P. R. Co. the sum of \$200,000 in consideration of certain undertakings on the part of the said company, and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared legal, binding and valid. . . . *Held*, that notwithstanding that the description of the by-law in the Act was confined to the portion relating to the issue of debentures the whole by-law including the exemption from taxation was validated. *Canadian Pacific Ry. Co. v. City of Winnipeg*, xxx., 558.

10a. *Expropriation of lands — Damages for use of rifle range—Mode of assessment—Valuation roll—Present uses—Prospective value—Evidence.*—The judgments appealed from (see 8 Ex. C. R. 163), decided, in effect, that as the lands taken for use as part of a rifle range, at the time of expropriation, had a prospective value for residential and other uses beyond that which then attached to them as lands in use for agricultural and other similar purposes, such prospective values should be taken into consideration in assessing what would be sufficient and just compensation to be paid upon the expropriation of the lands for such public uses as would, in various ways, affect the lands injuriously and diminish

their prospective values.—In making the assessment of such compensation, the court below consulted the municipal assessment rolls, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the lands expropriated. The Supreme Court of Canada affirmed the judgment appealed from. *The Turnbull Real Estate Co. v. The King; Corkery et al. v. The King; De-Bury et al. v. The King*, 6th October, 1903; xxxiii., 677.

11. *Notice of assessment — Alteration by Court of Revision without notice.*

See ASSESSMENT AND TAXES, 17.

12. *Assessment of gross income — Rates and taxes in St. John, N. B.—Foreign corporation—31 Vict. c. 3, s. 4 (N. B.).*

See ASSESSMENT AND TAXES, 6.

13. *Assessment — Taxes — Sale of land for arrears — Nullity — 32 Vict. c. 36, s. 155.*

See SALE, 99.

14. *Levy of taxes —Void assessment—Arrest of delinquent — Trespass — Liability of collector — "Respondent superior" — Damages against corporation.*

MASTER AND SERVANT, 1.

15. *Sale of land for taxes — Appropriate remedy — Injunction — Prohibition — Art. 1031 C. C. P.—Arts. 716, 746 (a) Mun. Code Que.*

See ASSESSMENT AND TAXES, 19.

16. *Extension of municipal boundary — Navigable waters — Legislative jurisdiction — 43 & 44 Vict. c. 62 (Que.)—Assessment of railway bridge, &c.*

See ASSESSMENT AND TAXES, 41.

17. *By-law — Tax on ferry boat — Double taxation — Jurisdiction of Montreal harbour commissioners—39 Vict. c. 52 (Que.)*

See CONSTITUTIONAL LAW, 53.

18. *Halifax Assessment Act 1883 — Lien—Priority— Mortgage made before statute — Land tax sales — Evidence of assessment — Irregularities cured by Act — Notice of assessment — Sealed statement — Tax sale deed.*

See ASSESSMENT AND TAXES, 59.

19. *Market by-law — License to sell meat— Prohibitory fee — Business tax — Restraint of trade.*

See CONSTITUTIONAL LAW, 54.

20. *By-law — Tax on working horse — Charter of street railway company—Payment for horses by.*

See ASSESSMENT AND TAXES, 12.

21. *Discriminatory rates—Water supply— Validity of by-law.*

See No. 199, *infra*.

22. *Double taxation — Repair of streets— Assessment of owners.*

See No. 125, *infra*.

23. *Negligence — Misapplication of funds — Re-assessment for extra cost of drainage works.*

See No. 92, *infra*.

24. *Unjust assessment — Improper system — Equalization of roll — Local improvement — Expropriation — Widening streets — Excessive valuation*—52 Vict. c. 79, s. 228 (Que.)

See No. 128, *infra*.

25. *Railways — Taxation — By-laws — Construction of statute — Voluntary payment — Action on répétition*—29 Vict. c. 57, s. 21 (Can.)—29 & 30 Vict. c. 57 (Can.)

See ASSESSMENT AND TAXES, 14.

26. *Ontario Assessment Act — Construction of statute—Arrears of taxes—Distress.*

See ASSESSMENT AND TAXES, 21.

27. *Local improvement — Rating for benefit—Trivial objection first taken on appeal.*

See APPEAL, 357.

2. BY-LAWS.

(a) Appeals.

28. *By-law — Petition to quash — Appeal to Queen's Bench*—40 Vict. c. 29 (Que.)—53 Vict. c. 70 (Que.)—*Judgment quashing—Appeal to Supreme Court*—R. S. C. c. 135, s. 24 (g)—*The Town Corporations Act*, 40 Vict. c. 29 (Que.), not having been excluded from the charter of the City of Ste. Cunégonde (53 Vict. c. 70), it is to be read as forming a part of it, and prohibits an appeal to the Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under s. 310 of said charter.—Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction no appeal lies to the Supreme Court of Canada from its decision (See Q. R. 7 S. C. 506; Q. R. 4 Q. B. 231). *City of Ste. Cunégonde v. Gougeon*, xxv., 78.

(b) Bonus.

29. *Aid to railways — Bonus by-law — Conditions of prior agreement — Specific performance—Damages.*—By an agreement with the E. & H. Ry. Co. the town agreed to pass a by-law granting a bonus to the company to aid a railway, subject to performance of specific conditions. The by-law subsequently approved by the ratepayers, and passed by the council of the town, did not contain all the conditions of the agreement. In an action to compel the delivery of debentures for the bonus defendant pleaded non-compliance with the conditions of the agreement as justifying it in withholding the debentures and, by way of counterclaim, prayed specific performance of such conditions by the plaintiffs. *Held*, 1. *Per Ritchie, C.J., Strong, Fournier and Henry JJ.*—(Taschereau and Gwynne, JJ., *contra*)—that the title to the debentures did not depend upon prior performance of conditions in the agreement not included in the by-law, but upon performance of those in the by-law alone, and the latter having been complied with, the debentures should issue.—2. *Per Fournier, J.*, that the debentures should, nevertheless, be withheld until the damages for non-performance of the conditions in the agreement were paid or secured.—3. *Per Ritchie, C.J., Strong and Henry, JJ.* (Four-

nier, J., *contra*) that specific performance was not an appropriate remedy in such a case and the defendants could only claim damages for non-performance.—4. *Per Ritchie, C.J., Strong and Fournier, JJ.*, that the claim of defendant for damages could be disposed of in this action under the counterclaim and there should be a reference to assess the same.—5. *Per Henry, J.*, that the evidence did not justify a reference and the counterclaim should be dismissed with a reservation of defendant's rights.—A condition in the agreement to be performed by the company was "to construct at or near the corner of Colborne and William streets (in Toronto) a freight and passenger station, with all necessary accommodation, connected by switches, sidings or otherwise, with the said road" upon the council of the town passing a by-law granting the necessary rights of way. *Held*, Strong, J., dissenting. 1. That such condition was not complied with by the erection of a station building not used nor intended to be used, and for which proper officers, such as a station master, ticket agent, &c., were not appointed.—2. *Per Strong, J.*, dissenting, that the condition only called for the construction of a building with the required accommodation and connections, and did not amount to a covenant to run the trains to such station or make any such use of it.—3. The words "all necessary accommodation" in the condition required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided.—The Act incorporating the railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act. *Held*, that such special Act was not restrictive of the Municipal Act, and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. *Held*, also, that all defects of form in the by-law were cured by 44 Vict. c. 24, s. 28, providing for registry of by-laws and requiring an application to quash to be made within three months after such registry.—Judgment appealed from (14 Ont. App. R. 32) affirmed. *Bickford v. Town of Chatham*, xvi., 235.

[Leave to appeal refused by Privy Council, 14 Can. Gaz. 153.]

30. *Special charter — Railway aid — Construction of 44 & 45 Vict. c. 4, s. 2 (Que.)*

See No. 105, *infra*.

31. *Refusal to issue debentures — Railway aid — Breach of agreement—Special damages.*

See CONTRACT, 6.

32. *By-law — Railway debentures — Future conditions — Municipal Code art. 982.*

See RAILWAY, 88.

33. *Railway aid — Condition in bond — Breach.*

See RAILWAY, 90.

34. *By-law — Bonus — Conditions of — Construction of term in condition.*

See BY-LAW, 13.

(c) Necessity of By-law.

35. *Drainage — Special tax — Additional works—Necessity of new by-law.*

See No. 90, *infra*.

36. *Extension of waterworks — Repairs to existing works — Necessity of new authorization.*

See No. 200, *infra*.

(d) *Passing of By-law.*

37. *By-law—Bonus to railway company—Remedy — Action at law — Mandamus — 34 Vict. c. 48 (O.)*—By 18 Vict. c. 33, the G. J. Ry. Co. amalgamated with the G. T. Ry. Co., but, not having been built within the specified time, its charter expired. In May, 1870, an Act to revive the charter gave it a slightly different name, and made some changes, and a by-law to aid the company by a bonus introduced in the County Council of Peterborough was read twice only, and, although it was declared that the ratepayers should vote on the by-law on 16th November, it was on the 23rd November that they voted to grant a bonus, construction to be commenced before 1st May, 1872. At the time of the voting there was no power in the municipality to grant a bonus. On 15th February, 1871, 34 Vict. c. 48 (O.) was passed declaring the by-law as valid as if it had been read a third time, and passed after the Act, and another Act, c. 30, was passed giving power to municipalities to aid railways by granting bonuses, and in 1874, 37 Vict. c. 43 (O.) was passed, amending and consolidating the Acts relating to the company. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 34 Vict. c. 48 (O.). In 1872 the council served formal notice, repudiating liability under the by-law. Work commenced in 1872, and time for completion was extended by 39 Vict. c. 71 (O.). No interest or sinking fund had been collected by the county, and no demand was made for the debentures until 1879, when the company applied for mandamus for the issue and delivery of them to the trustees. *Held*, affirming the judgment appealed from, that the effect of 34 Vict. c. 48 (O.), apart from any effect it might have of recognizing the existence of the railway company, was not to legalize the by-law, but merely to make it as valid as if it had been read a third time, and as if the municipality had had power to give the bonus, and, there being other defects in the by-law not cured by the statute, the appellants could not recover the bonus. — *Per* Gwynne, J., (Fournier and Taschereau, JJ., concurring): As the undertaking by the corporation in by-law is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated, the only way, in Ontario, in which delivery to trustees on behalf of the company can be enforced, before it shall have acquired a right to the actual receipt and benefit by fulfilment of the conditions, is by an action under the statutes in force then regulating proceedings in actions, and not by summary process by motion for mandamus. — *Per* Henry, J.: If appellants had made out a right to a bill for performance of a contract ratified by the legislature, they would not have the right to ask for the present writ of mandamus. (See 45 U. C. Q. B. 302; 6 Ont. App. R. 339). *Grand Junction Ry. Co. v. County of Peterborough*, viii., 76.

38. *Railway bonus—36 Vict. c. 48 (Ont.)—By-law—Submission to ratepayers—Error in*

copy submitted — Premature consideration—Municipal Act, ss. 226, 231—Judicial function of council.—A by-law was submitted in the City of Ottawa, under 36 Vict. c. 48, for the purpose of granting a bonus to a railway then in course of construction, and, after consideration by the council, it was ordered to be submitted to the ratepayers for their vote. By the notice published such by-law was to be considered by the council after one month from its first publication, 24th September, 1873. The ratepayers approved the by-law, and on 20th October it was read in the council a second and third time and passed. The mayor refused to sign it on the ground that its consideration was premature; and on 5th November, on motion, the by-law was rejected. In April, 1874, a motion was again made that such by-law be read a second and third time, which, on this occasion, carried, a copy only of the by-law being before the council, the original having been mislaid. It was found after the commencement of this suit, and it was discovered that the copy voted on by the ratepayers contained a date for the by-law to come into operation different from that of the original. In 1883 an action was brought for the delivery of the debentures under the by-law, and the question of the validity of the whole proceedings was raised. *Held*, affirming the judgment appealed from (12 Ont. App. R. 234), that the vote of 1873 was premature, and not in conformity with the provisions of s. 231 of the Municipal Act; that the mayor properly refused to sign it, and that without such signature the by-law was invalid under s. 226. That the council had power to consider the by-law on 5th November, 1873, and the matter was then disposed of. That the proceedings in April, 1874, were void for the reasons that the by-law was not considered by the council to which it was first submitted as provided by s. 236, which is to be construed as meaning the council elected for the year and not the same corporation; and, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates. *Semble*, that the functions of a municipal council in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote. *Canada Atlantic Ry. Co. v. City of Ottawa*, xii., 295, 365.

[The Privy Council granted leave for an appeal, but it was not prosecuted.]

39. *By-law—Casting vote — R. S. O. 1887, c. 174, ss. 152, 299.* — *Held*, affirming the judgment appealed from (14 Ont. App. R. 299), that the provisions of s. 159 of R. S. O. (1887) c. 174 in respect to casting votes are not applicable to voting on a municipal by-law, and the returning officer in case of a tie cannot give a casting vote. *Canada Atlantic Ry. Co. v. Township of Cambridge*, xv., 219.

[NOTE.—An appeal to the Privy Council was abandoned, 11 Can. Gaz. 394.]

40. *Railway aid debentures — Municipal Act—44 Vict. c. 24 s. 28 (Ont.)—46 Vict. c. 52 (Ont.)—Special Act — Restrictive provisions—By-law—Bonus — Defects of form.*—The Act incorporating a railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act. *Held*, affirming the judgment appealed from (14 Ont. App. R. 32), that such special Act was not restrictive of the Municipal Act and it was only

necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. *Held*, also, that all defects of form in the by-law were cured by 44 Vict. c. 24, s. 28, providing for registry of by-laws and requiring an application to quash to be made within three months after such registry. *Bickford v. Town of Chatham*, xvi., 235.

41. *By-law — Submission to ratepayers—Publication in adjoining local municipality—Compliance with statute — Imperative or directory provisions.*—A by-law of the Township of South Norwich was published in a newspaper in the Village of Norwich, not the county town, and which does not adjoin South Norwich but is an enclave in North Norwich which adjoins South Norwich:—*Held*, affirming the judgment appealed from (19 Ont. App. R. 343), that as the Village of Norwich was geographically within the adjoining municipality, s. 293 of the Ont. Mun. Act (R. S. O. [1887] c. 184) was sufficiently complied with. *Huson v. South Norwich*, xxi., 669.

42. *By-law—Street railway — Construction beyond limits of municipality—Validating Act—Construction of.*—The Town of Port Arthur passed a by-law intitled "A by-law to raise \$75,000 for street railway purposes, and to authorize the issue of debentures therefor," which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, &c., a street railway connecting Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed, but none was submitted ordering the construction of the work. Subsequently an Act declared the by-law "confirmed and to be valid, legal and binding on the town . . . and for all purposes, &c., relating to or affecting the said by-law, and any and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with." *Held*, reversing the decision appealed from (19 Ont. App. R. 555), Taschereau, J., dissenting, that the said Act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act requiring a by-law for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law. *Held*, also, that an erroneous recital in the preamble to the Act that the town council had passed a construction by-law had no effect on the question to be decided. *Dwyer v. Town of Port Arthur*, xxii., 241.

43. *Local improvement — Notice to ratepayers—By-law—Variance from notice—R. S. O. (1887) c. 184, s. 622.*—On a proposal for construction of a stone roadway as a local improvement on one of its streets, the City of Toronto notified the owners of property to be affected thereby, as required by the Municipal Act, R. S. O. (1887) c. 184, s. 622, s-s. 2, of intention to construct such local improvement, describing it as a "macadam roadway" and that payment of the cost should be assessed specially on the properties benefited payable "in five and twenty" equal annual payments. In the by-law passed for its construction the work was described as "a macadam and granite set roadway and stone curbing," and the cost was to be paid in five years. On application to quash the by-law it was not shewn that the work as described in the by-law was

identical with that mentioned in the *Held*, affirming the decision appealed from (Ont. App. R. 713), that the by-law was valid on account of the variances from notice, and that it had been properly quashed. *City of Toronto v. Gillespie*, 1st May,

44. *Money by-law—Construction of R. S. O. art. 4529—Approval of election.*—Under art. 4529, R. S. O., money by-law loans by town corporations require the assent of both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls. *Town of Chicoutimi v. Price*, xxix., 135.

45. *By-law—Homologation—Judgment aside process-verbal—Right of appeal.*—*See* APPEAL, 37.

46. *Corporate liability — Executed contract—Necessity of by-law—Corporate seal.*—*See* No. 55, *infra*.

(c) Validity of By-law.

47. *Approval by ratepayers—Casting vote.*—*R. S. O. (1877) c. 174, s-s. 286-7.*—In the case of a tie in voting on a municipal by-law, the returning officer has no authority to cast a vote, as s. 152 of R. S. O. (1877) c. 174 does not apply in such cases. *Can. Ry. Co. v. Township of Cambria*, 219.

An appeal to the Privy Council was allowed; 11 Can. Gaz. 394.

48. *By-laws—Power to license, regulate and prohibit trades—Prohibition—Ontario Municipal Act, R. S. O. (1887) c. 184 — s-s. 184-185.*—The power given to municipalities by s. 495 (3), Ontario Municipal Act, for licensing, regulating and prohibiting trades, &c., in their respective territories does not authorize the City of Toronto to prohibit the carrying on of these trades in certain streets. Fournier and Taschereau dissenting.—A by-law provided that no pedlar should be required from any pedlar farm and garden produce, fruit and other small articles that could be carried in the hand or in a small basket. *Held*, affirming the decision appealed from (19 Ont. App. 435), Gwynne and Sedgewick, J. dissenting, that a subsequent by-law fixing a license fee for fish-hawk pedlars was not void for repugnancy. *City of Toronto*, xxii., 447.

49. *Construction of statute — Approval by electors.*—Under art. 4529, R. S. O., by-laws for loans by town corporations require the approval of the majority in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls. *Town of Chicoutimi v. Price*, 135.

50. *Waterworks—Guarantee of delivery—By-law—Vote of ratepayers—Approval of Lieutenant-Governor—60 Vict. c. 78, s. 78.*—[*Que.*]—Judgment appealed from (Q. K. B. 77), holding that a by-law to authorize the guarantee of waterworks debenture by a company under 60 Vict. c. 78 (Q. 7 and 27, must be approved by the ratepayers and Lieutenant-Governor-in-Council but

can be legally binding upon a municipal corporation, was affirmed, on appeal, by the Supreme Court of Canada, Girouard, J., dissenting. *Hanson v. Village of Grand Mère*, xxxiii., 50.

Leave to appeal to Privy Council granted, May, 1903.

51. *Tramway—Operation of railway—Use of streets—Municipal regulations—Crossings—Powers—By-law or resolution*—63 Vict. c. 176 (N.S.).—*R. S. N. S. (1900) c. 71, ss. 263, 264—Construction of statute.*—By the Nova Scotia statute, 63 Vict. c. 176, the tramway company was granted powers as to the use and crossing of certain streets in the town subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property. *Held*, reversing the judgment appealed from, Davies, J., dissenting, that such regulations could only be made by by-law and that the by-law making such regulations would be subject to the provisions of s. 264 of "The Towns Incorporation Act." (*R. S. N. S. (1900) c. 71.*) *Liverpool and Milton Ry. Co. v. Town of Liverpool*, xxxiii., 180.

52. *By-law—Petition to annul—R. S. Q. art. 4389—Right of appeal—R. S. C. c. 135, s. 24 (g).*

See APPEAL, 60.

53. *Water rate by-law—Uniformity in rating—Discrimination.*

See No. 199, *infra*.

3. CASTING VOTE.

54. *Votation on by-law—Casting vote—R. S. O. (1887) c. 174, ss. 132, 299.*—The provisions of s. 299 of c. 174, R. S. O. (1877) do not entitle a returning officer in the matter of the submission of a municipal by-law for the approval of ratepayers, to give a casting vote as provided in the case of municipal elections by s. 152 of that Act. *Canada Atlantic Ry. Co. v. Township of Cambridge*, xv., 219.

[NOTE.—An appeal to the Privy Council was abandoned, 11 Can. Gaz. 394.]

4. CONTRACTS.

55. *Executed contract—Seal—Adoption—By-law or resolution—Manitoba Municipal Act, 1884, s. 111—Permissive construction.*—An executed contract for the performance of work within the purposes for which a corporation was created, which work it has adopted and of which it has received the benefit is a contract binding upon the corporation though it was not executed under corporate seal, and this rule applies to municipal as well as other corporations. (Ritchie, C.J., and Strong, J., dissenting.)—In s. 111, Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. (Ritchie, C.J., and Strong, J., dissenting.)—(Judgment appealed from, 6 Man. L. R. 88, reversed.) *Bernardin v. North Dufferin*, xix., 581.

56. *Contract—Municipal work—Condition as to sub-letting—Consent of council.*—Where

a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do.—In an action against the sub-contractor the latter pleaded the want of assent by the council whereupon the plaintiff replied that the assent was withheld at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract. Issue was joined on the replication. *Held*, affirming the judgment appealed from (27 Ont. App. R. 135), that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld and that the plaintiff had failed to prove his case on that issue. *Ryan v. Wiloughby*, xxxi., 33.

57. *Waterworks—Extension of system—Repairs to existing works—Injunction.*

See No. 200, *infra*.

58. *Hiring of personal services—Appointment of officers—Summary dismissal without notice—Text of Montreal city charter.*

See No. 111., *infra*.

59. *Waterworks contract—Rescission—Notice—Mise en demeure—Long user—Waiver.*

See No. 201, *infra*.

60. *Construction of waterworks—Water commissioners—Corporate liability.*

See No. 65, *infra*.

61. *Pledge—Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Set-off—Restitution of thing pledged.*

See PLEDGE, 9.

5. CORPORATE LIABILITY.

62. *By-law—Railway aid—Subscription for shares—Debentures—Division of county—Erection of new municipalities—Assessment—Sale of shares at discount—Action en reddition de comptes—Trustee—Debtor and creditor—Arts. 78, 164, 939 Mun. Code Que.—24 Vict. c. 30 (Que.)—39 Vict. c. 50 (Que.)*—An action en reddition de comptes does not lie against a trustee invested with the administration of a fund, until such administration is complete and terminated.—The relation existing between a county corporation under the provisions of the Municipal Code of Quebec, and local municipalities of which it is composed, in relation to money by-laws, is not that of agent or trustee, but the county corporation is a creditor, and the several local municipalities are its debtors for the amount of the taxes to be assessed upon their ratepayers respectively.—Where local municipalities have been detached from a county and erected into separate corporations they remain in the same position, in regard to subsisting money by-laws, as they were before the division and have no further rights or obligations than if they had never been separated therefrom, and they cannot either jointly or individually institute actions against

such county corporation to compel the rendering of special accounts of the administration of funds in which they have an interest, their proper method of securing statements being through the facilities afforded by art. 164 and other provisions of the Municipal Code. (See 3 Rev. de Jur. 557.) *Township of Ascott v. County of Compton; Village of Lennoxville v. County of Compton*, xxix., 228.

63. *Interference with proprietary rights—Abandonment of expropriation proceedings—Damages—Servitudes established for public utility—Arts. 406, 407, 507, 1053 C. C.—Eminent domain.*—Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault v. Gauthier et al.* (23 Can. S. C. R. 241) referred to. The Chief Justice dissented. *Hollesler v. City of Montreal*, xxix., 402.

64. *Negligence—Necessary proof—Statutory officer—Ratepayer—Statute labour.*—In an action for damages in consequence of a carriage having been upset by running against a pile of sand left on the highway, and one of the occupants thrown out and seriously injured, there was no direct evidence as to how the obstruction came to be placed on the highway, but it appeared that statute labour had been performed at the place of the accident immediately before under the direction of the pathmaster, an officer appointed by the corporation under statutory authority. The evidence indicated that the sand was left on the road by a labourer working under directions from the pathmaster or by a ratepayer engaged in the performance of statute labour. *Held*, affirming the judgment appealed from, that the action must fail for want of evidence that the injury was caused by some person for whose acts the municipal corporation was responsible. *Per Strong, C.J.*—*Quære*. Is the corporation liable for the acts of a statutory officer like the pathmaster, or of a ratepayer in performance of statute labour? *McGregor v. Township of Harwich*, xxix., 443.

65. *Principal and agent—Action—Parties—Water commissioners—Statutory body—Powers—Contract—37 Vict. c. 79 (Ont.).*—By 37 Vict. c. 79 (Ont.) the waterworks of Windsor are under management of a Board of Commissioners who collect the revenue, pay the city any surplus therefrom, and initiate works for improving the system, the city supplying the funds. The total expenditure is not to exceed \$300,000 and not more than \$20,000 can be expended in any one year without a vote of the ratepayers. *Held*, affirming the judgment appealed from (27 Ont. App. R. 566), that the Board is merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, not authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit was not a binding contract. *Held*, also, that if an action could have been brought on such contract the city corporation would have been a necessary party. *Quære*. Would not the city corporation have been the only party liable to be sued? *Macdougall v. Water Commissioners of Windsor*, xxxi., 326.

66. *Principal and agent—Police constable—Negligent performance of duty—Liability of municipal corporation.*—A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. (Judgment appealed from, 35 N. B. Rep. 296, affirmed). *McClave v. City of Moncton*, xxxii., 106.

67. *Negligence—Personal injuries—Drains and sewers—Liability of municipality—Officers and employees of municipal corporation—59 Vict. c. 55, s. 26, s.-s. 18 (Que.).*—The Act incorporating the Town of St. Louis, Que., gives power to the council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connections at their own cost, under the superintendence of an officer appointed by the corporation." *Held*, affirming the judgment appealed from (Q. R. 11 K.B. 117) that the municipality cannot be made liable for damages caused through the acts of a person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control. *Dallas v. Town of St. Louis*, xxxii., 120.

68. *Levy for tax—Arrest of delinquent—Void assessment—Damages against corporation.*

See MASTER AND SERVANT, 1.

69. *Calling out militia—Form of requisition—Suit for pay—Anticipated riots.*
See MILITARY LAW, 1.

70. *County debentures—Refusal to issue—Railway aid—Breach of agreement—Special damages.*

See CONTRACT, 6.

71. *Improper construction of drain—Acceptance of surplus funds—Suit by contractor.*
See ETSOPPEL, 3.

72. *Use of public street by railway company—Nuisance—Damages—Right of action.*
See RAILWAYS, 71.

73. *License by-law—Commercial traveller—Action for illegal arrest—29 & 30 Vict. c. 57, ss. 20, 21 (Que.).*
See TORT, 4.

74. *Municipal regulations—Edits et ordonnances L. C.—Common of Berthier.*
See SERVITUDE, 4.

75. *Public market—Traders and hucksters—Obstruction of streets, &c.*
See No. 155, *infra*.

76. *Negligence of municipal officers—Encroachment on street—Nuisance—Obstruction of show-window—Misfeasance—Statutable duty.*
See No. 171, *infra*.

77. *Obstruction of highway—Telephone poles on streets—Proximate cause of injury—Impleading third party—Costs.*
See NEGLIGENCE, 192.

78. *Contract — Drainage—Inter-municipal works—Guarantee—Continuing liability.*

See DRAINAGE, 8.

79. *Pledge — Deposit with tender—Forfeiture—Breach of contract — Damages—Restitution of pledge.*

See ACTION, 49.

80. *Guarantee of waterworks debentures—By-law — Vote of ratepayers — Approval of Lieutenant-Governor.*

See No. 50, ante.

6. COUNTY BUILDINGS.

81. *R. S. N. S. (5 ser.) c. 20, s. 1; 49 Vict. c. 11—County buildings — Establishment—Court house and jail — Removal from shire town.*]—By *R. S. N. S. (5 ser.) c. 20, s. 1*, as amended by 49 *Vict. c. 11*, jails, court houses and sessions houses may be established, erected and repaired by order of the municipal councils in the respective municipalities. In 1891 an Act empowered the municipality of L. to borrow a sum for erecting and furnishing a court house and jail for the county or repairing and improving the existing court house, provision being made for the municipality of C. and the town of L. respectively contributing towards payment of the loan. L. is the shire town of the county where the sittings of the Supreme Court are held as required by statute, and where the county court house and jail had always been situated. In pursuance of the Act, the council proposed to build a court house and jail at B. another town in the county, and, when built, to petition the legislature to transfer the court to B. An injunction was obtained restraining the council from erecting a court house and jail at B. or expending in such erection any funds in which the municipality of C. or the town of L. or either of them, were interested. *Held*, that the municipality could not, under the statutory authority to establish and erect a court house and jail, remove these buildings from the town of L. and so repeal and annul the statutes of the legislature which had established them in L.; that, without direct legislative authority therefor, the buildings could only be erected in the shire town, and that the injunction had been properly granted. *Municipality of Lunenburg v. Attorney-General of Nova Scotia*, xx., 596.

82. *Statute, construction of—55 Vict. c. 42, ss. 397, 404, 469, 473 (Ont.)—City separated from county—Maintenance of court house and gaol—Care and maintenance of prisoners.*]—No compensation can be awarded by arbitrators to a County Council in respect of the use, by a city separated from that county, of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality. A claim for compensation for the care and maintenance of prisoners' stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for the use of the court house and gaol. Judgment of the Court of Appeal for Ontario (24 *Ont. App. R.* 409), affirmed. *County of Carleton v. City of Ottawa*, xxviii., 606.

7. DEBENTURES.

83. *Aid to railway—Debentures signed by warden de facto — 44 & 45 Vict. c. 2, s. 19 (Que.)—Completion of railway — Evidence—Admission by co-defendant—Onus probandi.*]—A municipal corporation, under a by-law, issued and delivered its debentures to the treasurer of Quebec as a subsidy to a railway company, to be paid over to the company in the manner and subject to the same conditions as the provincial subsidy payable under 44 & 45 *Vict. c. 2, s. 19*, viz., "when the road was completed and in good running order to the satisfaction of the Lieutenant-Governor-in-Council." The debentures were signed by M. who was elected warden and held that office after the former warden had verbally resigned. —In an action by the company to recover the debentures from the provincial treasurer (after the Government bonus had been paid), in which the corporation was co-defendant, the provincial treasurer pleaded by demurrer only, which was overruled, and the corporation pleaded general denial and that the debentures were illegally signed. *Held*, 1. Affirming the judgment appealed from, that the debentures had been validly signed by the warden *de facto*. 2. That as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieutenant-Governor-in-Council the onus was on the municipal corporation to prove that the Government had not acted in conformity with the statute. *Strong, J.*, dissenting. *County of Pontiac v. Ross*, xvii., 406.

84. *Municipal bond — Form — Statutory authority — Construction.*]—An Act of the New Brunswick Legislature authorized the county council of Gloucester county to appoint Almshouse Commissioners for the Parish of Bathurst, in said county, who might build or rent premises for an almshouse and workhouse, the cost to be assessed on the parish. The municipality was empowered to issue bonds, to be wholly chargeable on said parish, under its corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed and headed as follows: "Almshouse Bonds, Parish of Bathurst." It went on to state that "This certifies that the Parish of Bathurst in the County of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer," . . . pursuant to an Act of Assembly (the above mentioned Act) &c. In an action by G. on said bond. *Held*, reversing the judgment of the Supreme Court of New Brunswick (35 *N. B. Rep.* 255), that, notwithstanding the above declaration that the parish was the debtor, the County of Gloucester was liable to pay the amount due on the bond. *Grimmer v. County of Gloucester*, xxxii., 305.

8. DRAINAGE.

85. *Construction of sewer—Entering adjoining municipality—R. S. O. (1887) c. 184, s. 479, s.s. 15; 51 Vict. c. 28, s. 20 (O.)*]—50 *Vict. c. 28, s. 20*, amending the Municipal Act of Ontario (*R. S. O. 1887, c. 184*), s. 479. does not remove restrictions imposed by the Municipal Act, and municipalities interested must either between themselves, settle the terms and conditions for construction of

sewers into the territory of an adjoining municipality, or proceed to arbitration. The Court of Appeal for Ontario (17 Ont. App. R. 346) and Divisional Court (18 O. R. 199) affirmed. *City of Hamilton v. Township of Barton*, xx., 173.

86. *Drainage — Damages — Reference — Drainage Trials Act, 54 Vict. c. 51—Powers of referee — Negligence — Liability of municipality.*—Upon reference of an action to a referee under the Drainage Trials Act of Ontario (54 Vict. c. 51), whether under s. 11, or s. 19, the referee has full power to deal with the case as he thinks fit, and to make, of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said s. 11 into a claim for damages arising under s. 591 of the Municipal Act.—In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen v. McGillivray* (18 Ont. App. R. 516), and *Nissouri v. Dorchester* (14 O. R. 294), distinguished.—One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act, that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.—The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.—A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.—Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as tortfeasors, but are liable under s. 591, Mun. Act, for damage done in construction of the work or consequent thereto.—A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder.—Judgment appealed from (20 Ont. App. R. 225) varied. *Township of Ellice v. Hiles; Township of Ellice v. Crooks*, xxiii., 429.

87. *Ditches and Watercourses Act, R. S. O. (1887) c. 220—Requisition for drain—Owner of land—Meaning of term "owner."*—By s. 6 (a) of the Ditches and Watercourses Act (Ont.), any owner of land to be benefited thereby may file with the clerk of a municipality a requisition for a drain if he has obtained "the assent in writing thereto of (including himself) a majority of the owners affected or interested." *Held*, affirming the judgment appealed from (21 Ont. App. R. 168), that "owner" in this section does not mean the assessed owner; that the holder of any real or substantial interest is an "owner affected or interested;" and that a

mere tenant at will can neither file the requisition nor be included in the majority required. —*Quare*, If the person filing the requisition is not an owner within the meaning of the term, are the proceedings valid if the majority without him? *Township of Caledonia v. York*, xxiv., 282.

88. *Petition for drain — Use of a common sewer — Connection with drain — Nuisance — Liability of householder.*—Petition by ratepayers under Mun. Act c. s. 570, asked for a drain to be constructed for draining property described therein township was afterwards annexed to the adjoining city, and the drain thereafter used as a common sewer, it being so construed for that purpose. In an action against a householder, who had connected the drain from his house with said drain, for a nuisance occasioned thereby at its outlet: *Held*, affirming the decision appealed from (2 Ont. App. R. 613), *Taschereau and Gwynn* dissenting, that s. 570 in authorizing the construction of a drain "for draining the property" empowered the township to connect a drain for draining not only surface water but sewage generally, and the householder not responsible for the consequences of connecting his house with said drain by a connection of the city.—Where a by-law providing that no connection should be made with a sewer, except by permission of the engineer, a resolution of the city council requiring an application for such connection terms which were complied with and the connection made was a sufficient compliance with said by-law. *Lewis v. Alexander*, xxiv., 191.

89. *Trespass — Damages — Easement — Equitable interest — Municipal by-law — Notice — Registry Act, R. S. O. c. 114.*—R. S. O. [1877] c. 114, s. 8 providing that no lien, charge or interest in land shall be valid as against a registered instrument executed by the same parties or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests. If the owner of land gives permission to a municipality to construct a drain through the municipality, after the work has been done, has an interest in the land to which the registry laws apply whether the agreement conveys the property, creates an easement or is a mere license which has become irrevocable, and if there has been no by-law authorizing the land to be taken such interest under the said section, invalid as against a registered deed executed by an assignee of the owner, a purchaser for value without notice. *Ross v. Hunter* (7 Can. S. C. R. 289) distinguished.—Judgment appealed from (Ont. App. 395) affirmed. *City of Toronto v. Jarvis*, xxv., 237.

90. *Municipal by-law — Special provisions — Drainage — Power of council — Additional necessary works — Ultra vires solutions — Executed contract.*—Where a municipal by-law authorized the construction of a drain benefiting lands in an adjoining municipality which was to pass under a culvert where it was apparent that a culvert off the water brought down by the drain would prevent the flooding of adjacent lands, the construction of such culvert was a matter within the provisions of s. 573 of the Municipal Act, R. S. O. [1887] c. 184, and a new by-law authorizing it was not necessary.—Judgment

pealed from (22 Ont. App. R. 330) reversed, *Taschereau, J.*, dissenting. *Canadian Pacific Ry. Co. v. Township of Chatham*, xxv., 608.

91. *Drainage — Assessment — Inter-municipal obligations as to initiation and contributions — By-law — Ontario Drainage Act of 1873—36 Vict. c. 38 (O.)—36 Vict. c. 39 (O.)—R. S. O. (1887) c. 184—Ontario Consolidated Municipal Act of 1892—55 Vict. c. 42 (O.)*—The provision of Ont. Mun. Act (55 Vict. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called and does not include original watercourses which have been deepened or enlarged.—If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law (25 Ont. App. R. 601) affirmed. *Broughton v. Townships of Grey and Elma*, xxvii., 495.

92. *Extra cost of drainage works—R. S. O. (1887) c. 174—46 Vict. c. 18 (Ont.)—Misapplication of lands — Negligence — Damages — Re-assessment — Inter-municipal works.*—Where a sum amply sufficient to complete drainage works, as designed and authorized by the by-law for the complete construction of the drain, has been paid to the municipality which undertook the works, to be applied towards their construction, and was misapplied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards, by another by-law, levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted. *Township of Sombra v. Township of Chatham*, xxviii., 1.

93. *Ditches and Watercourses Act, 1894 (Ont.) — Owner of land — Declaration of ownership — Award — Defects — Validating award — 57 Vict. c. 55—58 Vict. c. 54 (Ont.)*—A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1894, of Ontario. *Township of Osgoode v. York* (24 Can. S. C. R. 282) followed.—If the initiating party is not really an owner under the filing of a declaration of ownership under the Act will not confer jurisdiction.—Section 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings where the party initiating the latter is not an owner.—Judgment appealed from (25 Ont. App. R. 498) reversed. *Township of McKillop v. Township of Logan*, xxix., 702.

94. *Improvement of natural watercourses—Artificial watercourses — Embankments —*

*Dykes—“The Drainage Act, 1894”—57 Vict. c. 56 (Ont.) — “The Ontario Drainage Act, 1873”—“The Municipal Drainage Aid Act”—36 Vict. c. 39 — 36 Vict. c. 48 (Ont.) — “Benefit” assessment—“Injuring liability”—“Outlet liability” — Assessment of wild lands — Construction of statute.] — The Ontario Act, 57 Vict. c. 56, has not abrogated the fundamental principle underlying the provisions of the previous Acts of the legislature respecting the powers of municipal institutions as to assessments for the improvement of particular lands at the cost of the owners, which rests on the maxim *qui sentit commodum sentire debet et onus*—Lands from which no water is caused to flow by artificial means into a drain having its outlet in another municipality than that in which it was initiated cannot be assessed for “outlet liability” under said Act.—Where a drainage work initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for “outlet liability” therein is limited to the cost of the work at such outlet.—Every assessment, whether for “injuring liability” or for “outlet liability” must be made upon consideration of the special circumstances of each particular case and restricted to the mode prescribed by the Act. In every case there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands to their injury, which water is to be carried off by the proposed drainage work.—Assessment for “benefit” under the Act must have reference to the additional facilities afforded by the proposed drainage work for the drainage of all lands within the area of the proposed work, and may vary according to difference of elevation of the respective lots, the quantity of water to be drained from each, their distances from the work and other like circumstances.—Section 75 of that Act only authorizes an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse for the purpose of draining lands is not assessable upon particular lands under said s. 75, but must constitute a charge upon the general funds of the municipality.—In the present case, the scheme proposed was mainly for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality, and such works are not drainage works within the meaning of said s. 75 for which assessments can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited. *Sutherland-Innes Co. v. Township of Romney*, xxx., 495.*

95. *Municipal drains — Continuing trespass — Limitation of action ex delictu — 58 Vict. c. 4, s. 295 (N. S.)—Verdict.*—Action for trespass by the municipal corporation constructing and maintaining a drain through plaintiff's land. The jury found that it had been constructed in 1886 “by virtue of the streets commissioner's power of office.” Plaintiff, though aware of the existence at the time, made no objection till 1896, when the land caved in. The court below held (33 N. S. Rep. 401) that the jury had found that the defendant had constructed the drain by its agent, and that the trespass, being a continuing one, the action was not barred by the limitation provided in the “Towns Incorporation Act of 1895” for actions *ex delictu* against towns. The judgment appealed from (33 N. S. Rep. 401), was affirmed by the Su-

preme Court of Canada. *Town of Truro v. Archibald*, xxxi., 380.

96. *Intermunicipal works — Drainage — Removal of obstruction — Municipal Act, 1883, s. 570 (Ont.) Mun. Amendment Act, 1886, s. 22—Report of engineer.*—In 1884 a petition was presented to the council of Elizabethtown asking for the removal of a dam and other obstructions to the course of Mud Creek into which the drainage of that township and of the Township of Augusta, adjoining it, emptied. The council had the creek examined by an engineer who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each township. The council then passed a by-law authorizing the work to be done, which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, s. 570 of the Municipal Act, 1883. In 1886 the Act was amended, and a fresh petition was presented to the council of Elizabethtown which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval) but presented to the council his former report, plans, specifications and assessment, and another by-law was passed under which the work was done. In an action to recover from Augusta its proportion of the assessment: *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 4), Strong, C.J., dissenting, that the amendment in 1886 to s. 570 of the Municipal Act, 1883, authorized the council of Elizabethtown to cause the work to be done and claim from Augusta its proportion of the cost. *Held*, further, reversing said judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment. *Township of Elizabethtown v. Township of Augusta*, xxxii., 295.

97. *Drainage — Defective award — Report of surveyor — Works in adjoining municipality — Indefinite termini — Assessment—Petition for works—Initiating municipality—Lands benefited.*—Under the drainage clauses of the Municipal Act a by-law was passed by the Township of Chatham founded on the report, plans, and specifications of a surveyor, made with a view of drainage of lands in that township. The by-law set out that the petition had been signed by a majority of the ratepayers of the township to be benefited by the work and recited the report, by which it appeared that to obtain sufficient fall it was necessary to continue the drain into the adjoining Township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line road between Dover and Chatham, for part of the cost as for benefit. The Township of Dover appealed from this report under 46 Vict. c. 18, s. 582, on the grounds that a majority of the owners of property to be benefited had not petitioned for the works as required by the statute; that no proper reports, plans, specifications, assessments, and estimates had been made and served; that neither the Council of Chatham nor the surveyor had power to assess or charge the lands in Dover for the purposes stated in the report and by-law; that the report did not specify any facts to shew that the Council of Chatham or their surveyor had authority to assess

the lots or roads in Dover for any part of the cost of the proposed work; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived; that no assessment whatever should be made on lands or roads in Dover as the works would, in fact, be an injury thereto; and that the report did not sufficiently specify the beginning and end of the work, nor the manner in which Dover was to be benefited.—Three arbitrators were appointed under the Act who all agreed that Dover would be benefited by the work, but R. F., one of the arbitrators, thought \$500 should be taken off the town line road, and W. D., another arbitrator, held that, while the bulk sum assessed was not too great, the assessment on the respective lands and roads and parts thereof should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award "if in accordance with the above memoranda." W. D. and A. E. met and signed an award confirming the assessment on the lands and roads in Dover, and on the town line road made by the surveyor, and dismissing the appeal for the reason that the grounds mentioned had not been sustained.—The Queen's Bench Division set aside this award for want of concurring minds in the arbitrators, and defect in the report not specifying the beginning and end of the works (5 O. R. 325). This judgment was sustained on appeal (11 Ont. App. R. 248.) On appeal to the Supreme Court of Canada:—*Held*, Ritchie, C.J., dissenting, that the award should have been set aside upon the ground that it was not shewn that the petition was signed by a majority of the owners of the property to be benefited, so as to give the corporation of Chatham jurisdiction to enter Dover and do work therein.—That the arbitrators should have adjudicated upon the merits of the appeal against the several assessments on the lots and roads assessed, as their award was, by ss. 400 & 404 of 46 Vict. c. 18, made final, subject to appeal only to the High Court of Judicature, and it was not a matter for the Court of Revision to deal with;—Also that the award was bad because it professed to be a final adjudication against Dover upon all the grounds of appeal stated in the notice, and charged every lot and road so assessed with the precise amount assessed upon them respectively, although, by a minute of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to submit to the Court of Revision.—Further, that the arbitrators should have allowed the appeal against the assessment, and their award should have been set aside on the merits, because the evidence failed to shew any benefit to the lots or roads in Dover which were assessed, but actually shewed that the surveyor did not assess them for benefit from the works, but for reasons which were not sufficient under the statute, and did not warrant the assessment. *Township of Chatham and North Gore v. Township of Dover East and West*, xii., 321.

98. *By-laws—Drainage Act — Petition for drain—Withdrawal of name from—Improper construction.*—The action was brought by Gibson to have a by-law of the corporation quashed, or, in the alternative, for damages

for injury to his property, resulting from improper construction and want of repair of a drain made under said by-law. The ground upon which said by-law was attacked was that the plaintiff had withdrawn from the petition and there were not sufficient names on it without him.—The trial judge held that plaintiff had not withdrawn from the petition, and refused to quash the by-law. He also held that plaintiff had failed to prove his allegations in the statement of claim on which his right to damages was founded. The Divisional Court reversed the decision on the first ground, and held the by-law invalid. The Court of Appeal for Ontario (21 Ont. App. R. 504) restored the original judgment.—The Supreme Court of Canada affirmed the judgment appealed from and dismissed the appeal with costs. *Gibson v. Township of North Easthope*, xxiv., 707.

99. *Drainage works — Improper construction — Suit by contractor — Acceptance of surplus funds.*

See ESTOPPEL, 3.

100. *Drains — Negligence—Repair—Flooding lands — Restoring roads — Mandamus—Damages.*

See DRAINAGE, 3.

101. *Construction of drain — Action for damages — Reference — Appeal from referee's report—Confirmation by lapse of time.*

See PRACTICE, 127.

102. *"The Drainage Act, 1894," 57 Vict. c. 56 (Ont.)—"The Ontario Drainage Act, 1873"—"The Municipal Drainage Aid Act"—Improvement of natural watercourses — Artificial watercourses — Benefit — Injuring liability—Outlet liability — Assessment of wild lands.*

See DRAINAGE, 7.

103. *Negligence — Personal injuries — Drains and sewers — Municipal liability — Officers and employees of corporation.*

See No. 67, ante.

104. *Contract — Intermunicipal drainage—Guarantee — Continuing liability — Damages.*

See DRAINAGE, 8.

9. DUTIES AND POWERS.

105. *Special charter — Powers — Railway aid — Expropriation — Right of way — By-law — 44 & 45 Vict. c. 40, s. 2 (Que.)—Construction of statute.]—Under 44 & 45 Vict. c. 40, s. 2 (Que.), passed on a petition of the Quebec Central Railway Company, after notice, asking for an amendment of their charter, the Town of Lévis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence River, over and above \$30,000. Appellants, being ratepayers of Lévis, obtained an injunction to stay further proceedings on this*

by-law, on the ground of illegality. The proviso in s. 2 of the Act, under which the town contended that the by-law was authorized, is: "Provided that within 30 days from the sanction of the present Act, the corporation of the Town of Lévis furnishes the said company with its valid guarantee and obligation to pay all excess over \$30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the Town of Lévis there is no power or authority in the corporation to give such guarantee. The statute 44 & 45 Vict. c. 40 was passed 30th June, 1881; and the by-law forming the guarantee on 27th July following. *Held*, reversing the judgment appealed from (3 Dor. Q. B. 322) and restoring the judgment of the Superior Court (9 Q. L. R. 305), that the statute in question did not authorize the corporation to impose burdens upon the municipality which were not authorized either by their Acts of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained. (*Ritchie, C.J., dubitante*). *Quebec Warehouse Co. v. Town of Lévis*, xi., 666.

106. *By-law — Approval by ratepayers — Consideration by council.]—It would appear that upon the consideration of a by-law, after approval by ratepayers, a municipal council is not merely acting in a ministerial capacity but may refuse to sanction the by-law, notwithstanding the favourable vote. *Canada Atlantic Ry. Co. v. City of Ottawa*, xii., 365.*

107. *Powers of council — Market by-law—Licenses — Sale of meat — Quantity — Time and place.]—The Municipal Act of 1883 s. 503, s.-s. 5, empowers the council of a municipality to regulate the place and manner of selling meat, subject to restrictions in five next preceding sections. Section 497 authorizes the sale after certain hours at places other than the market of any commodity which has been offered for sale in the market. *Held*, affirming the judgment appealed from (15 Ont. App. R. 75), Strong and Taschereau, JJ., dissenting, that by-law No. 629 of the City of Ottawa requiring everybody offering fresh meat for sale in the city to take out a license, and providing that no meat should be sold in any place except the stalls of the different city markets, was a valid by-law and within the power of the city council to pass. *Held*, per Strong and Taschereau, JJ., that those portions of the by-law fixing the places at which fresh meat should be sold and prohibiting its sale elsewhere, are *ultra vires* of the city council under the said sections of the Municipal Act, 1883. *O'Meara v. City of Ottawa*, xiv., 742.*

108. *Powers — Purchase of fire apparatus —Resolution of council — Contract under seal — By-law — Executory contract — Enforcement — R. S. O. (1887) c. 184, s. 480.]—Under s. 480 of the Ontario Municipal Act, empowering municipal councils to purchase fire apparatus, the defendant's council by resolution authorized the fire and water committee to ascertain the price of a fire engine, and on the committee's report recommending the purchase, a contract was entered into under the corporate seal for the construction of an engine and hose by the company. No by-law was passed authorizing or sanctioning the contract, the engine was built, placed in the town hall, a committee appointed to engage*

experts to test it, the test made and the experts reported favourably, but the council afterwards passed a resolution that all negotiations in reference to the purchase be dropped and the company notified to remove the engine. Action was brought for the contract price of the engine and hose. The trial judge found that the engine had answered the test and fulfilled the requirements of the contract, but held that the contract could not be enforced for want of a by-law. This judgment was affirmed (20 O. R. 411; 19 Ont. App. R. 47). *Held*, affirming judgment appealed from, Gwynne, J., dissenting, that the engine not having been accepted by the corporation the contract was not executed; that s. 282 of the Municipal Act requires all powers of the corporation to be exercised by by-law unless otherwise expressly authorized or provided; that the authority to purchase fire apparatus is expressly given to municipal corporations by the Act and is a power to be exercised by by-law under said section, and the contract being executory the want of a by-law was a bar to the action. *Bernardin v. North Dufferin* (19 Can. S. C. R. 581) distinguished. *Held*, per Gwynne, J. That the powers to be exercised by by-law are only legislative powers and a contract such as that in question in this case could be enforced without a by-law. *Waterous Engine Works Co. v. Town of Palmerston*, xxi., 556.

109. *Ontario Municipal Act — County and municipal bridges — Width of stream — Freshets.*—By R. S. O. [1887] c. 184, s. 532, the council of any county has "exclusive jurisdiction over all bridges crossing streams or rivers over 100 feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county," and by s. 534, the county council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams 100 feet or less in width the bridges are under the jurisdiction of the respective municipalities through which the streams flow. *Held*, reversing the decision appealed from (20 Ont. App. R. 1), that the width of a river at the level attained after heavy rain, and freshets each year, should be taken into consideration in determining the liability under the Act; the width at ordinary high-water mark is not the test of such liability. *Village of New Hamburg v. County of Waterloo*, xxii., 296.

110. *Vancouver City charter — Right to extend streets to deep water — Crossing of railway — Jus publicum — Implied extinction by statute — Injunction — Powers of Canadian Pacific Ry. Co. to take and use foreshore.*—By 44 Vict. c. 1, s. 18 (D.), the Canadian Pacific Ry. Co. "have the right to take, use and hold the beach and land below high-water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways." By the Act of the Parliament of Canada, 50 & 51 Vict. c. 56, s. 55, the location of the company's line of railway between Port Moody and the City of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore Avenue, Vancouver City, was ratified and confirmed. The Act of incorporation of

the City of Vancouver, 49 Vict. c. 32, s. 213 (B. C.), vests in the city all streets, highways, &c., and in 1892 the city began the construction of works extending from the foot of Gore Avenue with the avowed object of crossing the railway track at a level and obtaining access to the harbour at deep water. On application by the railway company for an injunction to restrain the city corporation from proceeding with their work of construction, and crossing the railway: *Held*, affirming the judgment appealed from (2 B. C. Rep. 306), that as the foreshore forms part of the land required by the railway company, as shewn on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore Avenue is subordinate to the rights given to the railway company by the Dominion statute (44 Vict. c. 1, s. 18 a), on the said foreshore, and therefore the injunction was properly granted. *City of Vancouver v. Canadian Pacific Ry. Co.*, xxiii., 1.

111. *Master and servant—Hiring of personal services — Appointment of officers — Summary dismissal without notice—Difference in English and French versions of Montreal City charter — "A discrétion" — "At pleasure."*—The charter of Montreal, 1889 (52 Vict. c. 79 [Que.], s. 79) gives power to the city council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*." *Held*, affirming the judgment appealed from (Q. R. 6 Q. B. 177), that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment and the city council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. *Davis v. City of Montreal*, xxvii., 539.

112. *Inquiry as to municipal affairs — County Court judge — Judicial functions — Inferior tribunal*—R. S. O. (1887) c. 184, s. 477.

See PROHIBITION, 1.

113. *Licensing—Regulating traders — Validity of city by-law.*

See No. 48, ante.

114. *Repair of streets — Ice accumulating on sidewalk—Negligence.*

See No. 142, infra.

115. *Statutable duty — Line of street—Obstruction of show-window—Misfeasance.*

See No. 171, infra.

10. EXPROPRIATION.

116. *Street railway—By-law — Agreement — Notice — Municipal ownership — Arbitration.*—The Quebec Street Railway Company were authorized under a by-law of the City of Quebec and an agreement in pursuance thereof to construct and operate in streets of the

city a street railway for 40 years, but it was also provided that at the expiration of 20 years (from 9th February, 1865) the corporation might, after six months' notice to the company, to be given within the twelve months immediately preceding the expiration of the 20 years, assume the ownership of the railway upon payment of its value, to be determined by arbitration, plus ten per cent. *Held*, reversing the judgment appealed from (13 Q. L. R. 205), Fournier, J., dissenting, that the company was entitled to a full six months' notice prior to 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and therefore a notice given in November, 1884, to the company that the corporation would take possession of the railway in 6 months thereafter was bad.—*Per Strong and Henry, J.J.* That the court had no power to appoint an arbitrator or valuator to make the valuation provided for by the agreement after the refusal by the company to appoint their arbitrator. Fournier, J., *contra*. *Quebec Street Ry. Co. v. City of Quebec*, xv., 164.

117. *Abandonment of expropriation — Interference with proprietary rights — Servitude—Public nullity—Arts. 406, 407, 507, 1053 C. C.—Eminent domain.*—Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault v. Gauthier et al.* (28 Can. S. C. R. 241) referred to. The Chief Justice dissented. *Holleston v. City of Montreal*, xxix., 402.

118. *Widening street — Illegal detention of lands — Arbitrary abandonment of expropriation proceedings—Damages—Costs.*—Where the owner of land has been illegally dispossessed, he is entitled to have it returned to him in as good condition as when it was taken and in the same state and also to damages equal to the rents, issues and profits thereof during the period of illegal detention. (Q. R. 8 Q. B. 534, affirmed.) *City of Montreal v. Hogan*, xxxi., 1.

118a. *Expropriation of lands—Damages for use of rifle range—Mode of assessment—Consulting valuation rolls—Present uses—Prospective value—Evidence.*

See No. 10a, *ante*.

See EXPROPRIATION OF LANDS, 8-20.

11. LIBEL.

119. *Malice — Libellous resolution—Summary dismissal of municipal official.*—A resolution by which a municipal council summarily dismissed an official without any previous notice recited that he had committed a serious fault by making unfounded charges against his assistant; that he was charged with negligence towards his committee; that he, without cause, refused to recognize his assistant, and by his conduct tended to render the administration of his department inefficient. No malicious motive was shewn to have actuated the council in passing the resolution. *Held*, that there was nothing in

the resolution of a nature to injure the official character or reputation of the official so dismissed.—Judgment appealed from (Q. R. 6 Q. B. 177) affirmed. *Davis v. City of Montreal*, xxvii., 539.

12. LIQUOR LAWS.

120. *Canada Temperance Act — Application of fines—Incorporated town—Separation from county for municipal purposes.*—By order of the Governor-General-in-Council, 29th September, 1886, it is provided that "all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county or any incorporated town separated for municipal purposes from the county . . . shall be paid to the treasurer of the city, incorporated town or county," &c. *Held*, reversing the decision appealed from (32 N. B. Rep. 292), King, J., dissenting, that to come within the terms of this order an incorporated town need not be separated from the county for all purposes; it includes any town having municipal self-government even though it contributes to the expense of keeping up certain institutions in the county. *Town of St. Stephen v. County of Charlotte*, xxiv., 329.

121. *Liquor laws — Action — Discretion of members of council — Refused to confirm certificate — Liability of corporation.*—In an action against a municipal corporation for damages claimed on account of the council of the municipality having, as alleged, illegally refused to confirm a certificate to enable the plaintiff to obtain a license for the sale of liquor in his hotel: *Held*, affirming the judgment appealed from (Q. R. 8 Q. B. 276), that the municipal council had a discretion under the provisions of the "Quebec License Law," R. S. Q. art. 839, to be exercised in the matter of the confirmation of such certificates for the exercise of which no action could lie, and, further, that even if the members of the council had acted maliciously in refusing to confirm the certificate there could not be on that account any right of action for damages against the corporation. *Beach v. Township of Stanstead*, xxix., 736.

122. *Legislative jurisdiction — City charter — Sale of liquors — 20 Vict. c. 129 (Can.) — B. N. A. Act (1867) s. 91—38 Vict. c. 76 (Que.)—41 Vict. c. 3 (Que.)—By-law.*

See LIQUOR LAWS, 3.

123. *Sale of liquor — Local option — 53 Vict. c. 56, s. 18 (O.)—54 Vict. c. 46 (O.)—Powers of local Legislature.*

See CONSTITUTIONAL LAW, 45.

AND see LIQUOR LAWS, 13-21.

13. LOCAL IMPROVEMENTS.

124. *Special tax — Ex post facto legislation — Warranty.*—Assessment rolls were made by the City of Montreal under 27 & 28 Vict. c. 60 and 29 & 30 Vict. c. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the Legislature by two special Acts to

ake new rolls, but in the meantime the property in question had been sold and conveyed a deed with warranty containing a declaration that all taxes, both special and general, had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid. *Held*, affirming the judgment appealed from (20 R. L. 452), Wynne, J., dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the first were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale. *ante Ville Marie v. Morrison*, xxv., 289.

125. *Repair of streets — Pavements — Assessment of owners — Double taxation — 2½ Vict. c. 39 (N. S.)—53 Vict. c. 60, s. 14 (N. S.)*—By 53 Vict. c. 60, s. 14 (N. S.), the city of Halifax was authorized to borrow money for paving sidewalks with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work could be done and to be a first lien on such properties. A concrete sidewalk was laid under authority of this statute, in front of L's property, and he refused to pay half the cost on the ground that his predecessor in title had, in 1867, under 24 Vict. c. 39, furnished material to construct a brick sidewalk in front of the same property and that it would be imposing a double tax on the property if he had to pay for the concrete walk as well. *Held*, reversing the judgment appealed from (28 N. S. Rep. 268), that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous. *City of Halifax v. Lithgow*, xvi., 336.

126. *By-law — Assessment—Local improvements—Agreement with owners—Construction of subway—Benefit of lands.*—An agreement as made by the City of Toronto with a railway company and other property owners for the construction of a subway under the railway tracks ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement, in connection with the work a roadway had to be made, running east of King street to the limit of the subway, the street being lowered in front of the company's lands, which were to some extent cut off from frontages abutting on streets as before; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway. *Held*, that to the ex-

tent to which the lands of the company were cut off from the portions thereof abutting on the street, as before the work, was an injury and not a benefit to such lands and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway, and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement. *Held*, further, that as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the residue which might have been assessable as a local improvement if it had not been coupled with work not so assessable.—Notice to a property owner of assessment for local improvements under s. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act. Judgment appealed from (23 Ont. App. R. 250) affirmed. *City of Toronto v. Canadian Pacific Ry. Co.*, xxvi., 682.

127. *Appeal — Jurisdiction—Expropriation of lands—Assessments — Local improvements —Future rights—Title to lands and tenements —R. S. C. c. 135, s. 29 (b); 56 Vict. c. 29, s. 1 (D.)*—A by-law was passed for the widening of a portion of a street up to a homologated line and the necessary expropriations. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties sought to set aside the assessments. The Queen's Bench affirmed a judgment dismissing the action. *Held*, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in s. 1 (b), of s. 29 Supreme and Exchequer Courts Act, as amended by 56 Vict. c. 29, s. 1.—(See Q. R. 6 Q. B. 107.) *Stevenson v. City of Montreal*, xxvii., 187.

128. *Expropriation — Widening streets — Excessive valuation — Assessment — Setting aside roll—52 Vict. c. 79, s. 228 (Q.)*—Land forming part of lot No. 32 was benefited by the widening of St. Nicholas street in Montreal, on which it fronted. The expropriation commissioners, in error, supposed that the whole lot 32 (including the river front in rear owned by another person), was liable to be charged for the improvement, and placed it on the assessment roll providing for the expense of enlarging the street, basing the amount charged against it upon the valuation of the whole lot. Afterwards, becoming aware of their mistake, instead of preparing a new roll to equalize the assessments on the lands benefited, they imposed the whole sum thus as-

sessed upon the part of lot 32 fronting on St. Nicholas street, and, in order to make it bear such an assessment, gave it an excessive valuation. The Queen's Bench reversed the Superior Court, and held, that the expropriation commissioners had proceeded illegally in making the assessment, thereby causing grave injustice to the owner of the land in question, and annulled and set aside the assessment roll. — On appeal to the Supreme Court of Canada, after hearing counsel for the appellant, and without calling upon counsel for the respondent, the court dismissed the appeal, and affirmed the judgment appealed from (Q. R. 7 Q. B. 214.) *City of Montreal v. Ramsay*, xxix., 298.

129. *Assessment — Montreal harbour improvements — Widening streets — Construction of statute*—57 Vict. c. 57 (Que.)—52 Vict. c. 79, s. 139 (Que.)—A by-law passed in 1889 under the Quebec statute, 52 Vict. c. 79, s. 139, provided for a special loan in aid of the Montreal harbour improvements, and appropriated \$163,750 therefor for the construction of a tunnel with approaches, as shewn on a plan annexed, from Craig street, in a line with Beaudry street, to the tunnel, passing by the side of W.'s land, and subsequently a resolution was passed to open, alongside the open-cut approach, a high level roadway, to give communication from Craig street to Notre Dame street, on the surface of the ground. These works constituted, in fact, an extension of Beaudry street, from the line of Craig street, 77 feet in width, of which 42 feet constituted an open-cut approach to the tunnel and the remainder, the high level roadway, as shewn on the plans, this prolongation being 42 feet wider than Beaudry street. The resolution provided that a portion of the expense should be paid by the parties interested and benefited as for local improvements made by the "widening" of Beaudry street. Upon proceedings to quash the assessment, the Superior Court held that it was authorized and legalized as an "existing roll," by the Act 57 Vict. c. 57, s. 1 (Que.), and this judgment was affirmed by the Court of Review. *Held*, reversing the decision of both courts below, that notwithstanding the reference therein to "existing rolls," the application of the latter Act should be restricted to the cost of the "widening" only of the streets therein named in cases where there were, at the time of its enactment, existing rolls prepared by the commissioners fixing the limits for that purpose, and these words could not have the effect of extending the nature and character of such works so as to include works manifestly forming part of the harbour improvement scheme and chargeable against the special loan. *White v. City of Montreal*, xxix., 677.

130. *Expropriation—Assessment—Local improvement—Rating in proportion to benefit—Trivial objections first taken in appeal*—52 Vict. c. 79, ss. 209, 213, 243 (Que.)—54 Vict. c. 78, s. 2 (Que.)—55 & 56 Vict. c. 49, s. 22 (Que.)—57 Vict. c. 57 (Que.)—Where a statute for the widening of a street directs that part of the cost shall be paid by the owners of property bordering on the street, the apportionment of the tax should be made upon a consideration of the enhancement in value accruing to such properties respectively and the rate levied in proportion to the special benefit each parcel has derived from the local improvement.—Where an assessment roll covering over half a million dollars has been

duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trivial amount, he cannot be permitted afterwards to urge that objection before the courts upon an application to have the assessment roll set aside. Judgment appealed from (Q. R. 9 Q. B. 142) reversed; judgment of the Superior Court (Q. R. 15 S. C. 43) restored; Gwynne, J., dissenting. *City of Montreal v. Belanger*, xxx., 574.

131. *Montreal City charter — Local improvements — Expropriation for widening street—Action for indemnity*—52 Vict. c. 79 (Que.)—54 Vict. c. 78 (Que.)—59 Vict. c. 49 (Que.)—*Assessment of damages*.]—Where the City of Montreal, under the provisions of 52 Vict. c. 79, s. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected and, notwithstanding the subsequent amendment of the statute in December of that year, by 59 Vict. c. 49, s. 17, the city was bound, within a reasonable time, to apply to the court for the appointment of commissioners to fix the amount of the indemnity to be paid, to levy assessments therefor and to pay over the same to the owner, and, having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan v. City of Montreal* (31 Can. S. C. R. 1) distinguished.—The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *Grand Trunk Ry. Co. v. Coupal* (28 Can. S. C. R. 531) followed. *Fairman v. City of Montreal*, xxxi., 210.

132. *Local improvements — 35 Vict. c. 51, s. 192 (Que.) — Notice — Payment of invalid assessment—Error of law—Condictio indebiti —Proof—Frontage tax—Répétition de l'indu —Error of law — Onus probandi — Quashing roll.*]—Under 37 Vict. c. 51, s. 192, the council of the City of Montreal, by resolution, adopted a report recommending the construction of permanent sidewalks, with estimates indicating the quality and approximate cost of the work. The city, in 1877, caused the sidewalks to be made, and assessed the cost according to frontage upon the proprietors on each side of the streets, and a statement to be deposited with the treasurer for collection. B., an owner of real estate on these streets, did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving a notice to pay within fifteen days certain sums, in default whereof execution would issue, she paid, without protest, \$946.25; on the 29th October, 1878, she paid a further sum of \$438.90, and on the 14th November, 1878, without notice, paid \$700 on account of 1877 assessment. She afterwards sued the city, to recover the said sums as paid in error, believing the said assessment valid. *Held*, affirming the judgment of the court below, Henry and Gwynne, JJ., dissenting, that B. had failed, both in her allegations and proof, to make out a case for the recovery of the assessment paid, either as a voluntary payment in ignorance of its illegality or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might, in a proper proceeding, have entitled the ratepayers

to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of a void assessment illegally extorted. 2. That the city council, in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict. c. 51, s. 192. 3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal. *Bain v. City of Montreal*, viii., 252.

133. *By-law—Road repairs—Charge affecting future rights—Jurisdiction.*

See APPEAL, 43.

134. *Notice of assessment for local improvement—Variation of terms by by-law—Quashing by-law.*

See No. 43, ante.

135. *Highway — Private way — Widening streets—Special assessments—Res judicata.*

See RES JUDICATA, 13.

136. *By-law—Widening streets—Expropriation—Title to lands.*

See APPEAL, 75.

137. *Construction of sidewalk—Trespass—Action en bornage—Petitory action—Amendment of pleadings—Practice—Ceasing litigation—R. S. C. c. 195, s. 65.*

See ACTION, 171.

14. MONOPOLY.

138. *Construction of statute—By-law—Exclusive right—Statute confirming—Extension of privilege—45 Vict. c. 79, s. 5 (Que.)—C. S. C. c. 65.]—In 1881 the City of St. Hyacinthe, by by-law, granted to a company incorporated under a general Act (C. S. C. c. 65), the exclusive privilege for 25 years of manufacturing and selling gas in said city, and in 1882 said company obtained a special Act of incorporation (45 Vict. c. 79 Que.), s. 5 of which provided that "all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law or agreement of the said City of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present Act, including their right to break up, &c., the streets . . . and in addition it shall be lawful for the company, in substitution for gas or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise, and to convey the same by pipes or wires, with the same privilege, and subject to the same liabilities, as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this Act." *Held*, affirming the decision appealed from, that the above section did not give the company the exclusive right for 25 years to manufacture and sell electric light; that the right to make and sell electric light*

with the same privilege as was applicable to gas did not confer such monopoly, but gave a new privilege as to electricity entirely unconnected with the former purposes of the company; and that the word "privilege" there used could be referred to the right to break up streets and should not, therefore, be construed to mean the exclusive privilege claimed.—*Held*, also, that it was a private Act notwithstanding it contained a clause declaring it to be a public Act, and the city was not a party nor had it in any way assented to it; and that, in construing the Act, the court would treat it as a contract between the promoters and the legislature and apply the maxim *verba fortius accipiuntur contra proferentem* especially where exorbitant powers are conferred. *Compagnie pour l'Eclairage au Gaz de St. Hyacinthe v. Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe*, xxv., 168.

15. NEGLIGENCE.

139. *Highway — Level crossing — Negligence.]—It is not actionable negligence on the part of a municipal corporation to construct a sidewalk, crossing at a level of four inches above the grade of the street. (1 O. R. 26 reversed; Strong and Fournier, JJ., dissenting.) City of London v. Goldsmith*, xvi., 231.

140. *Duty to light streets — Negligence — Obstruction on sidewalk — Position of hydrant.]—L. walking on the sidewalk at night in the darkness fell over a hydrant and was injured. In an action for damages it was shewn that there was 7 or 8 feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on said street. The statutes do not oblige the council to light the streets but authorize contracts for that purpose. At that time the city was lighted by electricity by a contractor. The evidence shewed that it was not possible to prevent a single lamp or a batch of lamps going out at times. *Held*, reversing the judgment appealed from (24 N. S. Rep. 1), Strong and Taschereau, JJ., dissenting, that the city was not under any statutory duty to light the streets, that the relation between it and the contractor was not that of master and servant, nor of principal and agent, but that of employer and independent contractor, and the corporation was not liable for negligence in the performance of the service; that neither the position of the hydrant nor the flickering and going out of lights was, in itself, evidence of negligence in the corporation and that L. could have avoided the accident by the exercise of reasonable care. *City of Halifax v. Lordly*, xx., 505.*

141. *Highways—Control over streets — Repair of sidewalk—Negligence—Notice of action—Pleading—34 Vict. c. 11 (N. B.)—25 Vict. c. 16 (N. B.)]*—The Act 34 Vict. c. 11 (N. B.) gave a town council exclusive management and control over the streets, and repairing the same, and by s. 84 the provisions of 25 Vict. c. 16 and amending Acts, relating to highways, applied to said town and the powers, rights, and immunities vested in commissioners of roads declared to be vested in the council. No action could be brought against a commissioner of roads unless within three months after the act committed, and on one month's previous notice in writing.—

An action was brought by C. for injuries sustained by stepping on a rotten plank on a sidewalk and breaking his leg. More than a month before action plaintiff's solicitor wrote to the council notifying them of the injuries to plaintiff, and his intention to claim damages, and that the notice was given so that inquiry might be made and such damages paid. Except this no notice of action was given, but want of notice was not pleaded. The jury found that the plank was within the line of the street, and that the council had invited the public to use the sidewalk. *Held*, affirming the judgment appealed from (29 N. B. Rep. 311; 30 N. B. Rep. 492), Strong, J., dissenting, that the city was liable to C. for the injuries so sustained.—*Per* Ritchie, C.J., and Strong, J., that the letter was not a sufficient notice of action under the statute.—*Per* Ritchie, C.J. If notice of action was necessary, the want of it could not be relied on as a defence without being pleaded.—*Per* Taschereau, Gwynne and Patterson, J.J. Notice was not necessary; the liability did not depend on 34 Vict. c. 11, s. 84, but on the duty imposed to keep the streets in repair, and that the only privilege or immunity of commissioners of roads was exemption from the performance of statute labour.—*Per* Strong, J. One of the "immunities" vested in the council, was exemption from action without prior notice, and, no notice having been given, C. could not recover. *City of St. John v. Christic*, xxi., 1.

142. *Negligence—Repair of street — Accumulation of ice — Defective sidewalk.* — D. brought an action for damages against the corporation of the Town of C., for injuries sustained by falling on a sidewalk where ice had formed and been allowed to remain for a length of time. *Held*, affirming the judgment appealed from (21 Ont. App. R. 279), Gwynne, J., dissenting, that as the evidence at the trial of the action shewed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it, whereby the ice causing the accident was formed, the corporation was liable. *Held*, *per* Taschereau, J., allowing the ice to form and remain on the street was a breach of the statutory duty to keep the streets in repair, for which the corporation was liable. *Town of Cornwall v. Durochie*, xxiv., 301.

143. *Repair of streets — Liability for non-feasance.* — In the absence of a statute imposing liability for negligence or non-feasance a municipal corporation is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way or having been allowed to get out of repair. *Municipality of Pictou v. Geldert* ([1893] A. C. 524), and *The Town of Sydney v. Bourke* ([1895] A. C. 433) followed.—Judgment appealed from (33 N. B. Rep. 131) reversed. *City of Saint John v. Campbell*, xxvi., 1.

144. *Negligence—Snow and ice on sidewalks — By-law—Construction of statute—55 Vict. c. 42, s. 531—57 Vict. c. 50, s. 13—Finding of jury—Notice.* — A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks and, when pressed down by traffic, an incline more or less steep was

formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being injured asked damages against the city and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it and that the corporation has not been prejudiced in its defence. *Held*, affirming the decision appealed from (23 Ont. App. R. 406), Gwynne, J., dissenting, that there was sufficient evidence to justify the finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall v. Durochie* (24 Can. S. C. R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with notice of action. *City of Kingston v. Drennan*, xxvii., 46.

145. *Maintenance of streets—Accumulation of snow and ice—Gross negligence—R. S. O. [1897] c. 223, s. 606 (2).* — About 10.30 a.m., in January, a man walking along a street in Toronto slipped on the ice and fell receiving injuries from which he died. His widow sued for damages under the Ontario statute re-enacting Lord Campbell's Act. There had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. Early on the morning of the accident employees of the city had scattered sand on the crossing but the high wind prevailing at the time had probably blown it away. *Held*, affirming the judgment appealed from (27 Ont. App. R. 410), that the facts were not sufficient to shew that the injury to the deceased was caused by "gross negligence" of the corporation within the meaning of R. S. O. [1897] c. 223, s. 606 (2). *Ince v. City of Toronto*, xxxi., 323.

146. *Obstruction on highway — Repair of municipal streets — Negligence.* — The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 291) which held that permitting a mound of earth about eight inches in height to remain at a filling over a trench dug to lay a pipe across a public street was not a serious or unusual obstruction due to negligence on the part of the municipality and holding the plaintiff guilty of want of proper care in approaching during the darkness the dangerous place which he had previously seen by daylight in the same condition. *Messenger v. Town of Bridgetown*, xxxi., 379.

147. *Defective sidewalk — Evidence—Contributory negligence — Nonsuit—New trial—Lawful use of street.*

See NEGLIGENCE, 39.

148. *Exercise of powers — Injury to property by excavations — Negligence in manner of constructing streets.*

See No. 162, *infra*.

149. *Excavation in street—Action for personal injuries — Lord Campbell's Act — Evidence.*

See EVIDENCE, 19.

150. *Action of warranty—Negligence—Obstruction of street—Assessment of damages—Questions of fact.*

See APPEAL, 232.

151. *Extra cost of drainage works—Misapplication of funds — Negligence — Re-assessment.*

See No. 92, ante.

152. *Repairs to highway—Statute labour—Obstruction left upon roadway.*

See No. 64, ante.

16. NOTICE OF ACTION.

153. *Negligence—Repair of sidewalks — Pleading—Notice of action.*

See No. 141, ante.

154. *Discretion of trial court—Dispensing with notice of action—Repair of streets—Ice and snow on sidewalk.*

See No. 144, ante.

17. NUISANCE.

155. *Public market — Nuisance—Licensing traders and hucksters—Obstructing streets and sidewalks—Loss of rent—Damages.] — The Court of Queen's Bench, by the judgment appealed from, reversing the Superior Court, held that the City of Montreal was not responsible for injury to the owner of property in the vicinity of a public market by reason of the street being encumbered on market days, by licensed traders, hucksters, &c., provided reasonable efforts were made by the civic officials to prevent crowds from becoming stationary or preventing free access and egress to or from the premises.—On appeal to the Supreme Court of Canada the judgment of the Court of Queen's Bench (Q. R. 7 Q. B. 1) was affirmed. Davidson v. City of Montreal, xxviii., 421.*

156. *Use of street by railway—Nuisance—Corporate liability.*

See RAILWAYS, 71.

157. *Encroachment on street — Obstruction of show-window—Nuisance—Negligence of officials—Misfeasance—Statutable duty.*

See No. 171, infra.

157a. *Expropriation of lands—Damages for use of rifle range—Mode of assessment—Consulting valuation rolls — Present uses — Prospective value—Evidence.*

See No. 10a, ante.

18. PUBLIC HEALTH.

158. *Appointment of board of health—R. S. N. S. (5 ser.) c. 29—37 Vict. c. 6, s. 1 (N.S.)—42 Vict. c. 1, s. 67 (N.S.)—Contract—Reasonable expenses—Dismissal—Form of remedy*

—*Mandamus.*]—Section 67 of the Act which established municipal corporations in Nova Scotia (42 Vict. c. 1) giving them "the appointment of health officers . . . and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S. (4 ser.), providing for the appointment of boards of health by the Lieutenant-Governor-in-Council. (Ritchie, C.J., doubted the authority of the Lieutenant-Governor to make appointments in incorporated counties.)—A board of health employed M., a physician, to attend small-pox patients "for the season," at a fixed rate per day. On complaint against M., he was notified that the board had employed a consulting physician, but refusing to consult with the new appointee he was dismissed. His action set forth his engagement and dismissal and claimed payment to the date at which the last small-pox patient in the district was discharged and special damages for loss of reputation. The statute (R. S. N. S. (4 ser.) c. 29, s. 12) allows boards of health to incur reasonable expenses defined by 37 Vict. [N.S.] c. 6, s. 1, to be services performed and medicine supplied in carrying out its provisions, and makes such expenses a charge to be assessed and levied as ordinary county rates. *Held, per Fournier, Gwynne and Taschereau, J.J.*, affirming the judgment appealed from (21 N. S. Rep. 492), that the contract with M. was to pay him the rate per day so long as small-pox should prevail in the district during the season; that his dismissal was wrongful and the fulfilment of the contract could be enforced against the municipality by action.—*Per Ritchie, C.J.*, and Strong, J. There was sufficient ground for the dismissal of M. Assuming it, however, to have been unjustifiable, M.'s only remedy would have been by mandamus to compel the municipality to make an assessment to cover the expenses incurred. But the claim for damages for wrongful dismissal did not come within the "reasonable expenses," which may be incurred by a board of health and made a charge on the county, and the municipality was, therefore, not liable.—*Per Patterson, J.* That the proper remedy for the recovery of the expenses mentioned in said s. 12 is by action and not by mandamus to compel an assessment, but a claim for damages for wrongful dismissal does not come within the section and is not made a county charge. *County of Cape Breton v. McKay*, xviii., 639.

19. PUBLIC WAYS.

159. *Roads — Homologated procès verbal—Mun. Code (Que.), Arts. 100, 451, 705—Proceeding to annul.]—Where a procès verbal of a municipal council directing improvements to be made on a portion of road situated within the municipality has been duly homologated, it cannot subsequently be set aside by incidental procedure, but, like a by-law, it can only be attacked directly as indicated in the Municipal Code, arts. 100, 461. *Parent v. St. Sauveur* (2 Q. L. R. 258) approved. Judgment appealed from (M. L. R. 1 Q. B. 200; 4 Dor. Q. B. 192 affirmed.) *Reburn v. Ste. Anne du Bout de l'Isle*, xv., 92.*

NOTE.—This case was overruled in *Tousignant v. County of Nicolet*, xxxii., 353. See No. 174, infra.

160. *Road allowance — Obligation to open—Substituted road—Jurisdiction of Ontario*

courts—C. S. U. C. c. 54—R. S. O., 1887, c. 184, ss. 524, 531.]—H. owned and resided on a lot in front of which, under the provisions of C. S. U. C. c. 54, an allowance was granted by the township for a road that was never opened owing to difficulties caused by the formation of the land, and a by-law was passed authorizing a new road in substitution thereof. Some years after H. brought suit to compel the township to open the original road or, in the alternative, to provide him with access to his lot, and also to keep said road in repair and pay damages for injuries caused by the road not having been opened. *Held*, affirming the judgment appealed from (15 Ont. App. R. 687), that the provisions of the Act, C. S. U. C. c. 54, requiring a township to maintain and keep in repair roads, &c., and prohibiting the closing or alteration of roads applied only to roads which had been formally opened and used and not to those which a township, in its discretion, has considered it inadvisable to open. *Held*, also, that the courts of Ontario have no jurisdiction to compel a municipality, at the suit of a private individual, to open an original road allowance and make it fit for public travel. *Hislop v. Township of McGillivray*, xvii., 479.

161. *Highway — Control of streets—Grade*—34 Vict. c. 11 (N. B.)—45 Vict. c. 61 (N. B.)—The Act of incorporation of the Town of Portland, N. B. (34 Vict. c. 11) which remained in force when the town was incorporated as a city by 45 Vict. c. 61, empowered the corporation to open, lay out, regulate, repair, amend and clean the roads and streets, and this included the necessary authority to alter the level of the street, if the public convenience required it. *Williams v. City of Portland*, xix., 159.

162. *Negligence — Excavations — Highway — Lowering grade of street — Injury to lands — Statutory damages*—51 Vict. c. 42, s. 190 (B. C.)—The B. C. Act, 51 Vict. c. 42, by s. 190, empowered the City of Westminster to order by by-law the opening or extending of streets, and for such purposes to acquire and use lands within the city limits, either by private contract or under formalities stated in sub-sections 3, 4, 13 & 15 of that section, providing for the nomination of commissioners to fix prices for such land, and that deposit by the council of the price fixed by the commissioners should vest the title in the council. By sub-section 17, sub-sections 3 and 4 apply to damages to real or personal estate by reason of alteration in the line or level of any street and for compensation therefor, without further formality. A by-law authorized money to be raised for improving streets, but none was passed expressly ordering the improvements. The grade of a street named in the by-law was lowered causing the approach from an adjacent lot to become very difficult, and no retaining wall being built, the soil caved in and weakened the supports of buildings on the lot. *Held*, affirming the judgment appealed from, Ritchie, C.J., and Taschereau, J., dissenting, that the owner could maintain an action for damages sustained by the lowering of the grade and was not obliged to seek redress under the statute; that s.s. 17, dispensing with formalities, only applied to cases of land injuriously affected by access being interfered with, and where land was taken or used for purposes of work on the streets, the formalities of s. ss. 3 and 4 must

be observed; that the street having been excavated to a depth which caused a subsidence of adjoining land the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the statute; not having so acquired it and having neglected to take steps to prevent the subsidence of the adjacent land, they were liable for the damage thereby caused. *Held*, further that, however legal the making of the excavation may have been if skillfully executed, the neglect to take such precautions was in itself such negligence in the manner of executing it as to entitle the owner of the adjacent land to recover damages for the injury sustained. *Held, per Patterson, J.*, that in the absence of the statutory preliminaries a municipality has no greater right than any other owner of adjacent land to disturb the soil of a private person. *City of New Westminster v. Brighthouse*, xx., 520.

163. *Nuisance — Level of the streets — Raising street — Erecting fence — Access out off — Nonsuit — Charter of city — Powers of council.*—The City of Saint John had power to alter, amend and repair streets laid out, or to be laid out. The charter is confirmed by 26 Geo. III. c. 46, and the right to alter the levels of streets recognized by 9 Geo. IV. c. 4. Church street, not originally designated on the plan of the city, was made a public street in 1811, on petition of owners of land through which it passes, who gave the land for the street. In 1874 the corporation raised Church street below Canterbury street, filling it in to within 4 or 5 feet of plaintiff's house and shop. On the embankment so made in front of plaintiff's house and shop the corporation erected a fence, which deprived plaintiff of access from the street to his house and shop, but he reached them by a narrow passage left next the house and shop running easterly towards Canterbury street and westerly toward Prince William street. In his action against the city for damage by reason of so filling in the street and erecting the fence, plaintiff was nonsuited, on the ground that the charter and Acts gave defendant full authority to raise the level of the street, and that in it was vested the sole discretion as to the time and manner of doing it, and that having exercised a *bona fide* discretion in the matter and raised it, the damage sustained by the plaintiff was not the subject of an action; that as to the erection of the fence on the wall it was necessary for the protection of the public, and that it was the duty of defendant to put it there for that purpose. This nonsuit was set aside by the Supreme Court (N. B.) holding that the corporation had no right to fill in the street in the manner in which they did, and erect the fence on the embankment in front of plaintiff's house and shop, and that the manner in which the corporation had filled in the street and erected the fence was of itself evidence that it acted carelessly and without reasonable skill and care and that the consideration of this should not have been withdrawn from the jury. (2 Pugs. & Bur. 636.) *Held*, that the nonsuit should not have been set aside. Fournier and Henry, JJ., dissenting.—*Per Gwynne, J.*, Taschereau, J., concurring. That defendant had, under the Acts which confirm and amend the charter, complete legislative power to raise or lower the level of streets to any extent that the irregularities of the ground may seem to the corporation and its council, as representing the public, to require for the benefit and con-

venience of the public, cannot be doubted; the councils of these municipal corporations are themselves a deliberative, law-making assembly, chosen by the people to do whatever, within their jurisdiction, may in their judgment be necessary for the public benefit, and the powers conferred must therefore have a liberal construction in view of the public rather than of private interests. The power of altering, amending, repairing and improving the streets, which is a power vested in the corporation for the benefit of the public, represented by the council, is restricted by no condition save only by the implied condition that what shall be done in the name of the public, and ostensibly for their benefit and convenience, shall not be done in such a manner as in reality to constitute a public nuisance.—Plaintiff did not rest his right to maintain this action upon the ground that the act complained of was a public nuisance from which he sustained peculiar injury, and as he could not succeed without establishing the act complained of to be such public nuisance, the nonsuit was right and should be affirmed. *Mayor of St. John v. Pattison*, Cass. Dig. (2 ed.) 173.

164. *Ont. Mun. Act, ss. 534, 535 (2), 538—Intermunicipal bridges—River boundaries—Deviation of boundary road—Repairs to bridges—Liability of county—42 Vict. c. 47 (Ont.)—Territorial Act, R. S. O. (1887)—Municipality fronting on lake.*—The action was to enforce contributions to the maintenance and repair of bridges (15 O. R. 446, and 15 Ont. App. R. 617). On appeal to the Supreme Court of Canada, *Held*, affirming the Court of Appeal for Ontario.—*Per* Strong, J. The appeal must be dismissed for the reasons stated by Mr. Justice Osler in the Court of Appeal.—*Per* Patterson and Taschereau, JJ. That rivers over which bridges are built and which do not cross any road between counties do not come within the provisions of s. 535 of the Ont. Mun. Act, because as no road exists in law between the counties at the place in question there is no such deviation of a road. The bridges if made where the rivers called the Big Bob and the Little Bob cross the original allowance, could not be said, since March, 1880, to be over rivers crossing the boundary line between the townships. A fortiori, the bridge on the deflected road cannot be held to be over a river crossing the boundary line.—*Per* Gwynne, J. The bridge in question is one across the stream flowing from Sturgeon Lake into Pigeon Lake at a point distant over $1\frac{1}{2}$ miles west of Pigeon Lake and in the Village of Bobcaygeon, situate within the Township of Verulam, so that it is apparent: 1. That this is not a bridge over a river forming or crossing any boundary line between two municipalities, so as to come within s. 535; and 2. As there is no river which in point of fact does cross the boundary line between the two townships at any place, no question of deviation within the meaning of the section does or can arise. The bridge is one across a river wholly within the limits of the village of Bobcaygeon, and which is said to exceed 100 feet in width. The bridge, therefore, seems to come within the provisions of s. 534 of the Act. It certainly does not come within s. 535. *The County of Victoria v. The County of Peterborough*, Cass. Dig. (2 ed.) 558.

165. *Ownership of roads and streets—Rights of private property owners—Ownership ad medium filum viæ—R. S. N. S. (5 ser.) c.*

45—50 *Vict. c. 23 (N. S.)*—That the ship of lands adjoining a highway *exte medium filum viæ* is a presumption of law which may be rebutted, but the presumption will arise though the lands are described as a conveyance as bounded by or on the way. Gwynne, J., *contra*.—In construing the Act of Parliament the title may be referred in order to ascertain the intention of the legislature.—The Act, 50 *Vict. c. 23 (N. S.)* vesting the title to highways and the over which the same pass in the Crown as a public highway, does not apply to the City of Halifax.—The charter of the N. S. Telephone Co. authorizing the construction of lines of telephone along the shore of, and across and under, any public highway or street of the City of Halifax, provides in working such lines the company shall not cut down nor mutilate any trees. *He* reversing the judgment appealed from (10 S. Rep. 509) Taschereau and Gwynne dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring mental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in evidence to rebut the presumption of *ad medium*, or to shew that the land had been laid out under a statute of the province or dedicated to the public before the passing of any expropriation Act. *O'Connell v. N. S. Telephone Co.*, xxii., 276.

166. *Encroachment on street—Building "upon" or "close to" street line—City of Halifax, ss. 454, 455—Petition to remove obstruction—Judgment—Variance.* s. 54, charter of Halifax, any person intending to erect a building upon or close to the line of the street must first cause such building to be located by the city engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a judge thereof, may, on petition of the recorder, cause it to be removed. A petition was presented asking for the removal of a porch built by R. which, the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1885; while it was the portion of the street outside of it since its removal, the portion upon to which it had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved, but the judge held that it was close to the line so used by the public and ordered its removal. The Supreme Court (N. S.) reversed his decision, holding that the evidence would have justified the judge in holding that the porch was upon the line, but having held that it was close to the line while the petition only called for its removal as upon it, his order was proper reversed. *City of Halifax v. Reeves*, 340.

167. *Private way—Right of passage—Government and municipal aid—R. S. N. S. arts. 1716, 1717 and 1718—Arts. 407 and 408 C. C.*—The proprietor of land in the County of Clarendon by *action négatoire* claimed that it was purged from a servitude of right of passage claimed by his neighbour, the defendant, the road across the land was partly built by the aid of government and municipal aid, but no indemnity was ever paid plaintiff the privilege of passing across his land had

granted by plaintiff to certain parties other than the defendant by a special deed. *Held*, reversing the judgment appealed from, that the mere granting and spending of money by the government and the municipality did not make the private way a colonization road within the meaning of art. 1718 R. S. Q. *Chamberland v. Fortier*, xxiii., 371.

168. *Construction of statute — Retroactive effect — Turnpike road company — Erection of toll gates — Consent of corporation.*—A turnpike road company had been in existence for a number of years, erected toll-gates and collected tolls, when an Act, 52 Vict. c. 43 (a) forbid any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 provided "this Act shall have no retroactive effect," but was repealed by 54 Vict. c. 36 (a). After 52 Vict. c. 43 was passed, the company shifted one of its toll gates to a point beyond the limits of the village, which were subsequently extended so as to bring the gate within them. The corporation took proceedings against the company, contending that the repeal of s. 2 made 52 Vict. c. 43 retroactive, and that the shifting of the toll gate without the consent of the corporation was a violation of said Act. *Held*, affirming the decision appealed from, that as a statute is never retroactive unless made so in express terms, s. 2 had no effect, and its repeal could not make the statute retroactive; that the shifting of the toll gate was not a violation of the Act, which only applied to the erection of new gates, and that the extension of the limits of the village could not effect pre-existing rights of the company. *Village of St. Joachim de la Pointe Claire v. Pointe Claire Turnpike Road Co.*, xxiv., 486.

169. *Public highway — Private way — Registered plan — Dedications — User — Construction of statute — Retrospective statute.*—46 Vict. s. 18 (O.)—*Estoppel.*—The right vested in a municipal corporation by 46 Vict. c. 18 (O.), to convert into a public highway a road laid out by a private person on his property can only be exercised in respect to private roads to the use of which the owners of property abutting thereon were entitled.—Judgment appealed from (19 Ont. App. R. 641) reversed. *Gooderham v. City of Toronto*, xxv., 246.

170. *Powers of Legislature — License — Monopoly — Navigable streams — Intermunicipal ferry — Tolls — Disturbance of licensee.*—The authority of the Legislative Assembly, N. W. T., by R. S. C. c. 50, and orders-in-council thereunder to legislate as to "municipal institutions" and "matters of a local and private nature," (and perhaps as to license for revenue) within the territories, includes the right to legislate as to ferries.—The Town of Edmonton, by its charter and by "The Ferries Ordinance" (Rev. Ord. N. W. Ter. c. 28), can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor-in-Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary. *Dinner v. Humberstone*, xxvi., 252.

171. *Highway — Encroachment upon street — Negligence — Nuisance — Obstruction of*

show-window — Municipal officers — Misfeasance during prior ownership — Non-feasance—Statutable duty.—An action does not lie against a municipal corporation for damages in respect of mere non-feasance, unless there has been a breach of some duty imposed by law upon the corporation. *Municipality of Pictou v. Geldert* (1893) A. C. 524 and *Municipal Council of Sydney v. Bourke* (1895) A. C. 433, followed.—An action does not lie against a municipal corporation by the proprietor of lands for damages in respect thereof, through the mistake or misfeasance of the corporation or its officers, alleged to have occurred prior to the acquisition of his title thereto.—A municipal corporation is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such. *City of Montreal v. Mulcair*, xxviii., 458.

172. *Old trails in Rupert's Land — Substituted roadway — Necessary way — R. S. C. c. 50, s. 108—Reservation in Crown grant — Dedication — User — Estoppel — Assessment of lands claimed as highway — Evidence.*—The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government survey thereof does not give rise to a presumption that the lands over which they passed were dedicated as public highways.—The lands over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N. W. T., had been enclosed by the owner, divided into town lots and was for several years assessed and taxed as private property by the municipality, and a new street substituted therefor as shewn upon registered plans of sub-division and laid out upon the ground had been adopted as a boundary in the descriptions of lands abutting thereon in the grants by letters patent from the Crown. *Held*, reversing the decision appealed from, that, under the circumstances, there could be no presumption of dedication of the lands over which the old trail passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government survey of the Edmonton Settlement. *Heiminck v. Town of Edmonton*, xxviii., 501.

172a. *Old trails in Rupert's Land—Crown grant—Squatter's plan of sub-division—Substitution of new way—Dedication—Highway—Adopting new street as a boundary.*—A squatter in possession of public lands near the old Hudson Bay Trading Post at Edmonton, who afterwards became patentee of the greater part of the lands he occupied, had made a plan of sub-division thereof into town lots which shewed a new roadway or street laid down in the place of the old travelled trail across said lands leading to the trading post, and subsequently, the Crown, in making grants, described several parcels of the lands in the patents as being bounded and abutting upon the said new street, or roadway, so laid down on the plan. *Held*, affirming the judgment appealed from (1 N. W. T. Rep., pt. 4, p. 39), that the space so shewn upon the plan, as laid out for a street, had been adopted and dedicated by the Crown as and for a public street and highway, in substitution for the old travelled trail or roadway across said lands. *Brown et al. v. Town of Edmonton*, xxiii., 308; xxviii., 510.

173. *Public works — Negligence — Obstruction on highway.*—Action for damages for injuries caused through alleged negligence of the corporation in permitting a mound of earth about eight inches in height to remain at the filling over a trench dug to lay a pipe across a public street. In passing over the obstruction during the night plaintiff's horse stumbled and fell throwing the plaintiff from the vehicle whereby the injuries were sustained. The Supreme Court affirmed the judgment appealed from (83 N. S. Rep. 291), which held that there had been no negligence on the part of defendant, that the obstruction was not serious or unusual, and that the accident occurred through want of proper care by plaintiff in approaching, in the darkness, the dangerous place which he had previously seen in the same condition by daylight. *Messenger v. Town of Bridgetown*, xxxi., 379.

174. *Assessment and taxes — Appeal — Jurisdiction — Annulment of procès verbal—Matter in controversy.*—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a *procès verbal* establishing a public highway notwithstanding that the effect of the *procès verbal* in question might be to involve an expenditure of over \$2,000 for which the appellant's lands would be liable for assessment by the municipal corporation. *Dubois v. Village of Ste. Rose* (21 Can. S. C. R. 65); *The City of Sherbrooke v. McManaway* (18 Can. S. C. R. 594); *The County of Vercheres v. The Village of Varennes* (19 Can. S. C. R. 365) and *The Bell Telephone Company v. The City of Quebec* (20 Can. S. C. R. 230) followed; *Webster v. The City of Sherbrooke* (24 Can. S. C. R. 52, 268) and *McKay v. The Township of Hinchinbrooke* (24 Can. S. C. R. 55) referred to; *Reburn v. The Parish of Ste. Anne du Bout de l'Isle* (15 Can. S. C. R. 92) overruled. *Toussignant v. County of Nicolet*, xxxii., 353.

175. *Railway charter — Highway crossing — Control of streets—Compensation to municipality — Terminus "at or near" point named.*—Authority to a company to construct a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road.—A charter authorized construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the Counties of Vaudreuil, Prescott and Russell. *Held*, that if it were necessary, the railway could pass through Carleton County, in which the City of Ottawa is situated, though it was not named. *Held*, also, that in this Act the words "at or near the City of Ottawa" meant in or near the said city.—Judgment appealed from (4 Ont. L. R. 56; 2 Ont. L. R. 336) affirmed. *City of Ottawa v. Canada Atlantic Ry. Co.*; *City of Ottawa v. Montreal & Ottawa Ry. Co.*, xxxiii., 376.

176. *Lawful use of street — Defective sidewalk.*

See NEGLIGENCE, 39.

177. *Corporation ferry — Coupon ticket — Passenger by other lines — Carriers — Injury to passenger — Mooring of ferry boat—Damages.*

See NEGLIGENCE, 40.

178. *Construction of sidewalk — Level crossings — Negligence.*

See No. 139, ante.

179. *Control of streets — Negligence — Repair of sidewalks — Notice of action.*

See No. 141, ante.

180. *Public bridge — Want of repair — Damages — Road committee.*

See NEGLIGENCE, 189.

181. *Defective bridge — Repair of streets—Damages — Evidence—New trial.*

See NEGLIGENCE, 188.

182. *Road allowances — Substituted way—Reversion of original roadway — 50 Geo. III. c. 1—4 Geo. IV., c. 10—Municipal Acts—36 Vict. c. 48 (Ont.)—Public uses.*

See HIGHWAY, 33.

183. *County and municipal bridges—Width of streams—Freshets.*

See No. 109, ante.

184. *Vancouver City charter — Jus publicum — Extension of street to deep water — Crossing Canadian Pacific Railway — Use of foreshore.*

See No. 110, ante.

185. *Maintenance of streets—Action for personal injuries — Third party added as defendant—Admissibility of evidence.*

See EVIDENCE, 19.

186. *Defective sidewalk — Accumulation of ice — Repair of streets.*

See No. 142, ante.

187. *Obstruction of street — Accumulation of snow—Street railway.*

See NEGLIGENCE, 235⁴⁻⁵.

188. *Repair of streets — Private way — Level of sidewalk.*

See No. 143, ante.

189. *Obstruction of streets — Public market—Licensing traders and hucksters.*

See No. 155, ante.

190. *Care of streets — Snow and ice on sidewalks — Negligence—Notice.*

See No. 144, ante.

191. *Widening streets — Private way — Local improvement — Special assessment.*

See RES JUDICATA, 13.

192. *Licensing traders and hawkers—Public market — Obstruction of streets and sidewalks.*

See No. 155, ante.

193. *Public street — Dedication — Obstruction — Right of owner or occupier to compensation.*

See DEDICATION.

194. *Performance of statute labour — Repairing roads—Negligence.*

See No. 64, ante.

195. *Telephone polls on street — Cause of accident — Obstruction of highway.*

See NEGLIGENCE, 192.

196. *Maintenance of streets—Snow and ice accumulating—Gross negligence.*

See No. 145, ante.

197. *Repair of streets — Obstruction on highway—Negligence.*

See No. 146, ante.

198. *Tramway — Operation of railway—Use of streets — Municipal regulations — Crossings — Powers — By-law or resolution — Construction of R. S. N. S. (1900) c. 71, ss. 263, 264.*

See No. 51, ante.

20. WATERWORKS.

199. *By-law — Water supply — Rates to consumers — Discrimination.*—Under the authority given to municipal corporations to fix the rate or rent to be paid by each owner or occupant of a building, &c., supplied by the corporation with water, the rates imposed must be uniform. *Patterson, J. dissenting.*—A by-law excepting Government institutions from the benefit of a discount on rates paid within a certain time is invalid as regards such exception. *Patterson, J., dissenting.*—Judgment appealed from (18 Ont. App. R. 622) reversed. *Attorney-General of Canada v. City of Toronto*, xxiii., 514.

200. *Waterworks — Extension of works — Repairs — By-law — Resolution — Agreement in writing — Injunction — Highways and streets — R. S. Q. art. 4485—Art. 1033a C. C. P.]—By resolution of the Town of Chicoutimi, 9th October, 1890, based upon application previously made, L. obtained permission to construct waterworks in the town and lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system and had it in operation within the time prescribed but, the system proving insufficient, a company was formed in 1895, under R. S. Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes without receiving any further authority from the council.—*Held*, reversing the judgment appealed from (Q. R. 5 (O. B. 542), Gwynne, J. dissenting, that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town. *Held*, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of art. 1033a C. C. P. and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new*

works. *Ville de Chicoutimi v. Légaré*, xxvii., 329.

201. *Waterworks—Rescission of contract—Notice—Mise en demeure—Long user—Waiver—Art. 1067 C. C.]—A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract. *Held*, that, after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks and it would, under the circumstances, be inequitable to rescind the contract. *Held*, further, that a notice specifying the particular defects to be remedied was a condition precedent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. *Town of Richmond v. Lafontaine*, xxx., 155.*

202. *Principal and agent—Action on waterworks contract—Parties—Water commissioners—Statutory body.*

See No. 65, ante.

203. *Guarantee of waterworks debentures—By-law — Vote of ratepayers — Approval of Lieutenant-Governor.*

See No. 50, ante.

NAVIGABLE WATERS.

1. *Interference — Water lots—Easement—Trespass—Public waters—Prescription.]—W. was lessee of water lots held under Crown patent, granted in 1840, the lease being given by authority of the patent, and public statutes respecting the construction of the Esplanade in Toronto, which formed the boundary of said water lots. *Held*, affirming the judgment appealed from (12 Ont. App. R. 327), that such lease gave to W. a right to build as he chose on the lots, subject to any regulations which the city had power to impose, and in doing so to interfere with the right of the public to navigate the water.—*Held*, also, that the waters being navigable parts of the Bay of Toronto no private easement by prescription could be acquired therein while they remained open for navigation. *London and Canadian Loan and Agency Co. v. Warin*, xiv., 232.*

2. *Constitutional law — Title to abveus—Dedication of public lands — Presumption—User — Obstruction to navigation — Public nuisance—Balance of convenience.]—The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion. *Dixon v. Snettinger* (23 U. C. C. P. 235) discussed.—By 23 Vict. c. 2, s. 35 (Can.), power was given to the Crown to dispose of and grant water lots in*

rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.—The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.—If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes.—It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree. Judgment appealed from (5 Ex. C. R. 30) affirmed. *The Queen v. Moss*, xxvi., 322.

3. *Constitutional law—Municipal corporations—Powers of Legislature—License—Monopoly—Navigable streams—By-laws and resolutions—Inter-municipal ferry—Tolls—Disturbance of licensee—North-West Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act (1867) s. 92, s. ss. 8, 10 and 15—Rev. Ord. N. W. Ter. (1888) c. 28—Ord. N. W. T. No. 7 of 1891-92, s. 4—Companies, club associations and partnerships.*

See CONSTITUTIONAL LAW, 27.

4. *Canadian waters—Property in alveus—Public harbours—Erections in navigable waters—Interference with navigation—Rights of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Magna Charta—Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. arts. 1375 to 1378.*

See CONSTITUTIONAL LAW, 5.

5. *Legislative jurisdiction—Municipal boundary—43 & 44 Vict. c. 62 (Que.)*

See ASSESSMENT AND TAXES, 41.

AND see NAVIGATION—RIVERS AND STREAMS—WATERCOURSES.

NAVIGATION.

1. *Title to land—Unauthorized grant—Halifax Harbour—Obstruction—Low water mark—Nuisance—Trespass.*—Action of tort by E. against W. for having pulled up piles in the Harbour of Halifax below low water mark, driven in to be used as supports to an extension of E.'s wharf, built on land obtained by a Crown grant to E. in August, 1861. W. pleaded that "he was possessed of a wharf and premises in said harbour, in virtue of which possession he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax Harbour, to and from said wharf, with steamers, &c., and because piles, placed by plaintiffs in said waters, interfered with his rights, he removed the same." There was evidence that the erections E. was making for the extension of his wharf obstructed access by vessels to W.'s wharf. A verdict against W. was upheld by the full court. *Held*, reversing the judgment appealed

from (4 R. & G. 276), that, as the Crown could not, without legislative sanction, grant to E. the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as W. had shewn special injury, he was justified in removing the piles, which was the trespass complained of. *Wood v. Esson*, ix., 239.

2. *Negligence—Collision—Action—Towage contract—Joinder of defendants—Company—Liability limited—25 & 26 Vict. (Imp.) c. 63—Merchant Shipping Amendment Act, 1862—Navigation of Canadian waters, 31 Vict. c. 58, s. 12—Motion for judgment—Findings of jury—Weight of evidence—Practice.*—The towing company entered into a contract with S., to tow the ship "Thrasher" from Royal Roads to Nanaimo, and when loaded to tow her back to sea. At Nanaimo, under arrangements between the T. Co. and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat "Etta White" and the T. Co.'s tug "Beaver" proceeded to tow the "Thrasher" out of Nanaimo on her way to sea, the "Etta White" being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions and there was, on the other side of the course they were steering, upwards of ten miles of open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were strangers to the coast. In an action for damages for negligently towing the ship, and so causing her destruction; *Held*, 1. That as the tugs had not observed those proper and reasonable precautions in adopting and keeping the course to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so the owners of the tugs were jointly and severally liable. Taschereau, J., dissented as to the liability of the M. S. Co., holding that the T. Co. were alone liable. 2. That under the B.C. Judicature Act the action was maintainable in its present form by joining both companies as defendants. 3. That as there was nothing in the M. S. Co.'s charter or Act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for purposes such as it was used for in the present case. 4. That as the tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 25 & 26 Vict. (Imp.) c. 63. 5. That the limited liability under s. 12 of 31 Vict. c. 58 (D.) does not apply to cases other than those of collision. *Sewell v. B. C. Towing Co. and The Moodyville Sawmill Co.*, ix., 527.

[NOTE. — Leave to appeal to the Privy Council was obtained, but the case was settled before hearing.]

3. *Collision—Appreciation of evidence—Findings of fact—Appeal—Proper navigation—Negligent lookout—Anchor light.*—In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the

"Reliance," the decision mainly depended on whether or not the lights of the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the "Reliance." *Held*, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not, therefore, be disturbed on appeal. *Santanderino v. Vanvert* (23 Can. S. C. R. 145), and *The Village of Granby v. Ménard* (31 Can. S. C. R. 14) followed. *Schooner "Reliance" v. Conwell*, xxxi., 653.

4. Admiralty law — Navigation — Narrow channels—"White law" R. 24—Right of way —Meeting ships—Collision.]—Rule 24 of the "White law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take." *Held*, that this rule has no reference to the general course of vessels navigating the waters mentioned but applies only to meeting vessels. Therefore, a steamer ascending the St. Clair River with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.—The "Shenandoah" with a tow was ascending the St. Clair River in a fog and hugging the United States shore. The "Carmona" was coming down the river and they sighted each other when a few hundred yards apart. They simultaneously gave the port and starboard signals respectively and the port signal was repeated by the "Carmona." The "Shenandoah" then gave the port signal and steered accordingly. The "Carmona," thinking there was not room to pass between the other vessel and one lying close by at the elevator dock, reversed her engines. She passed the "Shenandoah," but on going ahead again collided with the vessel in tow. *Held*, reversing the judgment of the local judge (8 Ex. C. R. 1), that the "Shenandoah" was not in fault, and that as the local judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels was committed while in the agonies of collision, his judgment as to her should be affirmed. *Davidson v. Georgian Bay Navigation Co.; The Shenandoah and the Crete*, xxxiii., 1.

5. Public work — Navigation of River St. Lawrence — Negligence—Repair of channel—Parliamentary appropriation — Discretion as to expenditure.]—Action for damages to SS. "Arabia" sustained by striking an obstruction in the River St. Lawrence ship channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150), held that the channel was not a public work after the work of deepening was completed, and, even if it was, no negligence had been proved to make the Crown liable under s. 16 (c) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by Parliament for that pur-

pose was not obliged to expend the appropriation as such matters were within the discretion of the Governor-in-Council and Minister who were responsible only to Parliament in respect thereof. The Supreme Court affirmed the judgment appealed from. *Hamburg American Packet Co. v. The King*, xxxiii., 252.

[Leave to appeal to Privy Council granted July, 1903.]

6. Boom company—Obstruction of tidal and navigable waters — 45 Vict. c. 100 (N.B.)—Legislative jurisdiction.

See CONSTITUTIONAL LAW, 66.

7. Legislative jurisdiction — 39 Vict. c. 52 (Que.)—Taxation of ferry boats—Municipal by-law—Double tax—Montreal harbour—Jurisdiction of commissioners.

See CONSTITUTIONAL LAW, 53.

8. Narrow channel—Negligence—Agony of collision.

See SHIPPING, 3.

9. Throwing sawdust in river—Obstruction—Assessment of damages—Joint tort-feasors.

See DAMAGES, 61.

10. Narrow channel—Negligence—Lights—Collision.

See SHIPPING, 4.

11. Constitutional law—Navigable waters—Title to alveus—Crown—Dedication of public lands — Presumption of dedication — User—Obstruction to navigation—Public nuisance—Balance of convenience.

See CONSTITUTIONAL LAW, 81.

12. Canadian waters—Property in alveus—Public harbours — Erections in navigable waters—Interference with navigation—Right of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. arts. 1375 to 1378.

See CONSTITUTIONAL LAW, 5.

13. Maritime law—Collision—Rules of the road—Narrow channel — Navigation, rules of — R. S. C. c. 79, s. 2, arts. 15, 16, 18, 19, 21 and 23—"Crossing" ships—"Meeting" ships—"Passing" ships — Breach of rules—Presumption of fault—Contributory negligence—Moiety of damages—36 & 37 Vict. (Imp.) c. 85, s. 17—Manœuvres in "agony of collision."

See SHIPPING, 7.

14. Admiralty law — Collision — Ship at anchor—Anchor light — Lookout—Weight of evidence—Credibility—Findings of trial judge—Negligence.

See SHIPPING, 11.

15. Admiralty law—Collision—Undue speed—Ship in default—Rule 16—Navigation during fog.

See SHIPPING, 12.

AND see ADMIRALTY LAW—INSURANCE, MARINE—RIVERS AND STREAMS—SHIPPING.

NEGLIGENCE.

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1. BUILDINGS AND PREMISES.

1. *Insufficient foundation wall—Contract—41 Vict. cc. 6 & 7 (N.B.)—Building by-law—Violation of—Liability of owner—Assessment of damages—Loss of rent.*—S. contracted to erect a proper and legal building for W. and two days later the City of St. John, under the Act 41 Vict. c. 6 (N.B.), passed a by-law prohibiting buildings such as that contracted for. W. had reserved the right to alter plans and specifications, and make deviations in the construction, detail or execution of the work, and engaged an architect to superintend the work and enforce the conditions of the contract, &c. While in course of erection, the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to W. and McM., his neighbour. In an action against W. and S. to recover damages the jury found for the plaintiff for \$5,327, *i. e.*, general damages, \$3,952, and \$1,375 for loss of rent. In the full court the verdict was allowed to stand for \$3,952, amount of general damages (21 N. B. Rep. 31). On appeal and cross-appeal, *Held*, Gwynne, J., dissenting, that at the time of the injury, the contract for the erection of W.'s building being in contravention of a valid by-law, the defendant W., his contractors and agent were all equally responsible for the consequences of building the illegal wall which caused the injury; that the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish damage sustained, and therefore the verdict should stand for the full amount of the verdict.—*Per Gwynne, J.*, dissenting: That W. was not, by the terms of the contract, liable for the injury, and, even if the by-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it. *Walker v. McMillan*, vi., 241.

2. *Fortuitous event—High wind—Vis major—Fall of wall after fire—Arts. 17, s.-s. 24, 1053,*

1055, 1071 C. C.—Where fire destroyed his house, leaving walls dangerous, and defendant, knowing the fact, neglected to secure or support a wall or take it down, and some days after the fire it was blown down by a high wind and damaged plaintiff's house, defendant cannot shield himself under plea of *vis major*. Judgment appealed from (M. L. R. 6 Q. B. 402) affirmed. *Nordheimer v. Alexander*, xix., 248.

3. *Sic utere tuo ut alieno ne lœdas—Use of engine—Discharge of steam—Nuisance.*—A condenser pipe passed through the floor and discharged steam into a dock below, 20 feet from an adjoining warehouse into which the steam entered and damaged the contents. Notice was given to the company, but the injurious use continued. *Held*, affirming the judgment appealed from (23 N. S. Rep. 263), that the act causing the injury violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another, and the persons injured were entitled to damages, more especially as the injury continued after notice. *Chandler Electric Co. v. Fuller*, xxi., 337.

4. *Building—Want of repair—Damages—Héritiers fiduciaires—Personal liability of trustees—Executors—Arts. 921, 981 (a), 1055 C. C.*—The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair or use and management, which reasonable care can guard against.—A. T. sued J. F. and M. W. F. personally as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming \$4,000 damages for the death of her husband who was killed by a window falling on him from the third story of a building which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F. and his children, for whom the said J. F. and M. W. F. were also trustees. The courts below held appellants liable in their capacity of executors of the general estate and trustees under the will.—*Held*, reversing the judgment appealed from, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d'héritiers fiduciaires*) for the benefit of G. F.'s children; but were not liable as executors of the general estate. *Ferrier v. Trépannier*, xxiv., 56.

5. *Contributory negligence—Unsafe premises—Risk voluntarily incurred.*—An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal-bins. He did not apply to the School Board or the caretaker in charge of the premises for permission to enter before making his visit. *Held*, affirming the judgment appealed from (23 Ont. App. R. 597), that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises and could not recover damages. *Rogers v. The Toronto Public School Board*, xxvii., 448.

6. *Lawful use of land — Excavations—Injury to adjoining property—Damages—Right of action.*]—Plaintiff charged that defendant carelessly, negligently and improperly made excavations upon his lot adjoining that of the plaintiff, allowed water to accumulate in the excavations and to injure the foundations of plaintiff's building. The judgment appealed from (18 N. B. Rep. 523), ordered a nonsuit on the ground that damage and injury must both concur to afford a right of action, that the evidence shewed only an ordinary and legitimate use by defendant of his own land which did not constitute an injury and, therefore, he was not liable for damages. On appeal the Supreme Court of Canada affirmed the judgment appealed from. *St. John Young Men's Christian Association v. Hutchinson*, Cass. Dig. (2 ed.) 210.

2. CARRIERS.

7. *Carriers — Special contract—Limitation of liability — Damages—Wrongful conversion on connecting line of transportation—Sale of goods for non-payment of freight.*] — Conditions in a shipping receipt relieving the carrier from liability for loss or damages arising out of "the safe-keeping and carriage of goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carrier, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier. *Wilson v. Canadian Development Co.*, xxxiii., 432.

The Privy Council refused leave to appeal, July, 1903.

8. *Carriage of perishable freight — Bill of lading—Verbal condition—Duty as to suitable transportation—Covered cars — "At owner's risk"—Estoppel.*

See RAILWAYS, 1.

9. *Contract by carrier — Forwarding goods —Delivery — Connecting lines — Custody of goods.*

See CARRIERS, 6.

10. *Railway company—Carriage of goods—Limitation of liability—Railway Act, 1888, s. 246 (3).*

See RAILWAYS, 5.

11. *Railway company—Carriage of goods—Connecting lines—Special contract — Loss by fire in warehouse—Negligence—Pleading.*

See RAILWAYS, 6.

12. *Fragile goods — Stowage — Contract against fault of servants — Charter party—Affreightment.*

See CARRIERS, 16.

13. *Railways — Carriers—Special instructions—Acceptance by consignee—Warehousemen—Amendment.*

See CARRIERS, 17.

3. CAUSA CAUSANS ; PROXIMATE CAUSE.

14. *Runaway horses—Negligence — Proximate cause — Danger voluntarily incurred—Reasonable conduct.*] — C. having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team while he interviewed the proprietor of the yard. Shortly after a blast went off and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them, but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations to recover damages for such injury. *Held*, affirming the decision appealed from (20 Ont. App. R. 49), Gwynne, J., dissenting, that the negligent manner in which the blast was set off was the proximate and first cause of the injury to C., that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances. *Town of Prescott v. Connell*, xxii., 147.

15. *Passenger vessel—Use of wharf—Invitation to public — Accident in using insufficiently lighted wharf—Proximate cause—Irregular medical attendance — Excessive damages.*]—A company owning a steamboat making weekly trips between Boston and Halifax, occupied a wharf in the latter city leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk and instead of turning off at the end, there being no lights, and the night dark, they continued straight down the wharf which became narrower after some distance, and formed a jog, on reaching which, Y.'s wife tripped and as her husband tried to catch her they both fell into the water. Forty-four days afterwards Mrs. Y. died. In an action by Y. against the company to recover damages occasioned by the death of his wife it appeared that the deceased had not had regular and continual medical treatment after the accident and the doctors who gave evidence at the trial differed as to whether or not the immersion was the approximate cause of her death. The jury when asked: Would the deceased have recovered, notwithstanding the accident, if she had received regular and continual attendance? replied, "very doubtful." A verdict was found for plaintiff with \$1,500 damages, which the Supreme Court (N. S.) set aside, and ordered a new trial. *Held*, affirming judgment appealed from (24 N. S. Rep. 436), that Y. and his wife were lawfully upon the wharf at the time of the accident; that in view of the established practice they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company was under an obligation to see that they were safe.—*Held*, further, that it having been proved that the

wharf was only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company, whose officers had sole control of it, the company was in possession of it at the time of the accident.—*Held*, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y.'s death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed. *York v. Canada Atlantic SS. Co.*, xxii., 167.

16. *Master and servant — Negligence — "Quebec Factories Act" — R. S. Q. arts. 3019-3053 — Art. 1053 C. C. — Civil responsibility — Cause of accident — Conjecture — Evidence — Onus of proof — Breach of statutable duty — Police regulations.*—The plaintiff's husband was accidentally killed whilst employed as engineer in charge of defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture. — *Held*, that, in order to maintain the action it was necessary to prove by direct evidence, or by weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.—The provisions of the "Quebec Factories Act" (R. S. Q. arts. 3019 to 3053 inclusively) are intended to operate only as police regulations and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code. *Montreal Rolling Mills Co. v. Corcoran*, xxvi., 595.

17. *Master and servant — Evidence — Probable cause of accident.*—Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant and the actual cause of the accident is purely a matter of speculation or conjecture. *Canada Paint Co. v. Trainor*, xxviii., 352.

18. *Fault of fellow-servant — Contributory negligence — Employer's liability — Arts. 1053, 1056 C. C. — Dangerous material — Probable cause of accident.*—Defendants manufactured detonating cartridges or caps made by charging copper shells with a composition of fulminate of mercury and chlorate of potash, a highly explosive mixture, requiring great care in manipulation. It is, when dry, liable to explode easily by friction or contact with flame, but has the property of burning slowly without exploding when saturated with moisture. It was the duty of defendant's foreman, twice a day, to provide a sufficient quantity of the mixture for use in his special compartment during the morning and in the afternoon, and to keep it properly dampened with water, for which purpose he was furnished with a sprinkler. It was also the foreman's duty to fill the empty shells with the fulminating mixture as they were banded to him set on end in wooden plates, and then pass them on, properly moistened, through a slot

in his compartment, to a shelf whence they were removed by another employee and the charges pressed down to the bottom of the shells by means of a pressing machine worked by C., at a table near by. An explosion took place which appeared from the evidence to have originated at the pressing machine, and might have occurred either through the fulminate in the shells having been allowed to become too dry from carelessness in the sprinkling, or from an accumulation of the mixture in adhering to and drying upon the metal portions of the pressing machine. It was the duty of C., operating the pressing machine, to keep it clean and prevent the mixture from accumulating and drying there in dangerous quantities. When the explosion occurred, the foreman and C. and another employee were killed, but a fourth employee, who was blown outside the wreck of the building and survived, stated that the first flash appeared to come from the pressing machine, and the explosion followed immediately. The theory propounded by the plaintiff, father of C., assumed that nothing was known of the actual cause of the explosion, nor where it in point of fact originated, but inferred from a supposed condition of things, that the fulminate had not been sufficiently dampened, and that this indicated carelessness on the part of the foreman and raised a presumption that the explosion originated through his fault. The evidence of the survivor led to the conclusion that the explosion originated through C.'s neglect to clean the pressing machine. Defendants had taken all reasonable precautions to diminish risk of injury to their employees in the event of an explosion, and it appeared that conformity with rules prescribed and instructions given by them to their employees for the purpose of securing their safety, would be sufficient to secure them from injury. *Held*, *Taschereau and King, JJ.*, dissenting, that as it appeared under the circumstances of the case, that the cause of the accident was either unknown or else that it could fairly be presumed to have been caused by the negligence of the person injured, whose personal representative brought the action, that there could not be any such fault imputed to the defendants as would render them liable in damages. *Dominion Cartridge Co. v. Cairns*, xxviii., 361.

19. *Dangerous machinery — Statutory duty — Cause of accident.*—K., a workman in a cotton mill, was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. In an action by his widow and infant children against the company the negligence charged was want of a fence or guard around the machinery, which caused the death of K., contrary to the provisions of the Workmen's Compensation Act. *Held*, reversing the judgment appealed from (25 Ont. App. R. 36), Gwynne, J., dissenting, that whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident. *Canadian Coloured Cotton Mills Co. v. Kervin*, xxix., 478.

20. *Use of dangerous material — Unknown cause of accident — Injury resulting from explosion — Employer's liability — Fault of fellow-servant.*—The negligent accumulation of an unnecessary quantity of dynamite in

dangerous proximity to employees of a mining company, where damage might occur through the nature of the substance, carelessness or otherwise, is such negligence on the part of the company as will render it liable for injuries caused by an explosion of the dynamite although the direct cause of such explosion may be unknown. Gwynne, J., dissented. As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions of fellow-servants of a deceased workman do not exonerate employers from liability for the negligence of a servant which may have led to injuries. *The Queen v. Filion* (24 Can. S. C. R. 482), and *The Queen v. Grenier* (30 Can. S. C. R. 42) followed. Judgment appealed from affirmed. *The Asbestos & Asbestic Co. v. Durand*, xxx., 285.

21. *Injury to workmen — Proximate cause — Ontario Factories Act.*—A workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step ladder to get on a plank in front of the drier. The step ladder was moveable and placed close to a revolving cog wheel. On returning from the drier on one occasion another workman, accidentally or intentionally, removed the ladder as he was about to step on it and before he could recover his balance his leg was caught in the cog wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded and the ladder fastened to the floor; and that the non-guarding and fastening constituted negligence on the part of the defendants. *Held*, affirming the judgment of the Court of Appeal (3 Ont. L. R. 600), that the evidence justified the findings; that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor for which the defendants were liable. *Sault Ste. Marie Pulp and Paper Co. v. Myers*, xxxiii., 23.

22. *Common fault — Inconsistent findings of jury — Misdirection.*

See No. 141, *infra*.

23. *Use of dangerous material — Neglect to insulate electric wires — Probable cause of accident — Employer's liability.*

See No. 80, *infra*.

24. *Sparks from railway engine — Rubbish on berm — Findings of jury — Concurrent findings as to cause of injury.*

See No. 217, *infra*.

25. *Insecure tackle — Warning of danger — Imprudence — Cause of accident — Cause of injury.*

See No. 88, *infra*.

26. *Use of dangerous material — Unknown cause of accident — Injury resulting from explosion — Employer's liability — Fault of fellow-servant.*

See No. 20, *ante*.

27. *Horses running away — Cause of accident — Telephone poll on public street.*

See No. 192, *infra*.

28. *Evidence to support verdict—Findings of fact — Practice — Defective ways, works and machinery — Proximate cause of injury — Fault of fellow-workman — Mining regulations.*

See VERDICT, 3.

4. COMMON EMPLOYMENT.

29. *Negligence of servants or officers of the Crown — Injury caused to fellow-servant — Common employment.*—In the law of the Province of Quebec, the doctrine of common employment has no place. (4 Ex. C. R. 134, affirmed.) *The Queen v. Filion*, xxiv., 482.

Followed in *The Queen v. Grenier* (30 Can. S. C. R. 42) and in *Asbestos and Asbestic Co. v. Durand* (30 Can. S. C. R. 285). See Nos. 30 and 31, *infra*.

30. *Negligence of fellow-servant — Common employment — Doctrine in Province of Quebec.*—The doctrine of common employment does not prevail in the Province of Quebec. *The Queen v. Filion* (24 Can. S. C. R. 482) followed. *The Queen v. Grenier*, xxx., 42.

31. *Use of dangerous material — Unknown cause of accident — Injury resulting from explosion — Employer's liability — Fault of fellow-servant.*—The negligent accumulation of an unnecessary quantity of dynamite in dangerous proximity to employees of a mining company, where damage might occur through the nature of the substance, carelessness or otherwise, is such negligence on the part of the company as will render it liable for injuries caused by an explosion of the dynamite although the direct cause of such explosion may be unknown. Gwynne, J., dissented.—As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions of fellow-servants of a deceased workman do not exonerate employers from liability for the negligence of a servant which may have led to injuries. *The Queen v. Filion* (24 Can. S. C. R. 482), and *The Queen v. Grenier* (30 Can. S. C. R. 42) followed. Judgment appealed from affirmed. *The Asbestos & Asbestic Co. v. Durand*, xxx., 285.

32. *Master and servant — Common employment — Finding of jury — Question of fact.*

See MASTER AND SERVANT, 15.

33. *Negligent "loom fixer" — Defective machine — Evidence for jury.*

See No. 97, *infra*.

34. *Person in charge of electric car—Motor-man — Injury to conductor — Workmen's Compensation Act.*

See EMPLOYER AND EMPLOYEE, 1.

35. *Work in mine — Entering shaft—Code of signals — Disregard of rules—Danger.*

See No. 53, *infra*.

36. *Working of mines — Statutory regulations—Fault of fellow-workman.*

See No. 90, *infra*.

37. *Evidence to support verdict — Findings of fact — Practice — Defective ways, works and machinery — Proximate cause of injury—Fault of fellow-workman — Mining regulations.*

See VERDICT, 3.

5. CONTRIBUTORY NEGLIGENCE.

38. *Unbuoyed anchor of moored vessel — Custom of port — Ordinary caution — Rule of the road — Collision with anchor — Contributory negligence — Damages.*—At a port where vessels load timber, the "Erie Belle" was in the habit of landing and taking passengers. The "M. C. Upper" was moored at the west side of the dock, and had her anchor dropped some distance out in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform incoming vessels where it was. The "Erie Belle" came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the "M. C. Upper," making a large hole in her bottom. On a petition by the owner of the "Erie Belle" in the Maritime Court of Ontario, to recover damages done to his vessel by the "M. C. Upper," the trial judge found that both vessels were to blame, and held that each should pay one-half of the damage sustained by the "Erie Belle."—On appeal by owner of "M. C. Upper" and cross-appeal by owner of "Erie Belle," the court was equally divided, the appeal and cross-appeal were dismissed without costs; and it was *Held, per Ritchie, C.J., and Fournier and Taschereau, JJ.*, that as the "Erie Belle," being managed with care and skill, went to the wharf in the usual way, and came out in the usual way, that impact with the hawser or anchor is "impact between the vessels," and as the "M. C. Upper" had wrongfully and negligently placed her anchor where it ought not to have been, and without indicating, by a buoy or otherwise, its position to the "Erie Belle," the owner of the "Erie Belle" was entitled to full compensation, and the "M. C. Upper" should pay the whole of the damage.—*Per Strong, Henry and Gwynne, JJ.*, that the "M. C. Upper" had a right to have her anchor where it was, and that it was not in the line by which the "Erie Belle" entered and by which she could have backed out; that the strain on the anchor chain when the crew of the "M. C. Upper" were hauling on it all the time the "Erie Belle" was at Port K. sufficiently indicated the position of the anchor, and therefore that the accident happened through no fault or negligence on the part of the "M. C. Upper." *McCallum v. Odette*, vii., 36.

39. *Municipal corporation — New trial — Nonsuit — Defective sidewalk — Lawful use of street — Contributory negligence — Damages.*—In an action for damages from an injury caused by a defective sidewalk, the evidence of the plaintiff shewed that the accident whereby she was injured happened while she was engaged in washing the windows of her dwelling from the outside of the house, that in taking a step backward, her foot went through a hole in the sidewalk and she was thrown down and hurt; she knew the hole was there. There was no evidence as to the nature or extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation.—No motion for nonsuit was made, and the jury were directed that if the plaintiff knew the hole was there, it was contributory negligence; but if she believed it was firm ground there was no contributory negligence.—The jury awarded \$300 damages, and a rule *nisi* for a new trial was discharged. *Held, reversing the judgment*

appealed from (23 N. B. Rep. 559), that there should be a new trial.—*Per Ritchie, C.J., and Fournier, J.* That the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the street as alleged in the declaration, and she was, therefore, not entitled to recover.—*Per Ritchie, C.J.* The damages were excessive.—*Per Henry, J.* That the plaintiff was lawfully using the street, and there was evidence of negligence on the part of the corporation, but as the question of contributory negligence had not been left to the jury as it should have been there must be a new trial.—*Per Taschereau and Gwynne, JJ.* That there was no evidence of negligence to justify the verdict, and a nonsuit should have been granted if moved for. *Town of Portland v. Griffiths*, xi., 333.

40. *Municipal ferry — Manner of mooring — Contract to carry — Corporate liability — Injury to passenger — Contributory negligence.*—The ticket issued to M., a traveller by rail from Boston, Mass., to St. John, N. B., entitled him to cross the St. John harbour by ferry, and a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corporation of St. John. *Held*, that an action would lie against the corporation for injuries to M. caused by the negligence of the officers of the boat during passage.—The approaches of the ferry to the wharf were guarded by a chain extending from side to side of the boat at a distance of about one and a half feet from the end. On approaching the wharf the employee whose duty it was to moor the boat unloosed the chain at one side, and when near enough jumped on the floats to bring the mooring chain aboard. A number of the passengers rushed towards the floats, and M. seeing the chain down and thinking it safe to land followed them and fell through the space between the wharf and the boat and was injured. When this happened the boat was not moored. *Held*, affirming the judgment appealed from (25 N. B. Rep. 318), that the corporation was liable for the injuries sustained through the negligent manner of mooring the boat, and that M. was not guilty of such contributory negligence as would avoid that liability. *Mayor of St. John v. McDonald*, xiv., 1.

41. *Tramcar — Collision with vehicle — Duty of driver — Contributory negligence.*—The driver of a vehicle injured while crossing a tramway is not guilty of contributory negligence because he did not look to see whether or not a car was approaching if, in fact, it was far enough away to enable him to cross the tracks had it been proceeding moderately and prudently.—(21 Ont. App. R. 553, affirmed.) *Toronto Ry. Co. v. Gosnell*, xxiv., 582.

42. *Tramcar — Accident to workmen on track — Contributory negligence — New trial — Practice.*—A workman in the employ of the company was injured by a tramcar striking him while working on the track. An action for damages was defended on the ground that he had not been reasonably careful in looking out for the cars. The finding of the trial judge that the plaintiff was the cause of his own misfortune and could not hold defendants liable was affirmed in the Divisional Court but reversed by the Court of Appeal, which ordered a new trial.—The Supreme Court affirmed the decision appealed

from, Gwynne, J., dissenting, but on counsel for the company stating that a new trial was not desired, judgment was ordered to be entered for plaintiff with \$500 damages, the amount assessed by the jury at the trial, and the appeal was dismissed with costs. *Hamilton Street Ry. Co. v. Moran*, xxiv., 717.

43. *Contributory negligence — Infants.*—The doctrine of contributory negligence does not apply to an infant of tender age. *Gardner v. Grace* (1 F. & F. 359) followed. (33 N. B. Rep. 91, affirmed.) *Merritt v. Hepenstal*, xxv., 150.

44. *Defective snow-plough and bridge—Derailment of train — Contributory negligence—Findings of jury — Failure to answer questions — Act of incorporation — Change of name — New trial.*—A locomotive engineer in the company's employ was killed through the derailing of a snow-plough and consequent breaking of a bridge. The jury found that the derailing was the proximate cause of the accident; that deceased was not guilty of contributory negligence; that the snow-plough and bridge were defective, and that the train crew was insufficient. They answered "we do not know" to the questions, as to whose negligence caused the accident; whether or not the defects were known to defendant, before or at the time of accident, or could have been discovered by careful inspection; whether defendant was aware of insufficiency of the crews; whether different construction of the bridge would have secured the safety of the train; whether deceased knew the train was off the track before it reached the bridge, and if by reasonable care of the deceased or crew, the accident could have been prevented. The court below were equally divided as to necessity for a new trial. The trial judge instructed the jury that the proximate cause was what caused the accident and not that without which it would not have happened, and there was a question as to the parties, plaintiffs in the action. The court below were also divided in opinion on these points. The Supreme Court of Canada ordered the new trial and affirmed the holdings of the judgment appealed from (27 N. S. Rep. 498) in other respects. *Pudsey v. Dominion Atlantic Ry. Co.*, xxv, 691.

45. *Unprotected laundry rollers — Injury to employee — Passing faintness of victim — Approved machinery — Contributory negligence.*—An employee in a laundry, who had gone to work without her breakfast was attacked by faintness and while in a state of unconsciousness, dropped her hand into an opening in a steam mangle, receiving severe injuries by contact with the heated cylinder and large revolving rollers. She perfectly understood the management of the machine which was in good working order, and not considered dangerous. On a recent visit, the Government factories inspector had approved of the machine and the factory was in the best possible order. *Held*, affirming the judgment appealed from (Q. R. 5 Q. B. 191), that there was no negligence chargeable to the defendant for which an action would lie. *Demers v. Montreal Steam Laundry Co.*, xxvii., 537.

46. *Master and servant — Cause of accident — Contributory negligence — Evidence.*—In an action by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole

of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle needed to be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed; but it was proved that the speed had been increased to such extent at the instance of the employee himself, who was a skilled workman. *Held*, reversing the judgment appealed from, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable. *Burland v. Lee*, xxviii., 348.

47. *Risk voluntarily incurred — Common fault — Division of damages.*—P. was proprietor of certain lumber mills and a bridge leading to them across the River Batiscan. The bridge being threatened with destruction by the spring floods, the mill foreman called for volunteers to attempt to save it by undertaking manifestly dangerous work in loading one of the piers with stone. While the work was in progress the bridge was carried away by the force of the waters and one of the volunteers were drowned. *Held*, affirming in part the judgment appealed from (Q. R. 8 Q. B. 170), Gwynne, J., dissenting, that the maxim "*volenti non fit injuria*" did not apply, as the case was one in which both the mill-owner and deceased were to blame, and that, being a case of common fault, the damages should be divided according to the jurisprudence of the Province of Quebec. *Price v. Roy*, xxix., 494.

48. *Trial of action — Contributory negligence—Findings of jury — New trial — Evidence.*—On the trial of an action against a street railway company for injuries received through negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "Could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the answer was "We believe that it could have been possible." *Held*, reversing the judgment appealed from, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict.—*Held*, further, that as the other findings established negligence in the defendant which caused the accident which amounted to a denial of contributory negligence; as there was no evidence of negligence on plaintiff's part in the record, and as the court had before it all the materials for finally determining the question in dispute, a new trial was not necessary. *Rowan v. Toronto Ry. Co.*, xxix., 717.

49. *Negligence — Railway company — Injury to passengers in sleeping berth.*—S., an elderly lady, was travelling on a train of the Canadian Pacific Railway Company from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine she tried to turn around in the berth, and the car going round a curve at the time she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages it was not shewn that the speed of the train was excessive or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed. *Held*, reversing the judgment of the Supreme Court

of Nova Scotia, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. *Canadian Pacific Ry. Co. v. Smith*, xxxi., 367.

50. *Obstruction on highway — Repair of municipal streets — Contributory negligence.*—The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 291) which held that permitting a mound of earth about eight inches in height to remain at a filling over a trench dug to lay a pipe across a public street was not a serious or unusual obstruction due to negligence on the part of the municipality and holding the plaintiff guilty of want of proper care in approaching during the darkness the dangerous place which he had previously seen by daylight in the same condition. *Messenger v. Town of Bridgetown*, xxxi., 379.

51. *Operation of tramway — Street crossings — Speed and control of car — Findings of jury — Contributory negligence.*—In an action founded on personal injuries caused by a tramcar the jury found that defendants' negligence was the cause of the accident and also that plaintiff had been negligent in not looking out for the car. *Held*, reversing the judgment of the Court of Appeal (2 Ont. L. R. 53) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover. *London Street Ry. Co. v. Brown*, xxxi., 642.

52. *Negligence — Personal injuries — Use of elevator — Contributory negligence.*—H. entered an elevator in a public building after inquiring of the boy in charge if a certain tenant was in his office and being told he was not. He remained in the elevator while it made a number of trips in response to calls, and had been in it over ten minutes when a call came from the fifth floor. The elevator went up and the passenger who had rung entered. H. at first making no attempt to get out, the operator then shoved to the door of the elevator and at the same time started the wheel which had to be completely turned around to move the elevator. The time required to turn the wheel would be sufficient to permit of the closing of the door if shoved simultaneously with the turning of the wheel. While it was being turned H., without giving warning, tried to get out through the door and, the elevator being then descending, he was caught between it and the floor and injured so that he died soon after. In an action by his administrator against the owner of the building, *Held*, affirming the judgment appealed from (34 N. S. Rep. 365), that the accident was entirely due to the conduct of H. himself, and the owner was not liable. *Hawley v. Wright*, xxxii., 40.

53. *Work in mine — Entering shaft—Code of signals — Disregard of rules — Damages.*—A miner was getting into the bucket by which he was to be lowered into the mine when owing to the chain not being checked his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine owners the jury found that the system for lowering the men was faulty; the man in charge of it negligent; and that the engine and brake by which the bucket was low-

ered were not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing among other things that signals should be given, by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual in descending to signal with the bells; and that the injured miner knew of the rules but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for plaintiff and ordering a new trial; *Held*, reversing said judgment (8 B. C. Rep. 344) and restoring the judgment of the trial judge (7 B. C. Rep. 414), that there was ample evidence to support the findings of the jury that defendants were negligent; that there was no contributory negligence by non-use of the signals the rules having, with consent of the employees and of the persons in charge of the men, been disregarded which indicated their abrogation; therefore, the new trial should not have been granted. *Held*, further, that as the negligence causing the accident was not that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employees' Liability Act ([1897] R. S. B. C. c. 69.) *Warming-ton v. Palmer*, xxxii., 126.

54. *Operation of railway — Defective machinery — Contributory negligence — Examining train — Running rules.*—The judgment appealed from (8 B. C. Rep. 393) affirmed the order of the trial judge withdrawing the case from the jury on the grounds, in effect, that a conductor who had been injured through an accident caused by a defective brake-mast, had been guilty of contributory negligence by failing to see that his train was in proper condition before starting it and thus disobeying running rules. The Supreme Court affirmed the judgment appealed from. *Fawcett v. Canadian Pacific Ry. Co.*, xxxii., 721.

55. *Voluntary exposure — Incurring unnecessary danger — Condition of policy.*

See INSURANCE, ACCIDENT, 1.

56. *Boundary ditches — Flooding of lands — Maintenance of drains — Contributory negligence.*

See No. 208, *infra*.

57. *Toll gate — Obstruction on highway — Invitation to use dangerous way — Volunteer — Contributory negligence.*

See No. 187, *infra*.

58. *Running of railway trains — Accident to passenger embarking—"All aboard"—Duty of conductor — Contributory negligence—Attempting to board moving train.*

See No. 209, *infra*.

59. *Ferry landing — Wharf insufficiently lighted — Carelessness of passenger — Want of guard rails, &c.*

See No. 85, *infra*.

60. *Proximate cause of accident — Runaway horses — Danger voluntarily incurred — Reasonable conduct.*

See No. 14, *ante*.

61. *Dangerous way—Proximate cause—Injury to person—Irregular medical attendance.*
See No. 15, *ante*.

62. *Dangerous way—Voluntary exposure to danger—Employer's liability.*
See No. 87, *infra*.

63. *Railway company — Loan of cars — Reasonable care—Breach of duty—Risk voluntarily incurred—"Volenti non fit injuria."*
See RAILWAYS, 110.

64. *Unsafe premises — Risk voluntarily incurred.*
See No. 5, *ante*.

65. *Master and servant — Injuries by machinery—Proximate cause—Imprudence.*
See No. 120, *infra*.

66. *Walking on railway line—Risk voluntarily incurred—Trespass—Invitation to use passage—License.*
See No. 216, *infra*.

67. *Neglect of reasonable precautions—Employer's liability — Imprudence of person injured.*
See No. 121, *infra*.

68. *Use of dangerous materials—Trespass—Necessary precautions—Imprudence of injured person.*
See No. 81, *infra*.

69. *Trespasser—Warning of danger—Imprudence—Cause of injury—Dangerous way.*
See No. 88, *infra*.

70. *Excessive speed of tramcar—Prompt action—Driving across tracks — Risk voluntarily incurred.*
See No. 247, *infra*.

71. *Use of public way—Knowledge of defect —Contributory negligence — Obstruction on highway.*
See MUNICIPAL CORPORATION, 146.

72. *Sawmill—Injury to workman—Opening in floor—Fencing—Appeal—Findings at trial —Contributory negligence.*
See No. 89, *infra*.

73. *Operation of railway trains—Collision —Duty of engineman — Rules—Contributory negligence.*
See No. 225, *infra*.

6. DAMAGES.

74. *Common fault — Risk voluntarily incurred—Division of damages.]—In a case in the Province of Quebec where it appears that the employer and the injured employee were both at fault damages should be divided. Judgment appealed from, Q. R. 8 Q. B. 170, varied. Price v. Roy, xxix., 494.*

75. *Repair of street—Lord Campbell's Act —Art. 1056 C. C.—Bereavement—Solatium—Pecuniary loss—Cross-appeal.*

See DAMAGES, 3.

76. *Injuries on passenger elevator—Assessment of damages — Vindictive damages—Reasonable award.*

See No. 116, *infra*.

77. *Mercantile agency—Confidential report —False information—Assessment of damages.*
See LIBEL, 3.

78. *Negligence—Obstruction of street—Assessment of damages—Questions of fact—Action of warranty.*

See APPEAL, 232.

79. *Negligent navigation of hired tug—Presumption of fault—Compensation for repairs —Measure of damages.*

See No. 143, *infra*.

7. DANGEROUS MATERIALS, &C.

80. *Master and servant—Employers' liability—Use of dangerous material—Insulation of electric wires—Cause of death—Findings of fact—Arts. 1053, 1054 C. C.]—Persons dealing with dangerous material are obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end, and where there is evidence that there was a precaution which might have been taken by a company making use of electrical currents to prevent live wires causing accidents and that this precaution was not adopted the company must be held responsible for damages. Citizens' Light and Power Co. v. Lepitre, xxix., 1.*

81. *Use of dangerous material — Necessary precaution — Evidence — Trespass — Contributory negligence.] — Work on the construction of a railway was going on near the unused part of a public cemetery in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place, the workmen would hurriedly place any explosives they might have in their possession under their tool box, and then ran away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require. Held, reversing the judgment appealed from, that in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shewn to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M., which caused the cap to explode did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and*

hat whether or not M. was a trespasser, was also a question for the jury, who did not pass upon it. *Makins v. Piggott*, xxix., 188.

82. *Negligence—Use of dangerous materials—Cause of explosion—Cause of injury—Arts. 1053, 1056 C. C. — Fault of fellow-servant — Employer's liability.*—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on the part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. Gwynne, J., dissenting.—As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow-servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *The Queen v. Filion* (24 Can. S. C. R. 482), and *The Queen v. Grenier* (30 Can. S. C. R. 42) followed. *Asbestos and Asbestic Co. v. Durand*, xxx., 285.

83. *Operations of a dangerous nature—Supplying electric light—Insulation of electric wires.*—The defendants are a company engaged in supplying electric light to consumers in the City of Montreal under special charter for that purpose. They placed a secondary wire, by which electric light was supplied to G.'s premises in close proximity to a guy-wire used to brace primary wires of another electric company which, although ordinarily a dead wire, might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy-wire. While attempting to turn on the light of an incandescent electric lamp on his premises, on a wet and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury, *Held*, affirming the judgment appealed from, that the defendants were liable for actionable negligence as they had failed to exercise the high degree of skill, care and foresight required of persons engaging in operations of a dangerous nature. *Royal Electric Co. v. Hévê*, xxxii., 462.

84. *Use of dangerous material—Regulations of cartridge factory — Reasonable precautions—Probable cause of accident—Employer's liability—Fault of fellow-servant—Contributory negligence—Arts. 1053, 1056 C. C.*—Defendants manufactured detonating cartridges or caps made by charging copper shells with a composition of fulminate of mercury and chlorate of potash, a highly explosive mixture, requiring great care in manipulation. It is, when dry, liable to explode easily by friction or contact with flame, but has the property of burning slowly without exploding when saturated with moisture. It was the duty of defendant's foreman, twice a day, to provide a sufficient quantity of the mixture for use in his special compartment during the morning and in the afternoon, and to keep it properly dampened with water, for which purpose he

was furnished with a sprinkler. It was also the foreman's duty to fill the empty shells with the fulminating mixture as they were handed to him, set on end in wooden plates, and then pass them on, properly moistened, through a slot in his compartment, to a shelf whence they were removed by another employee and the charges pressed down to the bottom of the shells by means of a pressing machine worked by C., at a table near by. An explosion took place which appeared from the evidence to have originated at the pressing machine, and might have occurred either through the fulminate in the shells having been allowed to become too dry from carelessness in the sprinkling, or from an accumulation of the mixture adhering to and drying upon the metal portions of the pressing machine. It was the duty of C., operating the pressing machine, to keep it clean and prevent the mixture from accumulating and drying there in dangerous quantities. When the explosion occurred, the foreman and C. and another employee were killed, but a fourth employee, who was blown outside the wreck of the building and survived, stated that the first flash appeared to come from the pressing machine, and the explosion followed immediately. The theory propounded by the plaintiff, father of C., assumed that nothing was known of the actual cause of the explosion, nor where it in point of fact originated, but inferred, from a supposed condition of things, that the fulminate had not been sufficiently dampened and that this indicated carelessness on the part of the foreman and raised a presumption that the explosion originated through his fault. The evidence of the survivor led to the conclusion that the explosion originated through C.'s neglect to clean the pressing machine. Defendants had taken all reasonable precautions to diminish risk of injury to their employees in the event of an explosion, and it appeared that conformity with rules prescribed and instructions given by them to their employees for the purpose of securing their safety would be sufficient to secure them from injury. *Held*, *Taschereau and King, JJ.*, dissenting, that as it appeared under the circumstances of the case, that the cause of the accident was either unknown or else that it could fairly be presumed to have been caused by the negligence of the person injured, whose personal representative brought the action, that there could not be any such fault imputed to the defendants as would render them liable in damages. *Dominion Cartridge Co. v. Cairns*, xxviii., 361.

8. DANGEROUS WAY, WORKS, &C.

85. *Use of passage-way — Contributory negligence—Want of guard rails, &c.—Wharf insufficiently lighted—Ferry landing.*—B. alleged that her husband, upon whose labour she and her eleven children were dependent for support, was drowned at the Grand Trunk wharf, in Quebec; that the company caused his death by gross negligence, and want of forethought; that the company was bound to keep its wharves in good order; to put railings, guards and gates, and lights sufficient to ensure the safety of its passengers, and to light in a proper manner its wharves and pontoons, whenever necessary, all which it had failed to do for four or five months previous to the 29th October, 1883; that on that day the weather was rainy and very dark; that her husband purchased a ticket for appellant's

ferry boat and went to its wharf to take the steamer advertised to leave at 6.15 p.m.; that by reason of the negligence of the company, its wharf and pontoon were insufficiently lighted, in a dangerous and slippery condition, not provided with doors, guards or gates, and that the ferry boat was not at the wharf, notwithstanding that the hour of its arrival had passed; that her husband, while proceeding to take the ferry, which he believed to be at the wharf, without negligence or imprudence on his part, and notwithstanding that he took all possible precautions, but by reason of the want of light, and the absence of guards or gates, fell over the wharf and was drowned.—The plaintiff relied upon charges of general negligence on the part of the company, and upon specific omissions: 1st. Insufficiency of light. 2nd. Want of gates, guards or railings. 3rd. The late arrival of the ferry boat.—The company pleaded the general issue, thus negating the allegations in the statement of claim of due care and prudence on the part of the husband, and of negligence, general or special, on its own part.—The company's premises consist of a large wharf, upon which the offices, &c., are built, and a double pontoon, necessary by reason of the great rise and fall of the tide, to the outer of which the ferry boat moors. The pontoons are reached by a slip in the wharf. Upon the outer pontoon is built a large freight shed, through which a passage about twelve feet wide by thirty feet long leads to the river, and by means of which the ferry boat is reached.—Deceased, on his way home, at about 6 o'clock in the evening, came to the Grand Trunk ferry, crossed diagonally the first pontoon and had to enter the narrow passage-way on the covered pontoon, at the end of which he expected to find the steamboat already moored and prepared to receive passengers. The end of this passage is closed by a door or gate sliding on rollers, which is usually kept shut for the safety of freight, and for preventing rain or snow from coming in. This door was not then closed. The deceased walked through this passage-way to board the ferry (which was late that evening), and the night being dark and foggy, and the passage lighted with only one lamp, he walked or slipped into the water and was drowned.—The main point urged by plaintiff was insufficiency of the lights. The trial judge found that death was solely due to deceased's own gross negligence, carelessness and imprudence, and that the accident could not have happened had he exercised ordinary care and prudence, and dismissed the action.—This judgment was reversed by the Court of Queen's Bench, appeal side, (Cross, J., dissenting), the court holding that the accident had been occasioned by the negligence and want of due care of the company, and not to any fault or negligence on the part of deceased, and gave a verdict for plaintiff. *Held*, affirming the judgment appealed from (11 Q. L. R. 254), that there was culpable negligence on the part of the company in not having sufficient lights and a gate or chain to guard against accidents. The damages were not increased, but interest was allowed from the time of the demand. *Grand Trunk Ry. Co. v. Boulanger*, Cass. Dig. (2 ed.) 733.

86. *Workman in factory—Evidence—Questions of fact—Interference on appeal.*—W., a workman in a factory, to get to the room where he worked had to pass through a narrow passage, and at a certain point to turn to the left while the passage was continued in

a straight line to an elevator. In going to his work at an early hour one morning he inadvertently walked straight along the passage and fell into the well of the elevator, which was undergoing repairs. Workmen engaged in making such repairs were present at the time with one of whom W. collided at the opening, but a bar usually placed across the opening was down at the time. *Held*, affirming the decision appealed from (21 Ont. App. R. 164), *Strong, C. J., hesitante*, *Taschereau, J.*, dissenting, that there was no evidence of negligence of the defendants to which the accident could be attributed and W. was properly nonsuited at the trial.—*Held, per Strong, C.J.*, that though the case might properly have been left to the jury, as the judgment of nonsuit was affirmed by two courts it should not be interfered with. *Headford v. McClary Mfg. Co.* xxiv., 291.

87. *Master and servant—Voluntary exposure—Employers' Liability Act—Evidence—New trial—Imprudence.*—A mill workman sued for damages for injuries while passing over a set of uncovered cogs, upon which he slipped and was injured before they could be stopped. The jury found that there were other passage ways for plaintiff to use in fulfilling his duties, but that none of them was sufficient and the way used was more expeditious; that the omission by the company to place a covering over the cogs left a defective way; and that the plaintiff was not unduly negligent. The trial judge held that the plaintiff voluntarily incurred the risk and dismissed the action. His decision was reversed and verdict entered for plaintiff with damages as assessed by the jury. The Supreme Court of Canada reversed the judgment appealed from and ordered a new trial, on the ground that it was not sufficiently established that plaintiff had of reasonable and practical necessity to pass over a set of cogs, which, being uncovered, were in a dangerous and defective state as charged in the statement of claim. *British Columbia Mills Co. v. Scott*, xxiv., 702.

88. *Trespasser—Dangerous way—Contributory negligence—Cause of injuries—Warning of danger.*—B. was aboard a ship on the point of departure from the port, and was injured by tackle falling from a derrick used in stowing the cargo. The jury found that the accident was caused through imperfect hitching of the tackle, but that B. improperly remained in a dangerous position after being warned to "stand from under." The jury also found that B. was not, at the time, employed at his work and duty, but was aboard the ship with reasonable expectation of being engaged for the voyage. *Held*, that B. was a trespasser; that his fault and imprudence constituted the principal and immediate cause of his injuries, and that the owner and master of the ship was not responsible in damages, under the circumstances, even if B. had any lawful cause or right to be aboard the ship and although there may have been fault in the hitching of the tackle. *Roberts v. Hawkins*, xxix., 218.

89. *Sawmill—Injury to workman—Opening in floor—Fencing—Appeal—Findings at trial—Contributory negligence.*—T. was working in a sawmill at a time when the saws were stopped in order to change any requiring to be replaced. One only, the butting saw, was

left running, being near the end of a board 12 feet long used to measure the planks before they were cut. While the saws were stopped several of the workmen sat on this table, and T. going towards the end to find a seat slipped and fell into an opening in the floor where the deal ends dropped on being cut off. On slipping he threw out his left arm which came against the saw in motion and was cut off. In an action for damages against the mill-owner the trial judge held that the latter was negligent in not protecting the opening and in not stopping the butting saw with the others. On appeal from the decision of the Court of Review confirming the judgment at the trial: *Held*, affirming said judgment, that the want of protection of the opening was negligence for which the owner was responsible. *Held*, also, Strong, C.J., *hesitante*, that if T. was guilty of contributory negligence he was sufficiently punished by a division of the damages at the trial. *Held*, per Sedgewick, Davies and Mills, J.J., that negligence could not be attributed to the owner from the fact that the butting saw was not stopped with the others. *Price v. Talon*, xxxii., 123.

90. *Negligence—Working of mines—Statutory mining regulations—R. S. N. S. (5 ser.) c. 8—Fault of fellow-workmen.*—The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected and an explosion of gas occurred from the effects of which he died. In an action for damages by his widow, *Held*, reversing the judgment appealed from, Taschereau and Sedgewick, J.J., dissenting, that as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen. *Grant v. Acadia Coal Co.*, xxxii., 427.

91. *Negligence—Employer and employee—Insecure scaffold—Disobedience to rules—Dangerous way, works and machinery.*—The Supreme Court affirmed the judgment appealed from which had affirmed the decision of the Court of Review, at Quebec (Q. R. 21 S. C. 99), reversing the trial judgment and holding that it was the duty of an employer not only to order the discontinuance of dangerous operations on an insecure scaffold, but also to take measures to ensure the carrying out of such orders, and that, in the event of an accident occurring through neglect or disobedience of such orders, the employer was liable in damages for injuries caused thereby. *Lamoureux v. Fournier dit Larose*, xxxiii., 675.

92. *Wharf of passenger vessel—Invitation to public—Insufficient lighting—Dangerous way—Proximate cause—Evidence—Insufficient findings—Excessive damages—New trial.*—A company owning a steamboat making weekly trips between Boston and Halifax, occupied a wharf in the latter city leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They

went down the plank sidewalk and instead of turning off at the end, there being no light and the night dark, they continued straight down the wharf which became narrower after some distance, and formed a jog, on reaching which Y.'s wife tripped and as her husband tried to catch her they both fell into the water. Forty-four days afterwards Mrs. Y. died. In an action by Y. against the company to recover damages occasioned by the death of his wife it appeared that the deceased had not had regular and continual medical treatment after the accident and the doctors who gave evidence at the trial differed as to whether or not the immersion was the approximate cause of her death. The jury when asked: "Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance?" replied, "Very doubtful." A verdict was found for plaintiff with \$1,500 damages, which the Supreme Court (N. S.) set aside, and ordered a new trial. *Held*, affirming judgment appealed from (24 N. S. Rep. 436), that Y. and his wife were lawfully upon the wharf at the time of the accident, that in view of the established practice they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company was under an obligation to see that they were safe.—*Held*, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company, whose officers had sole control of it, the company was in possession of it at the time of the accident.—*Held*, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y.'s death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed. *York v. Canada Atlantic S.S. Co.*, xxii., 167.

93. *Defective construction—Machinery in mine—Cause of injury—Fault of fellow-workman—Ways and works—Verdict.*—An elevator cage was used in defendant's mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable which ran over a sheave wheel at the top of the shaft, and, to prevent accidents, guide rails were placed along the elevator shaft and the cage was fitted with automatic dogs or safety clutches intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point twenty feet below the sheave wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave wheel with such force that the cable broke and, the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred foot level and injured the plaintiff who was engaged at the work for which he was employed by the defendants about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the immediate cause of the injury was "the non-

continuance of the guide-rails" which, in their opinion, "caused the safety-clutches to fail in their action, and therefore allowed the cage to fall. *Held*, reversing the judgment appealed from (9 B. C. Rep. 62), that the verdict rendered in favour of the plaintiff ought not to have been disregarded as there was sufficient evidence to support the finding of fact by the jury. *McKelvey v. Le Roi Mining Co.*, xxii., 664.

The Privy Council refused leave for an appeal, 11th February, 1908.

94. *Coupling railway cars—Orders of conductor—Dangerous way—Findings of jury.*

See No. 212, *infra*.

95. *Guarding dangerous machinery—Statutory duty—Cause of accident.*

See No. 19, *ante*.

9. DEFECTIVE MACHINERY AND CONSTRUCTIONS.

96. *Use of dangerous machinery—Orders of superior — Reasonable care.*] — O. was employed in a factory to heat rivets and, with another workman, was engaged in oiling machinery which worked the drill in which the rivets were made. Having oiled part, the other workman went away for a time during which O. saw that the oil was running off the horizontal shaft of the drill and called the attention of the foreman of the machine shop to it and to the fact that the shaft was full of ice. The foreman said to him, "Run her up and down a few times and it will thaw her off." The shaft was seven feet from the floor and on it was what is called a buggy which could be moved along it on wheels. Depending from the buggy was a straight iron rod into the hollow end of which was inserted the drill secured by a screw, and attached to the buggy was a lever over six feet long. O. when so directed by the foreman tried to move the buggy by means of the lever but found he could not. He then went round to the back of the spindle and not being able then to move the buggy came round to the front, put his two hands upon a jacket around the spindle and put the weight of his body against it; it then moved and he stepped forward to recover his balance, when the screw securing the drill caught him about the middle of the body and he was seriously injured. It was shewn that O. had no experience in the mode of moving the buggy and that the screw should have been guarded. *Held*, affirming the decision appealed from (21 Ont. App. R. 596), Gwynne, J., dissenting, that the jury were warranted in finding that there was negligence in not having the screw guarded; that as the foreman knew that O. had no experience as to the ordinary mode of doing what he was told to do, he was justified in using any reasonable mode; that he acted within his instructions in using the only efficient means that he could; and that under the evidence he used ordinary care. *Hamilton Bridge Co. v. O'Connor*, xxiv., 598.

97. *Defective machinery — Evidence for jury — Findings of fact — Verdict.*] — T., a weaver in a cotton mill, was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained about 400 looms, and for every 46 there was a man called the

"loom fixer," whose duty it was to keep them in proper repair. The accident was caused by a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal. *Held*, Gwynne, J., dissenting, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify their finding, the verdict should stand.—*Per* Gwynne, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to shew that such examination could have prevented the accident, and there should be a new trial. *Canadian Coloured Cotton Mills Co. v. Talbot*, xxvii., 198.

98. *Unprotected laundry rollers—Injury to employee — Passing faintness of victim—Approved machinery — Contributory negligence.*] — An employee in a laundry, who had gone to work without her breakfast was attacked by faintness and while in a state of unconsciousness, dropped her hand into an opening in a steam mangle, receiving severe injuries by contact with the heated cylinder and large revolving rollers. She perfectly understood the management of the machine which was in good working order, and not considered dangerous. On a recent visit, the Government factories inspector had approved of the machine and the factory was in the best possible order. *Held*, affirming the judgment appealed from (Q. K. 5 Q. B. 191), that there was no negligence chargeable to the defendant for which an action would lie. *Demers v. Montreal Steam Laundry Co.*, xxvii., 537.

99. *Matters of fact — Finding of jury — Insecure rigging.*] — W. was working on a vessel in port when a boom had to be taken out of the crutch in which it rested and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced which the master undertook to do. When the boom was taken out it fell on the deck and W. was injured. In an action against the owners for damages the jury found that the fall of the boom was owing to the said rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants.—*Held*, affirming the judgment appealed from (30 N. S. Rep. 548), Gwynne, J., dissenting, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that if secured originally it had become insecure by negligence of defendants, and the jury having negatived negligence their finding should not be ignored. *Williams v. Bartling*, xxix., 548.

100. *Operation of railway—Defective works—Lock on switch — Finding of negligence—Evidence.*]—The absence of a lock or guard on a railway switch is a defect in the construction of the ways, works, machinery or plant connected with the construction of works sufficient to support findings of negligence by a jury. *Balch & Peppard v. Romburgh*, 12th June, 1900.

101. *Dangerous machinery — Railway — Sparks from engine — Evidence—Findings of jury—Defective construction.*—Fire was discovered on J.'s farm a short time after a train of the Grand Trunk Railway had passed it drawn by two engines one having a long, and the other a short, or medium, smoke-box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a larger smoke box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine and they believed it from that with the short smoke-box; and that the use of said box constituted negligence in the company which had not taken the proper means to prevent emission of sparks. *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 689), that the latter finding was not justified by the evidence and the verdict for plaintiff at the trial was properly set aside. *Jackson v. Grand Trunk Ry. Co.*, xxxii., 245.

102. *Findings of fact—Machinery in mine—Defective construction — Proximate cause of injury—Fault of fellow-workman—Defective ways, works and machinery—Disturbing verdict on appeal.*—An elevator cage was used in defendant's mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable which ran over a sheave wheel at the top of the shaft, and, to prevent accidents, guide rails were placed along the elevator shaft and the cage was fitted with automatic dogs or safety clutches intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point twenty feet below the sheave wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave wheel with such force that the cable broke and the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred foot level and injured the plaintiff who was engaged at the work for which he was employed by the defendants about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the immediate cause of the injury was "the non-continuance of the guide-rails" which, in their opinion, "caused the safety-clutches to fall in their action, and therefore allowed the cage to fall." *Held*, reversing the judgment appealed from (9 B. C. Rep. 62), that the verdict rendered in favour of the plaintiff ought not to have been disregarded as there was sufficient evidence to support the finding of fact by the jury. *McKelvey v. Le Roi Mining Co.*, xxxii., 364.

Leave to appeal refused by the Privy Council, 11th February, 1903.

103. *Damage by fire—Spark arrester—Misdirection.*—In a case where the main issue was as to the sufficiency of a spark-arrester in a steam engine used in running a hay-press, the trial judge directed the jury that "if there was no spark-arrester in the engine that in itself would be negligence for which the defendants would be liable."—*Held*, affirming the judgment appealed from (23 N. S. Rep. 776), *Strong, J.*, dissenting, that it was mis-

direction to tell the jury that the want of a spark-arrester was, in point of law, negligence. *Peers v. Elliott*, xxi., 19.

AND see NEW TRIAL 76.

104. *Employer's liability—Defective use of machinery—Notice — Injury to workman.*—Employers are no less responsible for the injuries occasioned by the defective system of using their machinery than they would have been for a defect in the machinery itself.—There being no Employers' Liability Act in force in British Columbia when the injury in question happened, plaintiff was not precluded from obtaining compensation by failure to give notice of the defects to his employers. *Webster v. Foley*, xxi., 580.

AND see MASTER AND SERVANT, 32.

105. *Absence of buffers on tramcars—Workman's Compensation Act.*—The absence of proper buffers on a tramcar is actionable negligence. *The Toronto Ry. Co. v. Bond*, xxiv., 715.

106. *Collision at sea — Steamship—Defective steering apparatus—Question of fact.*

See APPEAL, 226.

107. *Defective snow plough and bridge—Findings of jury—Contributory negligence—Answers to questions—Railway company—Act of incorporation—Change of name.*

See No. 213, *infra*.

108. *Insecure tackle—Warning of danger—Cause of injury.*

See No. 88, *ante*.

109. *Militia class-firing — Government rifle range—Officers and servants of the Crown—Injury to the person.*

See MILITARY LAW; MILITIA, 2.

110. *Sawmill—Injury to workman—Opening in floor—Fencing—Appeal—Findings at trial—Contributory negligence.*

See No. 89, *ante*.

111. *Evidence to support verdict—Findings of fact—Practice—Defective works, ways and machinery — Proximate cause of injury — Fault of fellow-workman—Mining regulations.*

See No. 93, *ante*.

112. *Operation of railway — Defective machinery—Contributory negligence—Examining train—Running rules.*

See No. 54, *ante*.

10. DRAINAGE.

113. *Drainage—Adjoining municipalities—Defective scheme—Tortfeasors.*—A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.—Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construc-

tion, as tortfeasors, but are liable under s. 591, Municipal Act, for damage done in construction of the work or consequent thereon. (20 Ont. App. R. 225, varied.) *Township of Ellice v. Hûes*; *Township of Ellice v. Crooks*, *xxiii.*, 429.

114. *Repair of drains — Duty of municipality—R. S. O. (1887) c. 184—Right of action—Land injuriously affected—Arbitration—Mandamus.*

See DRAINAGE, 2.

115. *Uncompleted drains—Flooding land—Mandamus—Municipal works.*

See DRAINAGE, 3.

11. EMPLOYERS' LIABILITY.

116. *Passenger elevator—Negligence of employees — Assessment of damages — Art. 1054 C. C.—Vindictive damages — Cross-appeal—Relief for respondent.]—On 13th April, 1883, C., an architect who had his office on the third flat of a building in which the landlord had placed an elevator for the use of tenants, desiring to go to his office, went towards the door admitting to the elevator, and seeing it open entered, but the elevator not being there he fell into the cellar and was seriously injured. In an action against the landlord, claiming damages, it was proved that the boy in charge at the time of the accident, had left the elevator with the door open to go to his lunch, leaving no substitute in charge. It was shewn also that C. had suffered seriously from a fracture of the skull, had been obliged to follow for many months an expensive medical treatment and had become almost incapacitated for the exercise of his profession. C. had been in the habit of using the elevator during the absence of the boy. The trial judge awarded \$5,000 damages, which, on appeal, was reduced to \$3,000 on the ground that C. was not entitled to vindictive damages. *Held*, affirming the judgment appealed from (M. L. R. 3 Q. B. 270), that the landlord was liable for the fault, negligence and carelessness of his employee, and that the amount awarded was not unreasonable. *Held*, also, that the sum of \$5,000 awarded by the Superior Court was not an unreasonable amount and could not be said to include vindictive damages, but as no cross-appeal had been taken the judgment of the Superior Court could not be restored. *Stephens v. Chaussé*, *xv.*, 379.*

117. *Loading of steamer — Accident—Evidence—Neglect of usual precaution—Liability of employer.]—When two stevedores are independently engaged in loading the same steamer, and, owing to the negligence of the employees of the one, an employee of the other is injured, the former stevedore is liable in damages for such injury. — The failure to observe a precaution usually taken in and about such work is evidence of negligence. Judgment appealed from (Q. R. 1 Q. B. 234) affirmed, Gwynne, J., dissenting. *Brown v. Leclerc*, *xxii.*, 53.*

118. *Negligence of Crown servants — Common employment.]—The doctrine of common employment does not prevail in the Province of Quebec. (4 Ex. C. R. 134, affirmed.) *The Queen v. Filion*, *xxiv.*, 482.*

Followed in *The Asbestos and Asbestic Co. v. Durand* (30 Can. S. C. R. 285), and in *The Queen v. Grenier* (30 Can. S. C. R. 42).

119. *Negligence of servant—Deviation from employment—Resumption.]—A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so he ran over and injured a child. *Held*, affirming the decision appealed from (33 N. B. Rep. 91), that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to the master's store and made a fresh start. *Merritt v. Hepenstal*, *xxv.*, 150.*

120. *Master and servant — Injuries sustained by servant — Responsibility—Contributory negligence—Protection of machinery.]—Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shewn that the accident by which the injuries were caused was directly due to his neglect. (Q. R. 9 S. C. 506, reversed.) *Tooke v. Bergeron*, *xxvii.*, 567.*

121. *Master and servant — Employer's liability—Concurrent findings of fact—Contributory negligence — Reasonable precautions.]—In an action by an employee for injuries sustained there was some evidence of neglect on the part of the employers which, in the opinion of both courts below, might have been the cause of the accident through which the injuries were sustained, and both courts found that the accident was due to the fault of the defendants either in neglecting to cover a dangerous part of a revolving shaft temporarily with boards or to disconnect the shaft or stop the whole machinery while the plaintiff was required to work over or near the shaft. *Held*, Taschereau, J., dissenting, that although the evidence on which the courts below based their findings of fact might appear weak, and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the Supreme Court of Canada would not, on appeal, reverse such concurrent findings of fact. *George Matthews Co. v. Bouchard*, *xxviii.*, 580.*

Followed in *Dominion Cartridge Co. v. McArthur* (31 Can. S. C. R. 392). See No. 144, *infra*.

122. *Municipal corporation — Obstruction on highway — Necessary proof — Statutory officer — Ratepayer — Statute labour.]—In an action against a municipal corporation for damages in consequence of a carriage having been upset by running against a pile of sand left on the highway, and one of the occupants thrown out and seriously injured, there was no direct evidence as to how the obstruction came to be placed on the highway, but it appeared that statute labour had been performed at the place of the accident immediately before under the direction of the pathmaster, an officer appointed by the corporation under statutory authority. The evidence indicated that the sand was left on the road by a labourer working under directions from the pathmaster or by a ratepayer engaged in the performance of statute labour. *Held*, affirming the judgment appealed from, that the action must fail for want of evidence that the injury was caused by some person for whose acts the municipal corporation was responsible.—*Per Strong, C.J. Quere*, Is the corporation liable for the acts of a statutory officer like the pathmaster, or of a ratepayer*

in performance of statute labour? *McGregor v. Township of Harwich*, xxix., 443.

123. *Master and servant — Hiring of servant by third party — Control over service.*]—The defendant hired by the day the general servant and horse and waggon of another company for use in its business, and while so hired the servant in carrying a load of glass knocked a man down and seriously injured him.—*Held*, reversing the judgment appealed from (26 Ont. App. R. 63), that the defendant was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired and not that of the defendant. *Consolidated Plate Glass Co. v. Caston*, xxix., 624.

124. *Negligence — Personal injuries — Drains and sewers — Liability of municipality — Officers and employees of municipal corporation*—59 Vict. c. 55, s. 26, s.s. 18 (Que.)]—The Act incorporating the Town of St. Louis, Que., gives power to the council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connection at their own cost, under the superintendence of an officer appointed by the corporation." *Held*, affirming the judgment appealed from (Q. R. 11 K. B. 117), that the municipality cannot be held liable for damages caused through the acts of the person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control. *Dallas v. Town of St. Louis*, xxxii., 120.

125. *Negligence — Vis major — Driving timber — Servitude — Watercourses — Floatable rivers — Statutory duty* — 53 Vict. c. 37 (Que.) — *Riparian rights.*]—The Rouge River, in the Province of Quebec, is floatable but not navigable, and is used by lumbermen for bringing down sawlogs to booms in which the logs are collected at the mouth of the river and distributed among the owners. The plaintiffs constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river did not place men at the bridge to protect it during the drive and took no precaution to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The River Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back by the jam and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen jointly and severally, *Held*, affirming the judgment appealed from, the Chief Justice and Sedgewick, J., dissenting, that, irrespectively of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused. *Ward v. Township of Grenville*, xxxii., 510.

126. *Withdrawal of case from jury — Evidence — Reasonable care — New trial — Questions for the jury.*

See EVIDENCE, 163.

127. *Government railway — Improper conduct of servant — Liability of Crown.*

See No. 206, *infra*.

128. *Lease of tolls — Negligence of toll collector — Liability of turnpike company.*

See No. 187, *infra*.

129. *Dangerous way — Imprudence — Contributory negligence.*

See No. 87, *ante*.

130. "Quebec Factories Act" — *Police regulations — Evidence — Unknown cause of accident — Breach of duty.*

See No. 16, *ante*.

131. *Use of dangerous material — Regulations of cartridge factory — Reasonable precautions — Accidental injury — Causa causans.*

See No. 18, *ante*.

132. *Neglect to insulate electric wires — Employer's liability — Causa causans.*

See No. 80, *ante*.

133. *Common fault — Division of damages — Risk voluntarily incurred.*

See No. 47, *ante*.

134. *Intercolonial Railway Relief and Assurance Association — Contribution from public funds — Exonerated from liability for injuries to employees.*

See No. 219, *infra*.

135. *Persons in charge of electric car — Motorman — Injury to conductor — Workmen's Compensation Act.*

See EMPLOYER AND EMPLOYEE, 1.

136. *Police constable — Negligent performance of duty — Liability of corporation.*

See MUNICIPAL CORPORATION, 66.

137. *Negligence of Crown officials — Public work — Right of action — Liability of Crown — Jurisdiction of Exchequer Court — Prescription.*

See No. 201, *infra*.

12. EVIDENCE.

138. *Evidence of negligence — Failure to observe ordinary precaution.*]—Failure to observe a precaution usually taken in the loading of ships by stevedores is evidence of negligence.—(Q. R. 1 Q. B. 234, affirmed.) *Brown v. Leclerc*, xxii., 53.

139. *Infant — Imprudence.*]—Action by next friend to infant for injuries sustained by his son from a portable mirror falling upon him when with her in defendants' shop. The trial judge found that there was no evidence of negligence by defendants to be submitted to the jury and dismissed the action. The Divisional Court reversed his decision and ordered a new trial (25 O. R. 78), and its

judgment was affirmed by the judgment appealed from (21 Ont. App. R. 264).—The Supreme Court of Canada affirmed the judgment appealed from and dismissed the appeal with costs. *T. Eaton Co. v. Sangster*, xxiv., 708.

140. *Landlord and tenant — Loss by fire — Cause of fire — Civil responsibility — Legal presumption — Onus of proof — Hazardous occupation — Arts. 1053, 1064, 1071, 1626, 1627, 1629 C. C.*—To rebut the presumption created by art. 1629 C. C. it is not necessary for the lessee to prove the exact origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he had used the premises leased as a prudent administrator (*en bon père de famille*) and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible.—Judgment appealed from (Q. R. 5 Q. B. 88), affirmed, Strong, C.J., dissenting. *Murphy v. Labbé*, xxvii., 126.

Followed in *Klock v. Lindsay* (28 Can. S. C. R. 453). See No. 142, *infra*.

141. *Master and servant — Common fault — Assignment of facts — Arts. 353 & 414 C. P.—Art. 427 C. P. Q.—Inconsistent findings — Misdirection — New trial — Pleading.*—In an action for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to shew the breach of a duty owed him by, and inconsistent with due diligence on the part of the defendant, and that the injuries were thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained, and a new trial should be granted.—Judgment appealed from (Q. R. 6 Q. B. 534) reversed. *Cowans v. Marshall*, xxviii., 161.

142. *Landlord and tenant — Loss by fire—Negligence — Legal presumption — Onus of proof—Construction of agreement—Covenant to return premises in good order — Art. 1629 C. C.*—A steam sawmill was totally destroyed by fire during the term of the lease, whilst in possession of and occupied by the lessees. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as could be expected considering the wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to shew that necessary and usual precautions had been taken for the safety of the premises, a night watchman kept there making regular rounds, that buckets filled with water were kept ready and force-pumps provided for use in the event of fire, and they submitted that, as the origin of the fire was mysterious and unknown, it should be assumed to have occurred through natural and fortuitous causes for which they were not responsible. It appeared, however, that the night watchman had been absent from the part of the mill where the fire was first discovered for a much longer time than was necessary or usual for the making of his rounds, that during his absence the furnaces were left burning without superintendence, that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the

fire was actually discovered, and that, on discovering the fire, the watchman failed to make use of the water buckets to quench the incipient flames, but lost time in an attempt to raise additional steam pressure to start the force-pumps before giving the alarm. *Held*, affirming the judgment appealed from (Q. R. 7 Q. B. 9), that the lessees had not shewn any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by 1629 C. C., against the lessees, had not been rebutted, and that the evidence shewed culpable negligence on the part of the lessees which rendered them civilly responsible for the loss by fire of the leased premises.—*Murphy v. Labbé* (27 Can. S. C. R. 126) approved and followed. *Klock v. Lindsay*; *Lindsay v. Klock*, xxviii., 453.

See No. 140, *ante*.

143. *Lease — Hire of tug — Conditions—Repairs — Compensation — Presumption of fault — Measure of damages.*—The company chartered the tug "Beaver" from K., by written contract dated at Quebec, 22nd May, 1895, by which it was agreed that K. should charter the tug "Beaver" for not less than one month from date, at \$45 per day of 24 hours. If kept longer than one month the rate to be \$40 per day. K. to furnish tug, crew, provisions, oil, &c., and everything necessary except coal and pilots above Montreal. The tug to leave next morning's tide and to be discharged in Quebec. The company took possession of the tug, put her in charge of their pilot (who assumed the control, employment and navigation of the vessel), and used the tug for their purposes until 8th July, 1895, when, while still in their possession, the pilot took her, in the daytime, into waters at the foot of the Cornwall Rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sank. She was raised a few days afterwards, towed to port and placed in dock for repairs at Montreal. The orders were to make the necessary repairs, to put the vessel in the same condition as she was immediately before the accident, and on 30th July, K. was notified that the repairs were completed, that the tug would be put out of dock the following day and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased, and requested the company to join in a survey, which, however, they declined to do. The survey was made by a naval architect, who reported that, in addition to the repairs already made it would cost \$2,494.90 to restore the vessel to the same condition as when leased to the company. On 1st August K. took possession of the tug, under protest and brought the action for the amount of this estimate in addition to the rent accrued with fees for survey and protest. The company admitted the rent due and tendered that portion of the claim into court. The Superior Court rendered judgment for the amount of tender, dismissing the action as to the remainder of the claim on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Court of Review and the Queen's Bench increased the verdict to the full sum claimed, \$4,909.90, by adding the amount of the surveyor's estimate and the fees. *Held*, affirming the judgment appealed from, *Sedgewick and Girouard, JJ.*, dissenting, that the contract between the parties was a contract of

lease; that the taking of the vessel, in the daytime, into the waters where she struck was *prima facie* evidence of negligence on the part of the company, and that as the company did not adduce evidence sufficient to rebut the presumption of fault existing against them they were responsible under the Civil Code for the damages caused to the vessel during the time she was controlled and used by them. *Held*, further, that the proper estimate of damages under the circumstances was the cost of repairs which should be assumed to be the measure of depreciation in value occasioned by the accident, and that no substantial error arose from regarding the condition and value of the vessel at the commencement of the lease as that in which she ought to have been discharged.—Girouard, J., was of opinion that the Superior Court judgment should be restored. *Collins Bay Rafting and Forwarding Co. v. Kaine*, xxix., 247.

144. *Use of dangerous materials — Proximate cause of accident—Injuries to workman—Employer's liability—Presumptions — Findings of jury sustained by courts below.*—As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence, which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff, not assented to by the trial judge, have been sustained by two courts below. Taschereau, J., dissented, taking a different view of the evidence and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co. v. Bourchard* (28 S. C. R. 580), and *The Metropolitan Railway Co. v. Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal. *The Asbestos and Asbestic Co. v. Durand* (30 S. C. R. 285) discussed and approved. *Dominion Cartridge Co. v. McArthur*, xxxi., 392.

Leave to appeal to Privy Council granted, 2nd August, 1902.

145. *Cause of accident — Conjecture—Onus of proof—Breach of duty—Police regulations.*

See No. 16, *ante*.

146. *Negligence of fellow-servant — Defective machine — Evidence for jury.*

See No. 97, *ante*.

147. *Precautions in case of dangerous material — Probable cause of accident — Employer's liability.*

See No. 18, *ante*.

148. *Concurrent findings of fact — Neglect of reasonable precautions — Imprudence of servant—Employer's liability.*

See No. 121, *ante*.

149. *Neglect of reasonable precautions — Presumption of fault — Contributory negligence — Findings of jury.*

See No. 81, *ante*.

150. *Damages — Improper evidence—Misdirection.*

See NEW TRIALS, 80.

151. *Railway crossings — Necessary precautions — Shunting cars — Evidence of negligence.*

See No. 221, *infra*.

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13. LACHES.

152. *Action in warranty — Joint speculation — Partnership or ownership par indivis.*—W. and D. entered into a joint speculation of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his own undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the money received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheque drawn in a similar way. M. N. D., who looked after the business for the representatives of D., paid diligent attention to the interests confided to him and received their share of such profits, but J. B. C., who acted in the W. interest, so negligently looked after the business as to enable the book keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to force the representatives of D. to bear a share of such losses: *Held*, affirming the judgment appealed from, that the facts did not establish a partnership between the parties, but a mere ownership *par indivis*. that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them.—Even if a partnership existed, there would be none in the moneys paid over to the parties after a division made. *Archbald v. deLisle*; *Baker v. deLisle*; *Mowat v. deLisle*, xxv., 1.

153. *Principal and agent — Negligence of agent — Lending money for principal — Financial brokers — Liability for loss — Measure of damages.*—Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest though their remuneration may come from the borrower.—An agent who invests money for his principal

without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby. —The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land.—Judgment appealed from (3 B. C. Rep. 416) varied, *Taschereau and Gwynne, J.J.*, dissenting. *Lowenburg v. Wolley*, xxv., 51.

154. *Marked cheque — Fraudulent alteration — Payment by mistake.*—There is no duty imposed upon persons in dealings with others to take precautions to prevent loss to the latter by the criminal acts of third persons, and the omission to do so is not, in itself, negligence in law.—Judgment appealed from (27 Ont. App. R. 590) affirmed. *Imperial Bank of Canada v. Bank of Hamilton*, xxxi., 344.

Affirmed on appeal by the Privy Council, [1903] A. C. 49.

AND see BANKS AND BANKING, 11.

155. *Solicitor and client — Breach of duty — Misconduct — Advice given to client.*—A solicitor advising his client according to the established jurisprudence of the court in which proceedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the advice may be subsequently overruled. *Taylor v. Robertson*, xxxi., 615.

156. *Failure to register judgment—Retainer—Instructions.*

See SOLICITOR, 3.

157. *Mandate — Administration through agent—Misappropriation.*

See TRUSTS, 9.

158. *Crown — Suretyship — Postmaster's bond — Penal clause — Lex loci contractus—Negligence — Laches of Crown officials — Release of sureties—Arts. 1053, 1054, 1131, 1135, 1927, 1929, 1265 C. C.*

See SURETYSHIP, 9.

159. *Application for insurance — Delay in delivery of policy — Escrow—Conversion.*

See INSURANCE, MARINE, 21.

160. *Omission in mortgage — Neglect to register—Laches—Findings of trial judge.*

See SOLICITOR, 8.

161. *Chattel mortgage—Mortgagee in possession — Wilful default — Sale under powers—"Slaughter sale" — Practice — Assignment for benefit of creditors — Revocation of.*

See SALE, 40.

162. *Drainage — Intermunicipal works — Damages — Extra cost — Misapplication of funds — Repairs — Assessment — R. S. O. (1877) c. 174—46 Vict. c. 18 (Ont.)*

See MUNICIPAL CORPORATION, 92.

163. *Warehouseman — Taking damp grain into elevator — Damages — New trial — Responsibility.*

See WAREHOUSEMAN, 3.

14. LANDLORD AND TENANT.

164. *Dangerous manufacture—Loss by fire —Arts. 1054, 1627, 1629 C. C.*

See LANDLORD AND TENANT, 16.

165. *Loss of leased premises by fire—Presumption of negligence — Art. 1629 C. C.—Onus of proof.*

See No. 140, ante.

166. *Loss of leased premises — Presumption of fault—Art. 1629 C. C.—Evidence in rebuttal—Probable cause of fire.*

See No. 142, ante.

15. LORD CAMPBELL'S ACT.

167. *Injuries caused by careless navigation —Action in rem—Lord Campbell's Act.*

See ACTION, 42.

168. *Bodily injuries — Prescription of deceased's right of action—Claim by representatives — Pleading.*

See LORD CAMPBELL'S ACT, 1.

169. *Action for personal injuries — Death of plaintiff — Subsequent action under Lord Campbell's Act — Evidence.*

See EVIDENCE, 19.

170. *Enactment of art. 1056 C. C.—Actions under Lord Campbell's Act.*

See No. 219, infra.

16. NAVIGATION.

171. *Death of servant — Lord Campbell's Act—Jurisdiction of Maritime Court of Ontario—Right of action.*

See ACTION, 42.

172. *Collision — Action — Joinder of defendants — Company — Limited liability — Merchant Shipping Amendment Act, 1862 (Imp.) — Navigation of Canadian waters, 31 Vict. c. 58, s. 12 (D.)—Motion for judgment—Findings of jury—Weight of evidence —Practice.*

See NAVIGATION, 2.

173. *Answering signals — Inland navigation — Agony of collision.*

See SHIPPING, 3.

174. *Collision — Vessel lying in narrow channel — Lights — Crew.*

See SHIPPING, 4.

175. *Obstructing navigation — Repairs to bridge — Powers conferred by charter.*

See RIVERS AND STREAMS, 2.

176. *Defective steering apparatus — Collision at sea — Question of fact.*

See APPEAL, 226.

177. *Collision — Rule of the road—Steamer —Sailing vessel.*

See ADMIRALTY LAW, 1.

178. *Maritime law — Collision — Rules of the road — Narrow channel — Navigation, rules of—R. S. C. c. 79, s. 1, Arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" ships — "Meeting" ships — "Passing" ships — Breach of rules — Moiety of damages — 36 & 37 Vict. (Imp.) c. 85, s. 17 — Manœuvres in "agony of collision."*

See ADMIRALTY LAW, 2.

179. *Hire of tug—Conditions—Repairs — Negligence—Compensation.*

See LEASE, 10.

180. *Public work — Navigation of River St. Lawrence —Repair of ship channel — Expenditure of parliamentary appropriation.*

See PUBLIC WORK, 11.

181. *Admiralty law — Collision — Ship at anchor — Anchor light — Lookout — Weight of evidence — Credibility — Findings of trial judge.*

See SHIPPING, 11.

182. *Admiralty law — Collision — Undue speed — Ship in default — Rule 16 — Navigation during fog.*

See SHIPPING, 12.

17. NOTICE OF ACTION.

183. *Highways — Repairs — Notice of action — Pleading.*

See MUNICIPAL CORPORATION, 141.

184. *Negligence of municipal corporation—Snow and ice on sidewalks—Notice of action —Discretion of trial judge.*

See No. 191, *infra*.

18. PUBLIC WAYS.

185. *Municipal corporation — Highway—Crossings — Level of street.] — A municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and shewing that a sidewalk is at a level of four inches above the level of the crossing is not such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger sustained by striking her foot against the curbing while attempting to cross the street. Judgment appealed from (23 C. L. J. 294; 11 O. R. 26) reversed; Strong and Fournier, JJ., dissenting. City of London v. Goldsmith, xvi., 231.*

186. *Highways—Alteration of level of street — Powers of municipality — Contributory negligence.]—W. owned and occupied a house situate several feet from a street and with steps in front. In altering the street level the corporation cut it down and removed the steps, leaving the house about six feet above the highway. W.'s wife, in going down planks placed by him to get down to the new level, slipped and fell, receiving injuries. Held, affirming the judgment appealed from (29 N. B. Rep. 1), that the corporation had authority to do the work and as it was not shewn to have been negligently or improperly done, the city was not liable. Held, also, that the wife was guilty of contributory negligence in using the planks as she did, knowing that such use was*

dangerous. *Williams v. City of Portland*, xix., 159.

187. *Toll-gate — Obstruction of highway—Volunteer — Contributory negligence—Invitation to use dangerous way—Liability of road company—Collector of tolls—Lessee.]—A toll-house extended to the edge of a highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was usually carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell sustaining injuries.—The toll collector was made a defendant but did not enter a defence. It was shewn that he had made an agreement with the company to pay a fixed sum for the privilege of collecting tolls for the year, and was not to account for the receipts. The company claimed that he was lessee of the tolls, and that they were not responsible for his acts. The jury found, however, that in using the chain to fasten the gate as he did he was only following the practice that had existed for some years previously, and doing as he had been directed by the company. The statute under which the company was incorporated contains no express authority for leasing the tolls, but uses the term "renter" in one section, and in another speaks of a "lease or contract" for collecting the tolls.—The company claimed, also, that C. had no right to use the board walk in walking along the highway, and that the fact of her being there was contributory negligence on her part which relieved them from liability for the accident. Held, affirming the judgment appealed from (18 Ont. App. R. 286), Gwynne, J., dissenting, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls, the company, under the finding of the jury, was liable for his acts. *Kingston & Bath Road Co. v. Campbell*, xx., 605.*

188. *Public streets — Municipal corporation —Repairs New trial—Evidence — Verdict.]—The proprietor of an omnibus line ran coaches through some of the principal streets of Halifax under license from the corporation. Owing to the want of repair on some of the streets, and the accumulation of snow and ice, the conveyances could not be run according to time table, and there was a falling off in the number of passengers; moreover, some of the horses were injured and vehicles broken or damaged by the rough state of the streets. Held, Ritchie, C.J., dissenting, that it was the duty of the corporation to keep the streets in good repair; and Gwynne, J., dissenting, that the plaintiff was entitled to retain his verdict, as he had proved special injury, and as the damages awarded were not too remote nor excessive. Judgment appealed from (4 R. & G. 371) affirmed. *City of Halifax v. Walker*, Cass. Dig. (2 ed.) 175.*

189. *Defective state of public bridge—Liability of municipality—Damages—New trial—Misdirection — Practice — Case reserved — Questions of law and fact—Drawing inferences.]—Action for damages for injury from falling over a bridge which was, at the time, very much out of repair, about twenty feet of the railing on one side having fallen*

away. One of the standing committees of the municipal council was a committee on roads and bridges, whose duty was to report to regular meetings of council the state of the roads and bridges in the county. There was no evidence as to whether or not the bridge was much used as a thoroughfare or otherwise—The only question submitted to the jury was as to amount of damages. The judge charged "that the accident which had occurred to plaintiff was a most disastrous one, resulting from the undoubted negligence of those on whom the duty lay of keeping the bridge in a safe condition, and that the liability of defendant was a matter of law which he would reserve for the full court."—The jury found for plaintiff for \$3,000, and defendant failed to obtain a new trial on grounds which did not include misdirection. The court below was equally divided, Rigby and Weatherbe, JJ., being of opinion that defendant's counsel had agreed in the view propounded by the judge at the trial, and had requested the court to determine the question of law first, as if the issue of negligence had been found against defendant, upon sufficient evidence and under a proper charge, considered the case disposed of by *Walker v. City of Halifax* (Cass. Dig. (2 ed.) 175; No. 188, ante) and *McQuarry v. Municipality of St. Mary's* (5 R. & G. 493.) On the other hand, McDonald, C.J., and Tompson, J., held that the reservation at the trial was a reservation for the opinion of the court of a mixed question of law and fact, and they not only doubted their power to draw inferences of fact at all, but were unable to draw the inference of negligence, the evidence being silent on material points, such as whether or not the bridge was much or little travelled, and whether or not the alleged defect ever came to the knowledge of the county officers. *Held*, affirming the judgment appealed from (6 R. & G. 549), Strong, J., dissenting, that the plaintiff was entitled to retain his verdict.—*Per Strong, J.*, dissenting, that there was not sufficient evidence of negligence to warrant the verdict, and the case reserved for the court being on questions of fact as well as of law, a new trial might have been ordered, notwithstanding that the objection was not taken either at the trial or in the rule nisi. *Municipality of Colchester v. Watson*, Cass. Dig. (2 ed.) 175.

190. *Municipal corporation — Repair of street—Accumulation of ice—Defective sidewalk.*—[In an action for injuries sustained through the plaintiff falling on a sidewalk where ice had formed and been allowed to remain for a length of time: *Held*, affirming the judgment appealed from (21 Ont. App. R. 279.) Gwynne, J., dissenting, that as the evidence at the trial of the action showed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it whereby the ice causing the accident was formed, the corporation was liable. *Held*, *per Taschereau, J.* Allowing the ice to form and remain on the street was a breach of the statutory duty to keep streets in repair in consequence of which the corporation was liable. *Town of Cornwall v. Derochie*, xxiv., 301.

Followed in *City of Kingston v. Drennan* (27 Can. S. C. R. 46) No. 191, *infra*.

191. *Municipal corporation—Snow and ice on sidewalks—By-law—Construction of statute—55 Vict. c. 42, s. 531—57 Vict. c. 50, s. 13—Finding of jury—Gross negligence—*

Notice of action—Discretion of trial judge.—[A by-law required frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action for damages against the city and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow or ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence. *Held*, affirming the decision appealed from (23 Ont. App. R. 406), Gwynne, J., dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall v. Derochie* (24 Can. S. C. R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with the notice of action. *City of Kingston v. Drennan*, xxvii., 46.

192. *Highway — Runaway accident—Proximate cause—Telephone pole—Liability of corporation — Action—Third party—Costs.*—[A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident.—In an action against the city corporation for damages in such a case the latter was ordered to pay the costs of the telephone company brought in as third party, it having been shown that the company placed the pole where it was lawfully, and by authority of the corporation. *Bell Telephone Co. v. City of Chatham*, xxxi., 61.

193. *Municipal corporation — Maintenance of streets — Accumulation of snow and ice—Gross negligence—R. S. O. (1897) c. 223, s. 606 (2).*—[About half past ten o'clock on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell, receiving injuries from which he died. His widow sued for damages under Lord Campbell's Act. There had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. Early on the morning of the accident, employees of the city had scattered sand on the crossing but the high wind prevailing at the time had probably blown it away. *Held*, affirming the judgment appealed from (27 Ont. App. R. 401), that the facts were not sufficient to show that the injury to the deceased was caused by "gross negligence" of the corporation within the

meaning of R. S. O. (1897) c. 223, s. 606 (2).
Ince v. City of Toronto, xxi., 323.

194. *Municipal corporation — Negligence—Obstruction on highway.*—Action for damages for injuries caused through alleged negligence of the corporation in permitting a mound of earth about eight inches in height to remain at the filling over a trench dug to lay a pipe across a public street. In passing over the obstruction during the night plaintiff's horse stumbled and fell, throwing the plaintiff from the vehicle, whereby the injuries were sustained. The Supreme Court affirmed the judgment appealed from (33 N. S. Rep. 291) by which the court below had held that there had been no negligence on the part of defendant, that the obstruction was not serious or unusual, and that the accident occurred through the plaintiff's want of proper care in approaching, in the darkness, the dangerous place which he had previously seen in the same condition by daylight. *Messenger v. Town of Bridgetown*, xxi., 379.

195. *Municipal ferry — Manner of mooring—Personal injuries—Corporate liability—Contributory negligence.*

See No. 40, ante.

196. *Lighting of streets — Position of hydrant — Obstruction on sidewalk—Statutory duty.*

See MUNICIPAL CORPORATION, 140.

197. *Obstruction of street—Snow and ice—Finding of jury—Proximate cause.*

See No. 245, infra.

198. *Municipal corporation — Repair of streets—Liability for non-feasance.*

See MUNICIPAL CORPORATION, 143.

199. *Obstruction on highway — Evidence—Statute labour—Corporate liability.*

See No. 122, ante.

19. PUBLIC WORKS.

200. *Crown—Negligence of servants or officers—Common employment—Law of Quebec—50 & 51 Vict. c. 16, s. 16 (c).*—A petition of right was brought by F. to recover damages for the death of his son caused by the negligence of servants of the Crown while engaged in repairing the Lachine Canal. *Held*, affirming the decision appealed from (4 Ex. C. R. 134), Taschereau, J., dissenting, that the Crown was liable under 50 & 51 Vict. c. 16, s. 16 (c); and that it was no answer to the petition to say that the injury was caused by a fellow-servant of the deceased, the case being governed by the law of Quebec, in which the doctrine of common employment has no place. *The Queen v. Filion*, xxiv., 482.

Followed in *The Queen v. Grenier* (30 Can. S. C. R. 42), and in *The Asbestos and Asbestos Co. v. Durand* (30 Can. S. C. R. 285), on the holding as to the doctrine of common employment. See Nos. 30 and 31, ante. Approved in *Letourneau v. The King* (33 Can. S. C. R. 335), No. 201, infra.

201. *Public work—Negligence of Crown of officials—Right of action—Liability of Crown—50 & 51 Vict. c. 16, ss. 16, 23, 58—Jurisdiction*

of the Exchequer Court — Prescription—Art. 2261 C. C.—Lands in the vicinity of the Lachine Canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it. *Held*, reversing the judgment appealed from (7 Ex. C. R. 1), Davies, J. (dissenting), that the owner had a right of action and was entitled to recover damages for the injuries sustained and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisions of ss. 16, 23 and 58 of the Exchequer Court Act. *The Queen v. Filion* (24 Can. S. C. R. 482) approved; *The City of Quebec v. The Queen* (24 Can. S. C. R. 430) referred to.—The prescription established by art. 2261 of the Civil Code of Lower Canada applies to the damages claimed by appellant in his petition of right. *Letourneau v. The King*, xxxiii., 335.

202. *Servants of the Crown—Injury to property on public work—Liability of Crown for tort—50 & 51 Vict. c. 16 (D.)—50 & 51 Vict. c. 16, ss. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort (Taschereau, J., expressing no opinion on this point).*—By 50 & 51 Vict. c. 16, s. 16 (D.), the Exchequer Court is given jurisdiction to hear and determine *inter alia*: "(c) Every claim against the Crown arising out of any death or injury to the person, or to the property, on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment; (d) Every claim against the Crown arising under any law of Canada." In 1877 the Dominion Government became possessed of the property in the City of Quebec, on which the Citadel is situated. Many years before that a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the city engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth, until, in 1889, a large portion of the rock fell from the cliff into a street of the city below, causing great damage, for which compensation was claimed from the Government.—*Held*, per Taschereau, Gwynne and King, J.J., affirming the decision of the Exchequer Court, that as the injury to the property of the city did not occur upon a public work, s.-s. (c) of s. 16 of the above Act did not make the Crown liable, and, moreover, there was no evidence that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.—*Held*, per Strong, C.J., and Fournier, J., that while s.-s. (c) of s. 16 of the Act did not apply to the case, the city was entitled to relief under s.-s. (d); that the words "any claim against the Crown" in that sub-section, without the additional words, would include a claim for a tort; that the added words "arising under any law of Canada," do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any province of Can-

ada, and even if the meaning be restricted to the statute law of the Dominion, the effect of s. 58 of 50 & 51 Vict. c. 16 is to reinstate the provision contained in s. 6 of the repealed Act, R. S. C. c. 40, which gives a remedy for injury to property in a case like the present; that this case should be decided according to the law of Quebec, regulating the rights and duties of proprietors of land situated on different levels; and that under such law the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair, and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain.—*Held*, also, *per* Strong, C.J., and Fournier, J., that, independently of the enlarged jurisdiction conferred by 50 & 51 Vict. c. 16, the Crown would be liable to damages for the injury complained of, not as for tort but for a breach of its duty as owner of the superior heritage, by altering its natural state to the injury of the inferior proprietor. *City of Quebec v. The Queen*, xxiv., 420.

203. *Public work—Navigation of River St. Lawrence—Repair of ship channel—Expenditure of Parliamentary appropriation.*—Action for damages to SS. "Arabia" sustained by striking an obstruction in the River St. Lawrence ship channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear, and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150) held that the channel was not a public work after the work of deepening was completed, and, even if it was, no negligence had been proved to make the Crown liable under s. 16 (c) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by Parliament for that purpose was not obliged to expend the appropriation as such matters were within the discretion of the Governor-in-Council and Minister, who were responsible only to Parliament in respect thereof.—The Supreme Court affirmed the judgment appealed from. *Hamburg American Packet Co. v. The King*, xxxiii., 252.

(Leave to appeal to the Privy Council was granted, July, 1903.)

20. RAILWAYS.

204. *Railways—Running of trains—Sparks from engine—Fire communicated from premises of company.*—14 Geo. III. c. 78, s. 86—*Questions for jury.*—Action against the company for negligence causing destruction of respondent's buildings by fire from one of their locomotives. The freight shed of the company was first ignited by the sparks and the fire extended to respondent's premises. The following questions were submitted and answers given by the jury:—"Q. Was the fire occasioned by sparks from the locomotive? A. Yes. Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes. Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty. Q. Was the smoke stack furnished

with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A. Out of order."—Verdict for plaintiff for \$800 was unanimously sustained by the Queen's Bench Division. *Held*, affirming the judgment appealed from, Henry, J., dissenting, 1. That the questions were proper questions to put to the jury and that there was sufficient evidence of negligence on the part of the appellants' servant to sustain the finding. 2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused by the burning of property of the railway company, ignited by fire escaping from the engine, coming directly in contact therewith. 3. The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6 & 7, is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act, 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence. *Canada Southern Ry. Co. v. Phelps*, xiv., 132.

205. *Operation of railway—Sidings—Notice of train approaching—Horses taking fright—Ringling of bell, &c.*—There is no duty upon a railway company to give notice of the approach of trains at sidings where there is no station or highway crossing by ringing a bell or sounding the whistle, nor to take any special precautions in approaching or passing such a siding.—Judgment appealed from (27 N. B. Rep. 59) reversed. *New Brunswick Ry. Co. v. Vanwart*, xvii., 35.

206. *Government railway—Public work—Improper conduct of servant—Prescription.*—Arts. 2262, 2267, 2188, 2211 C. C.—44 Vict. c. 25—R. S. C. c. 38—50 & 51 Vict. c. 16, s. 18—*Retroactive legislation.*—*Held*, reversing the Exchequer Court (2 Ex. C. R. 328), that even assuming 50 & 51 Vict. c. 16, gives an action against the Crown for injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expressed no opinion), the Act is not retroactive in effect and gave no right of action for injuries received prior to its passing. *Held*, also, that, even assuming that under the common law of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of having been received more than a year before the filing of the petition, the action was prescribed under arts. 2262 and 2267 C. C.—*Per* Patterson, J. The Crown is made liable for damages caused by the negligence of its servants operating Government railways by 44 Vict. c. 25 (R. S. C. c. 38), but as the petition of right was filed after the passing of 50 & 51 Vict. c. 16, the claimant became subject to the laws relating to prescription in Quebec, and his action was prescribed. *The Queen v. Martin*, xx., 240.

207. *Operation of railway—Construction of crossings—Notice of train approaching—Level of highway.*—Railway companies using a line

of railway constructed so as to cross a highway considerably below its level are liable for injuries caused from thus leaving the highway in a dangerous condition.—Failure to give notice of trains approaching crossings, by ringing a bell, renders the railway company liable for injuries caused through horses taking fright at approaching trains, although the train may not have come in contact with the vehicle or its occupants. *Grand Trunk Ry. Co. v. Sibbald*; *Grand Trunk Ry. Co. v. Tremaine*, xx., 259.

208. *Government railway* — 43 Vict. c. 8.—*Damage from overflow of water* — *Boundary ditches*.] — *Held*, affirming the judgment appealed from (2 Ex. C. R. 396), that under 43 Vict. c. 8, confirming the agreement of sale to the Crown of the Rivière du Loup branch of the Grand Trunk Railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879, unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear, by the evidence relied on, to have been caused through the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed. *Morin v. The Queen*, xx., 515.

209. *Intercolonial Railway* — *Duty of conductor* — *Running of trains* — "All aboard" — *Tacit license* — *Estoppel* — *Boarding moving train* — *Accident to passenger embarking* — *Right of action* — *Contributory negligence*.] — Plaintiff, having a first-class ticket by the Intercolonial Railway, intended going home by the mixed freight and passenger train which, on that day, was unusually long and, when it stopped at the station, the forward part of the first-class car was opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was on the platform when the train came in, but did not then get aboard. The conductor (defendant) got off the train and went to a hotel for dinner. While he was absent the train was, without his knowledge, backed down, so that only the second-class car remained opposite the platform. The jury found that the first-class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after dinner, came over hastily (being behind time and therefore in somewhat of a hurry), called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track), and almost immediately the train started.—The 124th regulation prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which was not done in this instance. Plaintiff and a friend were on the platform, and when they heard "all aboard," went towards the cars quickly, but plaintiff, who had a paper box in her hands, in attempting to get on board, caught the hand-rail of the car, slipped owing to the motion of the train and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board. *Held*, affirming the Supreme Court of New Brunswick (19 N. B. Rep. 340; 19 N. B. Rep. 586), s. c. d.—31

that although the plaintiff's contract was with the Crown, the defendant owed to her, as a passenger, a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury. *Taschereau and Gwynne, JJ.*, dissented.—*Per Ritchie, C.J.* There was no obligation on the part of the passengers to go on board the train until it was ready to start or until invited to do so by the intimation from the conductor "all aboard." It was the duty of the conductor to have had his first-class car up in front of the platform. Should circumstances have prevented this, it was his duty to be careful before starting his train to see that sufficient time and opportunity were afforded passengers to board the car in the inconvenient position in which it was placed, and the evidence shewed that the defendant exercised no care in this respect. — *Per Henry, J.* There was no satisfactory proof of contributory negligence on the part of the plaintiff. The package she carried was a light one, and such as is often carried by passengers with the knowledge and sanction of railway conductors and managers, and a tacit license is therefore given to passengers to carry such parcels with them into the cars.—The plaintiff violated regulations in attempting to get on the car while in motion. But the defendant could not shelter himself under those regulations, for when he gave the order "all aboard" he knew, or ought to have known, that the first-class car was away from the platform, and he ought to have advanced the train and stopped it, so that the plaintiff could have entered that car. The conductor was estopped from complaining that the plaintiff did what, by calling "all aboard," he invited her to do. After the notification "all aboard" is given by a conductor, it is his duty to wait a reasonable time for passengers to get to their places.—*Per Taschereau and Gwynne, JJ.*, dissenting. Whether the omission to stop the first-class car at the platform, or the conductor's failure to wait a reasonable time after calling "all aboard" before giving the starting signal were or were not breaches of the defendant's duty, such breaches could not be said to have caused the accident if the plaintiff had not voluntarily attempted to get on the train while it was in motion, which she was not justified in doing. *Hall v. McFadden*, Cass. Dig. (2 ed.) 723.

210. *Railways* — *Running of trains* — *Signal posts* — "Stop" notice — *Estoppel* — *Unskilful conduct* — *Disregarding rules* — *Approaching bridge* — "Res ipsa loquitur" — *New trial* — *Nonsuit* — *Partial appeal* — *Cross-appeal*.] — Plaintiff sustained injuries by being thrown out of his waggon, on a highway, in Winnipeg, where it approaches a bridge used as a railway and traffic bridge, owing to his horses becoming frightened at an engine and train which had advanced to the bridge, and immediately alongside the public highway approach to the bridge. After taking fright the horses became unmanageable and ran away, throwing the plaintiff on to a pile of stones. The statement of claim alleged that there was a post some distance from the bridge and down the railway track with "stop" painted on it, and it was the duty of the company to stop the engine at the sign, unless the bridge caretaker signalled that the line was clear; that on the occasion complained of, the engine came down to the bridge without stopping; that defendant neglected and refused to stop at the sign post, and to obey the flag signal of the bridge care-

taker; and that the defendant "so negligently, unskillfully and improperly managed the engine and train that they proceeded towards and up to the bridge, and immediately alongside the public highway approach thereto, and caused and permitted steam to escape from the engine with a loud noise, whereby and by reason of said negligent, unskillful and improper conduct of the servants of the defendants, and by reason of the close approach of the engine and train, and the escape of the steam;" the horses became frightened, while turning out of the bridge into the highway, and while upon the highway approach to the bridge the horses ran away, and the plaintiff was unable to control or manage them, and was thrown from the wagon, &c., &c.—A demurrer was filed on the ground that the declaration contained an allegation of duty which was a conclusion of law, and did not shew a violation by defendant of any common law duty, or statutory obligation. Wallbridge, C.J., refused a motion for nonsuit, but gave leave to defendant to move on the whole case. — Witnesses were then called for the defence, and the jury gave a verdict for plaintiff for \$750.—On a rule to set aside the verdict and enter a nonsuit, or for a new trial, the demurrer was overruled, on the ground that the allegations pointed to in the demurrer did not stand alone, but other and sufficient causes were shewn to impose upon the defendant that care and regard for the safety of the public, the absence of which care and regard constituted, with the wrongful acts charged, the cause of action of the plaintiff and the rule was discharged as to nonsuit, but made absolute for a new trial. Defendant appealed but plaintiff took no cross-appeal. *Held*, that plaintiff was entitled to recover, but not having appealed from the rule ordering a new trial, that rule should be affirmed and the appeal dismissed with costs.—*Per Ritchie, C.J.* The evidence shewed that there was a man employed to watch the bridge, whose duty it was to signal trains crossing, and that he was there and discharged his duty. It was also shewn that the company had posts erected on the line approaching the bridge, put there for the purpose of indicating that engines should stop there before approaching the bridge, to give the signal to enable them to cross the bridge in safety; but, instead of stopping there, on the occasion in question, the train went on and approached within a very few yards of the bridge and stopped, when those persons who were crossing the bridge were compelled to come immediately alongside, and within a few feet of the engine. The engine being there and blowing off steam, the horses of the plaintiff became frightened and ran away, causing the damages claimed. The accident was occasioned solely through negligence on the part of the defendant. If the engine had stopped at the indicated stopping place, the evidence shewed that the accident would not have happened. Running it down as close as possible to where the carriages had to cross the bridge was a piece of recklessness. There was no contributory negligence on the part of the plaintiff; no neglect or want of care on his part, as he had a right to cross the bridge at the time, and under the circumstances could not be anywhere else than where he was.—*Per Strong, J.* The case appears one in which the maxim "*res ipsa loquitur*" applies. The defendant by putting the post with a printed sign board on it, with a direction to engine drivers not to pass it, as indicating the point beyond which it was not safe to proceed until it was ascer-

tained that the bridge was clear, by its own act had shewn that the omission to obey this direction would be negligence.—*Per Henry, J.* The mere fact that the post was established by arrangement between the city and railway authorities for engines to stop at, made the company liable for breaking the rule, there being no contributory negligence on the part of the plaintiff. Appeal dismissed with costs. *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2 ed.) 729.

211. *Railway—Accident to passenger—Train longer than platform—Damages—Negligence.*—L. was the holder of a ticket, and passenger on the company's train from Lévis to Ste. Marie, Beauce. When the train arrived at Ste. Marie station the car upon which L. had been travelling was some distance from the station platform, the train being longer than the platform, and L. fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out of the end of the car, the distance to the ground from the steps being about two feet and a half, and in so doing he fell and broke his leg which had to be amputated. The action was for \$5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence, the Superior Court, the judgment being affirmed by the Court of Queen's Bench, decided in favour of L. and awarded him the full amount of damages claimed. On appeal to the Supreme Court of Canada, *Held*, reversing the judgment appealed from, that in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident was wholly attributable to his own fault in alighting as he did and that, therefore, he could not recover. Four-nier, J., dissenting. *Quebec Central Ry. Co. v. Lortie*, xxii, 336.

212. *Railways—Dangerous way—Injury to employee—Finding of jury—Interference on appeal.*—W. was an employee of the G. T. R. Co., whose duty it was to couple cars in the Toronto yard of the company. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. The conductor denied having given directions for the coupling, and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions and W. obtained a verdict. *Held*, affirming the judgment appealed from (20 Ont. App. R. 528), that though the findings of the jury were not satisfactory upon the evidence a second Court of Appeal could not interfere with them.—*Per King, J.*, that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one, as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way, which it was shewn he did; that the conductor was empowered to give directions as to the mode of doing the work if, as was stated at the trial, he believed that using such a mode could save time;

and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence. *Grand Trunk Ry. Co. v. Weegar*, xxiii., 422.

213. *Defective snow-plough and bridge—Derailment of train—Contributory negligence—Findings of jury—Failure to answer questions—Act of incorporation—Change of name—New trial.*—A locomotive engineer in the company's employ was killed through the derailling of a snow-plough and consequent breaking of a bridge. The jury found that the derailling was the proximate cause of the accident; that deceased was not guilty of contributory negligence; that the snow-plough and bridge were defective and that the train crew was insufficient. They answered "we do not know" to the questions, as to whose negligence caused the accident; whether or not the defects were known to defendant before or at the time of accident, or could have been discovered by careful inspection; whether defendant was aware of insufficiency of the crew; whether different construction of the bridge would have secured the safety of the train; whether deceased knew the train was off the track before it reached the bridge, and if by reasonable care of deceased or crew, the accident would have been prevented. The court below were equally divided as to the necessity for a new trial. The trial judge instructed the jury that the proximate cause was what caused the accident and not that without which it would not have happened, and there was a question as to the parties, plaintiffs in the action. The court below were also divided in opinion on these points. The Supreme Court of Canada ordered the new trial and affirmed the holdings of the judgment appealed from (27 N. S. Rep. 498) in other respects. *Pudsey v. Dominion Atlantic Ry. Co.*, xxv., 691.

214. *Negligence—Sparks from railway engine or "hot-box"—Damages by fire—Evidence—Burden of proof—Art. 1053 C. C.—Questions of fact.*—In an action for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from (Q. R. 9 S. C. 319), held that there was no sufficient proof that the fire occurred through the fault or negligence of the company and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. *Sénézac v. Central Vermont Ry. Co.*, xxvi., 641.

Followed in *Grand Trunk Railway Co. v. Rainville* (29 Can. S. C. R. 201), No. 217, *infra*.

215. *Railways—Construction of statute—51 Vict. c. 29, s. 262 (D.)—Railway crossings—Packing railway frogs, wing-rails, &c.*—The proviso of the fourth sub-section of s. 262 of "The Railway Act" (51 Vict. c. 29 (D.)), does not apply to the fillings referred to in the third sub-section, and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of the railway frogs and crossings and the fixed rails and switches during the winter months. Judgment appealed from (24 Ont. App. R. 183) reversed. *Washington v. Grand Trunk Ry. Co.*, xxviii., 184.

(Affirmed by Privy Council, [1899] A. C. 275.)

216. *Railways—Regular depot—I facilities—Railway crossings—Walking line of railway—Trespass—Injurious License—51 Vict. c. 29, ss. 240, 256, (D.)*—A passenger storm-bound at I Crossing on the Grand Trunk Railway, the train and attempted to walk through storm to his home a few miles distant. W proceeding along the line of the railway the direction of an adjacent public highway he was struck by a locomotive engine killed. There was no depot or agent maintained by the company at Lucan Crossing a room in a small building there was as a waiting-room, passenger tickets were and fares charged to and from this point, for a number of years, travellers had been allowed to make use of the permanent way in order to reach the nearest highways, there being no other passage-way provided. Judgment reversing the judgment appealed from (Ont. App. R. 672), *Taschereau and I J.J.*, dissenting, that notwithstanding the user of the permanent way in passing to from the highways by passengers taking leaving the company's trains the deceased could not under the circumstances, be said to have been there by the invitation or license of the company at the time he was killed that the action would not lie. *Grand Trunk Ry. Co. v. Anderson*, xxviii., 541.

217. *Sparks from railway engine—Ruins on railway berm—Damages by fire—Findings of jury—Evidence—Concurrent findings of courts appealed from.*—In an action for damages in consequence of property destroyed by fire alleged to have been caused by sparks from an engine of the company the court found, though there was no direct evidence how the fire occurred, that the company negligently permitted an accumulation of grass rubbish on their road opposite plaintiffs' property which, in case of emission of sparks or sparks would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiffs' property. A verdict against the company was sustained. *Held*, affirming the judgment appealed from (25 Ont. App. R. 242), following *Sénézac v. Central Vermont Ry. Co.* (26 Can. S. C. R. 64), and *George Matti Co. v. Bouchard* (28 Can. S. C. R. 580), the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial court and Court of Appeal, it should not be disturbed by a second appellate court. *Grand Trunk Ry. Co. v. Rainville*, xx 201.

218. *Railway—Running of trains—Approaching crossing—Warning—Shunting Railway Act, 1888, s. 265.*—Section 25 of the Railway Act, 1888 providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded, at the distance of at least 80 rods from every place at which the railway crosses any highway and that the bell shall be kept ringing or the whistle sounded at short intervals until the engine has crossed such highway" applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic. Judgment appealed from (25 Ont. App. R. 437) affirmed. *Canada Atlantic Ry. Co. v. Henderson*, xxix., 632.

219. *Government railways — Injury to employee — Negligence of fellow-servant—Lord Campbell's Act—Art. 1056 C. C.—Exoneration from liability — R. S. C. c. 38, s. 50.]—* Art. 1056 C. C. embodies the action previously given by a statute of the Province of Canada re-enacting* Lord Campbell's Act. *Robinson v. Canadian Pacific Ry. Co.* ([1892] A.C. 481) distinguished.—A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action for injuries caused by the fault of a fellow-servant, under Art. 1056 C. C. *Griffiths v. Earl Dudley* (9 Q. B. D. 357) followed.—In s. 50 of the Government Railways Act (R. S. C. c. 38) providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister," the words "notice, condition or declaration" do not include a contract, or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow-servants. *Grand Trunk Ry. Co. v. Vogel* (11 Can. S. C. R. 612) disapproved.—An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually \$6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant: *Held*, reversing the judgment appealed from (6 Ex. C. R. 276) that the rule of the association was an answer to an action by his widow under art. 1056 C. C. to recover compensation for his death.—The doctrine of common employment does not prevail in the Province of Quebec. *The Queen v. Filion* (24 Can. S. C. R. 482) followed. *The Queen v. Grenier*, xxx., 42.

220. *Operation of railway — Condition of permanent way — Grass on siding.]—* For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate an employee who is injured in consequence of such growth while on the side track in the course of his employment. *Wood v. Canadian Pacific Ry. Co.*, xxx., 110.

221. *Railway crossing — Necessary precautions — Shunting cars — Warning — Proof of negligence—Jury trial—Questions to be determined by jury.]—* B. in driving towards his home on a night in September, had to cross a railway track between nine and ten o'clock, on a level crossing near a station. Shortly before a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some shunting the train

was made up, and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass but apparently failed to see the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal. *Held*, affirming the judgment appealed from, Gwynne, J., dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line. *Lake Erie & Detroit River Ry. Co. v. Barclay*, xxx., 360.

222. *Negligence—Running of railway trains —Injury to passengers in sleeping berth.]—* A passenger in a sleeping berth at night, believing that she was riding with her back to the engine, tried to turn around in the berth and, the car going round a curve at the time, she was thrown out on to the floor and injured. In an action against the railway company for damages it was not shewn that the speed of the train was excessive nor that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed. *Held*, reversing the judgment appealed from, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. *Canadian Pacific Ry. Co. v. Smith*, xxxi, 367.

223. *Railway company — Fencing — Culvert — Negligence — Cattle on highway — 51 Vict. c. 29, s. 194—53 Vict. c. 28, s. 2.]—* A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse, and where cattle went through the culvert into a field and thence to the highway and straying on to the railway track were killed, the company was not liable to their owner, Taschereau, J., dissenting. *Grand Trunk Ry. Co. v. James*, xxxi., 420.

224. *Backing trains in station yard—Findings of jury — Operation of railway—Lights on train — Evidence.]—* A conductor in defendant's employ while in the performance of the duty for which he was engaged at the Windsor station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train nor was there any person stationed there to give warning of the movement of the train. *Held*, affirming the judgment appealed from (Q. R. 11 K. B. 394), that by omitting to have a light on the rear end of the train the railway company failed in its duty and this constituted *prima facie* evidence of negligence. *Canadian Pacific Ry. Co. v. Boisseau*, xxxii., 424.

* The Act referred to did not conform entirely either with Lord Campbell's Act, nor with the similar enactment in Upper Canada, and, as a consequence, it would appear that art. 1056 C. C. is, in effect, a limitation upon the formerly existing action under the civil law. *Quære* — Whether contracts are permissible against liability under art. 1053 C. C.? (Author's note.)

225. *Operation of railway trains — Collision — Duty of engineman — Rules — Contributory negligence.*—By rule 232 of the Grand Trunk Railway Company, "conductors and enginemen will be held responsible for the violation of any rules governing their trains, and they must take every precaution for the protection of their trains even if not provided for by the rules." By rule 52, enginemen must obey the conductor's orders as to starting their trains unless such orders involve violation of the rules or endanger the train's safety, and rule 65 forbids them to leave the engine except in case of necessity. Another rule provides that a train must not pass from double to single track until it is ascertained that all trains due which have the right of way have arrived or left. M. was engineman on a special train which was about to pass from a double to a single track and when the time for starting arrived, he asked the conductor if it was all right to go, knowing that the regular train passed over the single track about that time. He received from the conductor the usual signal to start and did so. After proceeding about two miles his train collided with the regular train and he was injured. In an action against the company for damages in consequence of such injury, *Held*, affirming the judgment of the Court of Appeal, that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone, that he was bound to obey the conductor's order to start the train, having no reason to question its propriety, and he was, therefore not guilty of contributory negligence in starting as he did. *Grand Trunk Ry. Co. v. Müller*, xxxii., 454.

226. *Railway crossing — Defective air-brakes — Vis major — C. S. C. c. 166, ss. 142, 143—Failure to stop at level crossing.*
See RAILWAYS, 99.

227. *Tort — Crown servants — Public work — "The King can do no wrong."*
See RAILWAYS, 100.

228. *Running of railway trains — Use of wood as fuel — Sparks from engine — Evidence—Findings of jury—New trial.*
See RAILWAYS, 102.

229. *Running of railway trains — Defective engine — Sparks from engine — Cause of fire — Presumption—Evidence.*
See RAILWAYS, 103.

230. *Operation of railway—Running trains through town — Notice at crossing — Contributory negligence.*
See RAILWAYS, 47.

231. *Running railway trains — Ringing bells — Improper conduct of servant — Contributory negligence—Accident while on duty.*
See RAILWAYS, 105.

232. *Operation of railway — Sparks from engine—"Damage."*
See RAILWAYS, 69.

233. *Railway station — Approaches—Running of trains—Imprudence.*
See RAILWAYS, 106.

234. *Railway crossing — Ringing of bell—Sounding of whistle — C. S. C. c. 66, s. 104.*
See RAILWAYS, 108, 111.

235. *Running of railway trains — Ringing bell—Sounding whistle—Crossing highway.*
See RAILWAYS, 108, 111.

236. *Broken railway track — Effect of climate.*

See RAILWAYS, 48.

237. *Railway company — Accident at crossing — Statutory requirements — Notice of approach.*

See APPEAL, 225.

238. *Railway company — Breaking of rail — Latent defect—Arts. 1053, 1673, 1675 C. C.*
See RAILWAYS, 10.

239. *Dangerous machinery — Railway — Sparks from engine — Evidence — Findings of jury — Defective construction.*
See No. 101, ante.

240. *Operation of railway — Defective machinery — Contributory negligence — Examining train — Running rules.*
See No. 54, ante.

241. *Carriage by railways — Special instructions—Acceptance by consignees—Warehousemen.*

See RAILWAYS, 7.

21. TRAMWAYS.

242. *Street railway — Height of rails — Statutory obligation — Accident to horse.*—A tramway charter, required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and his caulk caught in the groove whereby he was injured. The rail, at the place where the accident occurred, was above the level of the roadway. *Held*, affirming the judgment appealed from (21 N. S. Rep. 531; 24 N. S. Rep. 113), that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby. *Halifax Street Ry. Co. v. Joyce*, xxii., 258.

243. *Tramway — Wrongful ejectment from car — Exposure to cold — Consequent illness—Damages — Remoteness of cause.*—In an action for damages from being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor.—

Judgment appealed from (21 Ont. App. R. 578) affirmed, Gwynne, J., dissenting. *Toronto Ry. Co. v. Grinstead*, xxiv., 570.

244. *Tramway — Collision with vehicle — Excessive speed—Contributory negligence.*—Persons crossing street railway tracks are entitled to assume that the cars will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed the street railway company is responsible.—The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross.—Judgment appealed from (21 Ont. App. R. 553) affirmed, Gwynne, J., dissenting. *Toronto Ry. Co. v. Gosnell*, xxiv., 582.

245. *Obstruction of street — Accumulation of snow — Question of fact — Finding of jury.*—An action was brought against the City of Toronto to recover damages for injuries incurred by reason of snow having been piled on the side of the streets, and the street railway company was brought in as third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city, and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to 20 inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence.—*Held*, affirming the decision appealed from, that under the evidence of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and that this was the sole cause of the accident.—*Toronto Ry. Co. v. City of Toronto*, xxiv., 589.

246. *Tramway — Defective appliances — Absence of buffers on cars.*—The plaintiff was a motorman in the employ of the company and sued under the Workman's Compensation Act to recover damages for injuries sustained while coupling a street car and trailer. The main negligence charged was the absence of buffers to protect the employees from injury in coupling. Plaintiff had a verdict at the trial which was affirmed. *Held*, affirming the judgment appealed from (22 Ont. App. R. 78), that there was negligence on the part of the company in not having proper appliances to prevent injury, and that a new trial had been properly refused. *Toronto Ry. Co. v. Bond*, xxiv., 715.

247. *Electric car — Excessive speed — Prompt action — Contributory negligence.*—A cab driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the tramway company for damages it appeared that the accident occur-

red on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that, the brakes proving ineffectual, he reversed the power, being about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking out more sharply for the car, and that, notwithstanding such negligence on the part of the driver the accident could have been averted by the exercise of reasonable care by the motorman. *Held*, affirming the judgment appealed from (32 N. S. Rep. 117), Gwynne, J., dissenting, that the last finding neutralized the effect of that of contributory negligence; that as the car was on a down grade and going at an excessive rate of speed it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run. *Halifax Electric Tramway Co. v. Inglis*, xxx., 256.

248. *Street railway track—Improper construction—Bad order of track—Questions of fact—Findings of trial judge.*—The plaintiff, who was thrown out of a wagon, sustaining injuries, brought action for negligence owing to improper construction and bad order of the company's track. Torrance, J., found that the track was in bad order, the switch three inches above the level of the road, contrary to law, and that this caused the accident without any fault on the part of the plaintiff, whose damages he assessed at \$2,500. The Queen's Bench reversed this judgment, being of opinion that the rails, as well as the part of the roadway the company was bound to maintain, were lawful and sufficient; that the company was not at fault, and that the plaintiff had not exercised necessary caution and prudence, and might, by reasonable caution and prudence, have avoided the accident. *Held*, that as the questions to be decided were purely matters of fact, the judgment of the court of first instance should not have been disturbed. Strong, J., dissented, on the ground that the judgment of the Court of Queen's Bench on the facts was correct. *Parker v. Montreal City Pass. Ry. Co.*, Cass. Dig. (2 ed.) 731.

[The Privy Council refused leave to appeal, as the findings of fact should not have been disturbed on appeal; see 6 Can. Gaz. 174.]

249. *Motorman — Person in charge of electric car—Injury to conductor — Workmen's Compensation Act.*—The motorman of an electric car may be a "person who has charge or control" within the meaning of s. 3 of the Workmen's Compensation Act (R. S. O. [1897] c. 160), and if he negligently allows an open car to come in contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured, the electric company is liable in damages for such injury. Judgment appealed from (27 Ont. App. R. 151) affirmed. *Toronto Ry. Co. v. Snell*, xxxi., 241.

250. *Operation of tramway — Contributory negligence — Pleadings — Issues — Evidence — Verdict — New trial — Objections taken*

on appeal]—In an action to recover damages from injuries to a motorman through a collision of his car with a special car returning to the car barn at unusual speed on the wrong track, a verdict was entered for the plaintiff on the findings of the jury. On appeal to the Court of Review, defendant objected (1) that plaintiff had not denied charges in the statement of defence that the accident had been caused by his fault; (2) that there was misdirection by the trial judge telling the jury that the plaintiff could succeed even if he had himself been negligent if they thought such negligence had not caused the accident; (3) that it had not been alleged that the car which came in collision with that of the plaintiff had no right to be in the place where it was at the time; (4) that, since the trial, defendant had discovered that plaintiff had stated his age at 47 instead of 45 years; and, (5) that the verdict was against the weight of evidence. Langelier, J., in delivering the judgment appealed from, *Held*, (1) that objection to the pleadings came too late, after the necessary proof had been made and an amendment permitted; (2) that, as in Quebec, contributory negligence would merely tend to reduction of damages, negligence not leading to injury could not be considered, and, seeing that the direction did not affect the verdict which attributed the injury solely to the negligence of the defendant, the verdict should not be disturbed; (3) that as evidence had been made without objection on the third point objected to, the objection came too late on the appeal; (4) that evidence discovered after trial must be of a nature tending to change the result of the trial, in order to obtain a new trial, and that the difference of a couple of years in plaintiff's age could not have that effect, and (5) as the evidence was such that a reasonable person could have concluded as the jury did there could not be a new trial. The Supreme Court affirmed the judgment appealed from for the reasons stated by Mr. Justice Langelier. *Sherbrooke Street R. Co. v. Kerr*, 7th November, 1899.

NEGOTIABLE SECURITY.

Fraudulent conversion — Past due bonds — Debentures transferable by delivery — Equity of previous holders — Estoppel — Implied notice — Innocent holders for value — C. C. arts. 1487, 1490, 2202 and 2287.—A *bona fide* holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper, but also to those of all parties having an interest therein. *In re European Bank; Ex parte, Oriental Commercial Bank* (5 Ch. App. 358) followed. Judgment appealed from (Q. R. 3 Q. B. 539, affirmed.) *Young v. MacNider*, xxv., 272.

AND see BANKS AND BANKING—BILLS AND NOTES, ETC.

NEGOTIORUM GESTOR.

Mandatory — Action for new account — Release — Parties — Purchase of trust estate — Curator — Administration — Form of action — Indivisibility — Release — Specific performance — Art. 1484 C. C. — Art. 920 C. C. P.]—Respondent, representing the institutes and substitutes under the will of the late J. D.,

brought an action against appellant, one of the institutes who acted as curator and administrator of the estate for a certain time, for an account of three particular sums, which plaintiff alleged defendant had received while curator. *Held*, reversing the judgment appealed from (18 R. L. 647), that an action did not lie against the appellant for these particular sums apart and distinct from an action for an account of his administration of the rest of the estate.—Plaintiff alleged that he represented S. D., one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of defendant £447 7s. 6½d., defendant having in an action of account settled by deed with S. D. for \$4,000, which he agreed to pay and for which plaintiff became surety: *Held*, that as the deed gave defendant a full and complete discharge of all accounts as curator or administrator of the estate, plaintiff could not claim a further account of these particular sums.—Plaintiff also claimed to represent F. D. and E. D., two other institutes, in virtue of assignments to him by them on 21st January and 15th November, 1869, respectively. In 1865, after defendant had been sued in an action of account, by a deed of settlement, F. D. and E. D. agreed to accept as their shares in the estate \$4,000 each, and gave defendant a complete and full discharge: *Held*, affirming the judgment appealed from, that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement. — By the judgment appealed from (18 R. L. 647), defendant was condemned to account for his own share transferred to plaintiff in 1862, and also for C. D.'s share, another institute who in 1882 transferred his rights to plaintiff. The transfer by defendant was as co-legatee of such rights and interests as he had at the time of transfer, and he had at that time received the sixth of the sum for which he was asked to account: *Held*, reversing the court below, that plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in an action to account as mandatory or *negotiorum gestor* of plaintiff. 2. That F. D. and E. D., having acquired an interest in C. Z. D.'s share after the transfer of their shares to plaintiff in 1869, plaintiff could not maintain his action without making them parties to the suit.—*Quære*, Were the transfers made by the institutes to plaintiff while curator, null and void under art. 1484, C. C.? *Dorion v. Dorion*, xx., 430.

AND see ACCOUNT—EXECUTORS AND ADMINISTRATORS—MANDATE — PRINCIPAL AND AGENT.

NEWSPAPER.

1. *Authority to publish — Corporation publisher and proprietor — Deposit of affidavit or affirmation — Newspaper Act, 50 Vict. c. 23 (Man.)*—By 50 Vict. c. 23 s. 1 (Man.) no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the Act directs has been deposited with the prothonotary of the Court of Queen's Bench or clerk of the Crown for the district in which the newspaper is published; by s. 2 such affidavit or affirmation shall set forth the real and true names, &c., of the printer or publisher

of the newspaper and of all the proprietors; by s. 6, if the number of publishers does not exceed 4 the affidavit or affirmation shall be made by all, and if they exceed 4, it shall be made by 4 of them; and s. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for receiving affidavits to be used in the Court of Queen's Bench. *Held*, 1. That 50 Vict. c. 23 contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper. 2. That s. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne, J., dissenting. 3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.—Judgment appealed from (6 Man. L. R. 578) affirmed. *Ashdown v. Manitoba "Free Press" Co.*, xx., 43.

2. *Mining law — Dominion Lands Act — Publication of regulations — Renewal of license — Payment of royalties — Voluntary payment*—R. S. C. c. 54, ss. 90, 91.

See MINES AND MINERALS, 13.

NEW TRIAL.

1. ACCOUNTS, 1.
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1. ACCOUNTS.

1. *Taking accounts — Jury unable to deal with questions of account — Misdirection.*—Counsel urged that the jury should be instructed to deal with accounts between the parties, but the jury stated they were unable to do so. *Held*, that the accounts should have been taken in order properly to decide the case and a new trial was ordered. *Griffith v. Boscovitz*, xviii., 718.

2. APPEALS.

2. *Appeal—Matter of discretion—Construction of 38 Vict. c. 11, s. 22.*—Under s. 22 of the Supreme and Exchequer Courts Act no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion. *Boak v. The Merchants' Marine Ins. Co.*, i., 111.

[See Supreme Court Amendment Act, 1880, s. 4, and the R. S. C. c. 135, s. 24, par. (d) as amended by 54-55 Vict. c. 25, s. 2, enacted since above decision.]

3. *Discretion — New trial ordered by court below — Appeal.*—The Supreme Court of Canada will not hear an appeal from a judg-

ment ordering a new trial on the ground that the verdict was against weight of evidence. *Eureka Woollen Mills Co. v. Moss*, xi., 91.

4. *Order for new trial — Questions of law and fact — Insurable interest — Discretion to hear appeal.*—Where the order for a new trial in the court below has been made upon both questions of law and fact, the Supreme Court will hear an appeal. *Howard v. Lancashire Ins. Co.*, xi., 92.

5. *Order for new trial—Final judgment—Appellate jurisdiction.*—There is no appeal under the provisions of the Supreme Court Act from a judgment (after amendment of the pleadings and a new cause of action being set up) ordering a new trial which is not, in such a case, a final judgment nor otherwise within the appellate jurisdiction of the Supreme Court of Canada. *Canadian Pacific Ry. Co. v. Cobban Mfg. Co.*, xxii., 132.

6. *Appellate jurisdiction in cases of new trial—Questions of law.*—It was contended that the circumstances were stronger than in *Eureka Woollen Mills Co. v. Moss* (11 Can. S. C. R. 91), (No. 3, ante), and that the discretion of two courts below in favour of a new trial should not be interfered with, although there was no objection to the jurisdiction taken in the respondent's factum. The judgment appealed from held that there had been no misdirection but that the circumstances were peculiar and the discretion of the Divisional Court ordering a new trial ought not to be interfered with. *Held*, that as the judgment appealed from did not proceed on the ground that there had been misdirection on a point of law, there could be no appeal to the Supreme Court. As the appeal was quashed for want of jurisdiction, only costs as of a motion to quash were allowed. *O'Sullivan v. Lake*, xvi., 636.

7. *Order for new trial—Judgment on motion—Non-jury cases.*—Section 24 (d) of R. S. C. c. 135, allowing appeals to the Supreme Court "from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law," applies to jury cases only. *Halifax Street Ry. Co. v. Joyce*, xvii., 709.

8. *Contract — Collateral agreement—Questions for jury—Verdict—New trial—Duty of appellate court.*—Whether or not a memorandum of agreement set up by the defendant as containing the only contract between the parties was intended to settle the contract in whole or in part is a question for the jury. The onus of shewing that it contained all the terms of the contract is upon the party producing it. In such a case oral testimony is admissible on behalf of both parties. A verdict based upon the appreciation of the evidence in such a case ought not to be interfered with by an appellate court. *Peters v. Hamilton*, Cass. Dig. (2 ed.) 763.

9. *Jurisdiction of appellate court—Entering new verdict*—37 Vict. c. 7, ss. 32, 33 (Ont.)—38 Vict. c. 11, ss. 20, 22, 38 (D.)

See APPEAL, 130.

10. *Insufficient findings of jury—Order for new trial—Final judgment.*

See APPEAL, 172.

11. *Appeal—Jurisdiction—Criminal law—The Criminal Code, 1892, ss. 742-750—Construction of statute—55 & 56 Vict. c. 29, s. 742.*

See APPEAL, 118.

12. *Appeal from order for new trial—Jurisdiction—Final judgment.*

See No. 5, ante.

13. *Special leave to appeal—Jurisdiction—"Judge of court appealed from"—R. S. C. c. 135, s. 42—Construction of statute.*

See APPEAL, 336.

14. *Libel—Question of privilege—Proof of malice—Improper admission of evidence—Misdirection—Power to grant new trial on appeal—N. S. Judicature Act.*

See No. 40, infra.

3. CRIMINAL CASES.

15. *Criminal prosecution—New trial—Jurisdiction of Provincial Court—Discharge of prisoner ordered by Supreme Court.*—In a criminal case reserved the Court of Queen's Bench (Crown side), deferred pronouncing judgment on the verdict against the prisoner, being in doubt as to the legality of the admission of certain evidence, and ordered a new trial. This order was affirmed by the judgment appealed from. *Held*, that 32 & 33 Vict. c. 29, repealed so much of C. S. L. C. c. 77, as would authorize any court in the Province of Quebec to order new trials in criminal cases, and since that Act and 33 Vict. c. 26, repealing C. S. L. C. c. 77, s. 63, the Court of Queen's Bench in that province has no power to grant new trials in such cases. Thereupon the Supreme Court of Canada, in exercise of its appellate jurisdiction, rendered the judgment which ought to have been given in the court appealed from and ordered that the prisoner should be discharged from custody. *The Queen v. Laliberté*, i., 117.

15a. *Order for new trial—Sections 742 to 750, Criminal Code—Appeal—Jurisdiction of Supreme Court of Canada.*

See APPEAL, 118.

16. *Canada Evidence Act, 1893—Husband and wife—Competency of witnesses—Privilege—Admission of evidence.*

See CRIMINAL LAW, 25.

4. DAMAGES.

17. *Breach of contract—Dismissal—Notice—Master and servant—Evidence—Measure of damages.*—The plaintiff was master of a ship owned by the company, plaintiff being one of the largest shareholders. Plaintiff's contract was to supply the ship with men and provisions for passengers and crew, and sail her as commander for a monthly salary. The ship had been accustomed to remain at St. Pierre 48 hours, but the time was lengthened to 60 hours by the company, yet the plaintiff insisted on remaining only 48 hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, without prior notice, dismissed from service. The

trial judge considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict for \$2,000. A rule *nisi* was made absolute by the full court for a new trial. *Held*, affirming the judgment appealed from (2 Russ. & Geld. 54), 1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on that ground. 2nd. *Per* Ritchie, C.J., and Fournier and Gwynne, J.J., that the fact of the master being a shareholder in the corporation owning the vessel, had no bearing on the case, and that it was proper to grant a new trial upon the question as to whether or not the plaintiff so acted as to justify his dismissal. *Gulford v. Anglo-French SS. Co.*, ix., 303.

18. *Improper rejection of evidence—Excessive damages—New grounds on appeal.*—On motion for new trial on grounds of excessive damages, &c., the verdict was sustained. The Supreme Court affirmed the decision, Gwynne, J., dissenting, although the amount of damages found was unsatisfactory. *Royal Ins. Co. v. Duffuss*, xviii., 711.

See EVIDENCE, 13.

19. *Repair of streets—Damages—Evidence—Special injury—Verdict.*—The proprietor of an omnibus line ran coaches through some of the principal streets of Halifax under license from the corporation. Owing to the want of repair on some of the streets, and the accumulation of snow and ice, the conveyances could not be run according to time table, and there was a falling off in the number of passengers; moreover, some of the horses were injured and vehicles broken or damaged by the rough state of the streets. *Held*, Ritchie, C.J., dissenting, that it was the duty of the corporation to keep the streets in good repair; and (Gwynne, J., dissenting), that the plaintiff was entitled to retain his verdict, having proved special injury, and the damages awarded not being too remote nor excessive. Judgment appealed from (4 R. & G. 371) affirmed. *City of Halifax v. Walker*, Cass. Dig. (2 ed.) 175.

20. *Misdirection—Verdict—Proceedings at trial—Questions reserved—Defective state of public bridge—Liability of municipality—Damages—New trial—Practice.*—Action for damages for injury from falling over a bridge at the time very much out of repair, about twenty feet of the railing on one side having fallen away. One of the standing committees of the municipal council was a committee on roads and bridges, whose duty was to report to regular meetings of council the state of the roads and bridges in the county. There was no evidence as to whether or not the bridge was much used as a thoroughfare or otherwise. The only question submitted to the jury was as to amount of damages. The judge charged "that the accident which had occurred to plaintiff was a most disastrous one, resulting from the undoubted negligence of those on whom the duty lay of keeping the bridge in a safe condition, and that the liability of defendant was a matter of law which he would reserve for the full court."—The jury found for plaintiff for \$3,000, and defendant failed to obtain a new trial on grounds which did not include misdirection, the court below being equally divided, Itigby and Weatherbe, J.J., of opinion that defendant's counsel had agreed in the view propounded by the judge at the trial, and had requested the court to deter-

mine the question of law first, as if the issue of negligence had been found against defendant, upon sufficient evidence and under a proper charge, considered the case disposed of by *City of Halifax v. Walker* (Cass. Dig. (2 ed.) 175; No. 19, *ante*) and *McQuarry v. Municipality of St. Mary's* (5 R. & G. 493.)—*McDonald, C.J.*, and *Thompson, J.*, held that the reservation at the trial was a reservation for the opinion of the court of a mixed question of law and fact, and they not only doubted their power to draw inferences of fact at all, but were unable to draw the inference of negligence, the evidence being silent on material points, such as whether the bridge was much or little travelled, and whether the alleged defect ever came to the knowledge of the county officers. *Held*, affirming the judgment appealed from (6 R. & G. 549), *Strong, J.*, dissenting, that the plaintiff was entitled to retain his verdict.—*Per Strong, J.*, dissenting, that there was not sufficient evidence of negligence to warrant the verdict, and the case reserved for the court being on questions of fact as well as of law, a new trial might have been ordered notwithstanding the objection was not taken either at the trial or in the rule *nisi*. *Municipality of Colchester v. Watson*, Cass. Dig. (2 ed.) 175.

21. *Discretionary order—Excessive damages—Costs.*—[Plaintiff declared on a special contract for the sale of a vessel to defendant, averring performance of all conditions necessary to entitle him to payment of the price, and assigning, as a breach, non-payment by defendant. The plaintiff further declared on the common counts.—Defendant pleaded non-assumpsit, non-delivery of the vessel, payment and set-off.—The cause was tried with a jury who found a verdict for plaintiff for \$3,000. A rule *nisi* to set aside this verdict was made absolute by the Supreme Court of Nova Scotia on the ground that the damages were excessive, observing that it was unnecessary to decide whether the verdict was objectionable on other grounds.—On appeal prior to R. S. C. c. 135, s. 24 (d) as amended by 54 & 55 Vict. c. 25, *Held*, on motion to quash, *Henry, J.*, *dubitante*, that the judgment ordering a new trial on the ground of excessive damages proceeded upon matter of discretion only, and that such judgment was not appealable.—Appeal quashed with the general costs of appeal to hearing. By fiat of *Taschereau, J.*, a counsel fee of \$50 on motion was taxed. *McGowan v. Mockler*, 13th October, 1879; Cass. Dig. (2 ed.) 421; Cass. Prac. (2 ed.) 81, 82.

22. *Excessive damages—Discretionary order—Reduction of verdict or new trial.—Publication in newspaper—Defamatory plea—Incidental demand—Excessive damages—Reduction of verdict—New trial.*—[Damages were assessed by a jury at \$6,000 for a newspaper libel and \$4,000 additional on a further libel contained in a defamatory plea. *Held*, on appeal from the Court of Queen's Bench (M. L. R. 4 Q. B. 84), that the damages were excessive; that they should be reduced to a total of \$6,000, and in the event of plaintiff's refusal to accept a reduced verdict for that amount a new trial should be allowed. *Mail Printing Co. v. Laflamme*, Cass. Dig. (2 ed.) 493.

23. *Action for negligence—Excessive damages—Finding of jury.*—[An order for a new trial was affirmed, on appeal, for grounds, amongst others, that the damages were exces-

sive under the evidence. *York v. Canada Atlantic Ry. Co.*, xxii., 167.

See NEGLIGENCE, 15.

24. *Negligence—Taking damp grain into elevator—Responsibility—General assessment of damages.*

See WAREHOUSEMAN, 3.

24a. *Reduction of damages—Evidence—Discretionary order.*

See No. 27, *infra*.

5. DISCRETIONARY ORDERS.

25. *Discretion of court below—Verdict against weight of evidence—Appeal.*—[Where the court below in exercise of its discretion has ordered a new trial on the ground that the verdict is against the weight of evidence, the Supreme Court will not hear an appeal. *Eureka Woollen Mills Co. v. Moss*, xi., 91.

26. *Nonsuit—Proceedings at trial—Rule to set aside the nonsuit and for new trial—Discretionary order.*—[A rule to set aside a nonsuit and for a new trial was discharged on the ground that the nonsuit was voluntary. The trial judge's notes shewed that the nonsuit was moved for, plaintiff's counsel replied and judgment of nonsuit was entered, the judge stating, however, that he believed the understanding to be that the nonsuit should be entered. *Held*, that, as there was doubt as to what took place at the trial, the parties were entitled to the benefit of that doubt, and that the rule to set aside the nonsuit should be made absolute. *Levy v. Halifax and Cape Breton Ry. and Coal Co.*, Cass. Dig. (2 ed.) 579.

27. *Evidence as to damages—Discretionary order.*—[In a case where the evidence shewed definitely what damages had been sustained and where there appeared to be no good reason for remitting the case back to the trial court to take further evidence the Supreme Court of Canada, in reversing the judgment appealed from, refrained from ordering a new trial but directed that the damages as found by the trial judge should be reduced to the amount proved in respect of certain goods wrongfully converted. *Armour, J.*, was, however, of opinion that the judgment of the trial judge ought to have been restored. *Wilson v. Canadian Development Co.*, xxxiii., 432.

The Privy Council refused leave for an appeal, July, 1903.

28. *Discretion—Question of law—Costs—Jurisdiction.*

See No. 2, *ante*.

29. *Excessive damages—Discretionary order—Reduction of verdict or new trial.*

See LIBEL, 5.

30. *Municipal corporation—Construction of sidewalk—Trespass—Action en bornage—Petitory action—Amendment of pleadings—Practice—Ceasing litigation—R. S. C. c. 135, s. 65.*

See PRACTICE OF SUPREME COURT, 5.

6. EVIDENCE.

31. *Sale of machinery — Knowledge of defects—Promissory note—Failure of consideration.*—Action on promissory note. Defence, that note was given in payment of a machine for polishing wood, which machine did not do the work it was represented to do. The machine had been used for some time in connection with building cars, and evidence for defendant went to prove that the work was under the control of a contractor with defendant; that before the machine could be used a fan had to be attached to keep off the dust; that it spoiled the boards on which it was used; and that the contractor did not inform the defendant as to the defects and he knew nothing of them until the case came on for trial. It appeared, however, that the general superintendent of defendant's business watched the progress of the work in which the machine was used and inspected all the cars before they were delivered. The jury found a verdict for plaintiffs and a new trial was refused, the Supreme Court (N. B.) holding that defendant must be held to be affected with the contractor's knowledge or, at all events, that the superintendent was in a position to know if the machine did not work properly. *Held*, that the new trial was properly refused. *Es-son v. McGregor*, xx., 176.

32. *Ship's disbursements — Freight balance—Notice to owner — Guarantee on delay of proceedings—Misrepresentation—Defence under plea of fraud—Evidence.*—On a ship under charter being loaded £173 was due the charterer for difference between actual freight and that specified in the charter party and, as agreed, a bill for that amount was drawn by the master on the agents of the ship, and, also, a bill of £735 for disbursements. These bills not being paid at maturity notice of dishonour was given to V., managing owner, who sent his son to solicitors, who held the bills for collection to request that the matter should stand over until the ship arrived at St. John, where V. lived. This was acceded to and V. signed an agreement in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £735 he guaranteed, on the vessel's arrival or in case of her loss, payment of the draft and charges and also payment of the draft for £173 and charges. On the vessel's arrival he refused to pay the smaller draft and to an action on his guarantee, pleaded payment and that he was induced to sign the same by fraud and misrepresentation. By order of a judge the pleas of payment were struck out.—On the trial the son of V. who had interviewed the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. contradicted his son and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by shewing that from age and infirmity he was incapable of remembering the circumstances, but a verdict was given against him. It was admitted that if there had been any misrepresentation by the solicitors, it was innocent misrepresentation only. *Held*, affirming the judgment appealed from (28 N. B. Rep. 364), that the defence of misrepresentation set up was not available to V. under the plea of fraud, and, therefore, was not pleaded; that if available without plea, it was not proved;

that nothing could be gained by ordering another trial as V. having died, his evidence would have to be read to the jury who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him. *Held*, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship. *Vaughan v. Richardson*, xxi., 359.

33. *Libel—Justification — Fair comment—Public affairs — Pleading — Rejection of evidence—General verdict — Disregard of material question.*—Action for libel in a newspaper article respecting legislation. The innuendo alleged by plaintiff (Attorney General of Manitoba when such legislation was enacted), was that the article charged him with personal dishonesty. Pleas "not guilty" and that the article was fair comment on a public matter. Defendant put in evidence, under objection, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendant and, in answer to the trial judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal from an order for a new trial, *Held*, affirming the judgment appealed from (8 Man. L. R. 50), that defendant not having pleaded the truth of the charge in justification, evidence to establish it should not have been received, but as it had been received evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty; for these reasons a new trial was properly granted. *Manitoba Free Press Co. v. Martin*, xxi., 518.

34. *Malicious prosecution—Reasonable and probable cause — Inferences — Functions of judge—Nonsuit.*—In an action for malicious prosecution, the existence or non-existence of reasonable and probable cause is to be decided by the judge and not the jury.—A. staff inspector of police, laid an information charging M. with keeping a house of ill-fame. In laying the information, he acted on a statement made to him by D., a frequenter of the house, sufficient, if true, to prove the charge. A warrant issued, M. was arrested and brought before the magistrate, who, after hearing the evidence, dismissed the charge.—The action was tried three times, each trial resulting in a nonsuit, which was set aside and a new trial ordered. From the judgment ordering the third new trial A. appealed, and the judges being equally divided, the order stood. On this last trial it was shewn that A. had requested the inspector for the division in which M.'s house was situate to inquire about it, and that, after the information, the inspector reported that there were frequent rows in the house, but he thought there was nothing in the charge. The trial judge held that want of reasonable and probable cause was not shewn and withdrew the case from the jury. The Divisional Court held that he should have asked the jury to find on the fact of A.'s belief in the statement on which he acted in bringing

the charge. *Held*, Taschereau, J., dissenting, that A. was justified in acting on the statement, and, the facts not being in dispute, there was nothing to leave to the jury and the trial judge rightly held that no want of reasonable and probable cause had been shewn. *Lister v. Perryman* (L. R. 4 H. L. 521) followed; *Abraith v. North-Eastern Ry. Co.* (11 App. Cas. 247) considered. *Archibald v. McLaren*, xxi., 588.

35. *Evidence for jury—Improper admission of evidence—Withdrawal of evidence from jury—Practice.*—Plaintiff was the licensee of Crown lands to cut timber and logs thereon. The licenses did not mention boundaries, but limits were described as (1) "No. 192 east half block 176 Muzeral Brook, containing three square miles," and (2) "South of main S. W. Miramichi River, N. east quarter of block 42, and the southern $1\frac{1}{4}$ miles of block 41." Plaintiff endeavoured by the testimony of B. and F. to identify lands alleged to be included in these licenses, and in their evidence and that of Flynn proved that logs had been cut upon these blocks by two parties, respectively named S. and K., and on the trial the plaintiff offered to prove the statements of these two parties and admissions made by them. Defendant's counsel objected to these statements as no evidence against the defendant, and the Chief Justice only admitted it on the plaintiff's counsel undertaking to connect the defendant with the parties. This he failed to do, but called C., an agent of the plaintiff, to depose as to certain statements of the defendant. Plaintiff's counsel addressed the jury upon the whole evidence, commenting upon all the facts, but the Chief Justice in charging the jury said that if the case rested on the evidence of B., he was of opinion that the plaintiff failed to make out his case, and also stated his opinion that the declarations of S. and K. were not evidence against defendant, and that the plaintiff's case must depend upon the conversations between C. and defendant respecting the logs. The jury found a verdict for the plaintiff for \$965.—A rule nisi for a new trial was discharged under authority of *Wilmot v. Vancaert* (1 P. & B. 496), holding that when evidence, improperly received, has been withdrawn by the judge from the consideration of the jury, the improper admission is not a ground for a new trial.—*Held*, that the new trial was properly refused on the ground of the improper admission of evidence; the plaintiff having failed to connect the statements of S. and K. with the defendant, such evidence was properly and sufficiently withdrawn from the jury. But as regards C.'s evidence there was not sufficient to go to the jury, and the Chief Justice should have left nothing to the jury. On this ground the rule nisi for a new trial should be made absolute. Judgment appealed from (3 P. & B. 597) reversed. *Snowball v. Stewart*, Cass. Dig. (2 ed.) 570.

36. *Trespass—Description of lands—Metes and bounds—Preponderance of evidence.*—Action of trespass and trover. The declaration alleged a trespass on lands claimed by the plaintiff, and had a count in trover and a count for the trespass to personal property. The pleas traversed the allegations of trespass and conversion, and the allegations as to property in the plaintiff, and justified by title in some of the defendants.—The place of beginning in the plaintiff's grant was identified and

the description then read "running south 52 chains to a large pine tree marked 'J. G.' and then west," &c. To reach the locus the line should be extended about 50 chains more. To that increased distance the surveyor's line on the ground extended, but there was no pine tree so marked either at the distance expressed in the description, or at the end of the surveyor's line. At the latter point, however, a spruce tree was marked "H. G." and "J. G." The plan attached to the grant represented the lot as a different shape from that claimed, and the area expressed in the grant was inconsistent with plaintiff's contention.—The jury found a verdict for plaintiff, which verdict was set aside by the court *en banc*. *Held*, affirming the judgment appealed from (5 Russ. & Geld. 431), that there was evidence for the jury that the line claimed by plaintiff was the western line of his grant. The case, however, was not so clear as to justify the court in reversing the decision of the court below, come to on a review of the evidence, but was a proper case for further consideration on a new trial. (Henry, J., dissenting). *Gates v. Davidson*, Cass. Dig. (2 ed.) 847.

37. *New trial—Improper reception and rejection of evidence—Nominal damages.*—The appeals were from two decisions in favour of the respondent C., who brought his action for the price of timber supplied to S., under a written agreement. S. defended on the ground that the timber was not of the quality contracted for. The plaintiff obtained a verdict and a new trial was moved for on a great number of grounds, only two of which were relied on in argument. The rule for a new trial was made absolute unless the plaintiff filed a consent to his verdict being reduced, and such consent being filed the rule was discharged and the verdict stood for the reduced amount.—Another action was brought by S. against C. for damages in not supplying timber up to the standard the contract required. In this action a verdict was given for the defendant, and a new trial was moved for, the main ground urged being that plaintiff was entitled to nominal damages at least. The court was of opinion that the plaintiff was entitled to nominal damages, but refused a new trial to enable him to have a verdict therefor. (31 N. B. Rep. 250, 265).—Both appeals were dismissed, the Supreme Court being of opinion that the objections to the verdicts for improper reception and rejection of evidence were properly overruled by the court below and the new trial to enable S. to recover nominal damages was properly refused. *Scammel v. Clarke*, xxiii., 307.

38. *Findings of jury—Answers to questions—New trial—Negligence—Railway company—Act of incorporation—Change of name.*—Where it appeared on the argument before the Supreme Court of Canada, that the jury had not properly answered some of the questions submitted to them at the trial, a new trial was ordered. *Pudsey v. Dominion Atlantic Ry. Co.*, xxv., 691.

NOTE.—In other respects the judgment appealed from (27 N. S. Rep. 498) was affirmed; See JURY, 3.

39. *Libel—Privileged communication—Malice—Charge to jury—Evidence—Unfriendliness.*—On the trial of an action claiming damages for a libel alleged to be contained in a privileged communication the judge charged

the jury as to privilege and added "if the defendant made the communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him." *Held*, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him. — One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact. *Held*, that, as to prove malice the writer's knowledge of the falsity of the fact was the material point, the sense in which he may have used the words was the governing consideration.—The judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff.—Judgment appealed from (32 N. S. Rep. 129) affirmed, Gwynne and Sedgewick, JJ., dissenting. *Green v. Miller*, xxxi., 177.

40. *Libel—Question of privilege—Proof of malice—Improper admission of evidence—Misdirection—Power to grant new trial on appeal—N. S. Judicature Act, O. 57, R. 5; O. 38, R. 10.*—Where the defendant asked only for a new trial in the court appealed from the Supreme Court of Canada cannot order judgment to be entered for him on the appeal.—Evidence as to how the recipient of a letter understood it as imputing to the person mentioned therein a wrongful retention of money should not be received on the trial of an action for libel as making proof of actual malice; the reception of such evidence in the case in question caused a miscarriage of justice and justified the defendant's application for a new trial.—Where the trial judge charged the jury that the question to be decided was the truth or falsity of the statements in the alleged libellous letter it was a misdirection that gave the defendant a right to a new trial as the question at issue was whether or not, if the statements were false, the defendant honestly believed them to be true.—Order 57, rule 5 of the Nova Scotia Judicature Act applies only to cases tried by a judge without a jury and order 38, rule 10, applies to cases tried with a jury. *Green v. Miller*, xxxiii., 193.

41. *Evidence as to damages — Discretionary order—New trial.*—In a case where the evidence shewed definitely what damages had been sustained and where there appeared no good reason for remitting the case back to the trial court to take further evidence the Supreme Court of Canada, in reversing the judgment appealed from, refrained from ordering a new trial, but directed that the damages as found by the trial judge should be reduced to the amount proved in respect of certain goods wrongfully converted. *Armour, J.*, was, however, of opinion, that the judgment of the trial judge ought to have been restored. *Wilson v. Canadian Development Co.*, xxxiii., 432.

[Leave to appeal refused by Privy Council, July, 1903.]

42. *Improper admission of evidence — Excessive damages—Telegraph message—Liability of company.*—The declaration alleged: 1.

That plaintiffs were wholesale and retail merchants at Halifax. That the company wrongfully, falsely and maliciously, by their telegraph lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated and published the false and defamatory message following:—"John Silver & Co., wholesale clothiers, of Grenville street, have failed; liabilities heavy." 2. That same message was caused also to be published in other parts of the Dominion. 3. That the company agreed with the proprietor or publisher of the St. John "Daily Telegraph" newspaper, and entered into an arrangement with him, whereby the company was to collect and transmit, by their telegraph lines, news dispatches to said newspaper from time to time; that the publisher should pay for all such messages, and publish them in his newspaper, and that in pursuance of said agreement the company wrongfully, maliciously, and by means of said telegraph, transmitted, sent and published from their office in Halifax to their office in St. John and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and their credit and business standing and reputation were thereby greatly damaged. It was proved that the telegram published in the morning paper was corrected in the evening edition; that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original dispatch was not produced. The only evidence as to damage was of two witnesses, that by reason of the publication they ceased to do business with the plaintiffs as they had previously been accustomed to do. This evidence was objected to, but was received. The dealings of these witnesses with plaintiffs consisted in selling their exchange and sometimes discounting their notes. A motion for nonsuit was refused, and the jury rendered a verdict for the plaintiffs with \$7,000 damages. *Held*, reversing the judgment appealed from (2 Russ. & Geld. 17), Taschereau and Gwynne, JJ., dissenting. 1. That the company was responsible for the publication of the libel in question. 2. That the damages were excessive, and therefore a new trial ought to be granted. *Ritchie, C.J.*, doubting, and *Henry, J.*, dissenting.—*Per Taschereau and Gwynne, JJ.*, dissenting. Assuming the agreement in question to be one within the scope of the purposes for which the company was incorporated, and that Snyder had sufficient authority to enter into it on behalf of the company, the evidence established that the company collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the proprietor and publisher of said news, for which the damages were awarded. *Held*, also, *per Strong, Taschereau and Gwynne, JJ.* No special damages having been alleged in the declaration, the evidence as to such damages having been objected to, was inadmissible, and therefore a new trial should be granted. *Dominion Telegraph Co. v. Silver*, x., 238.

43. *Evidence — Art. 1235 C. C.—Commercial contract—Rejection of parol testimony.*

See EVIDENCE, 6.

44. *Municipal corporation — Defective sidewalk — Contributory negligence—Nonsuit — Evidence—Damages.*

See NEGLIGENCE, 39.

45. *Delivery of policy — Payment of premiums—Escrow—Division of opinion — Practice—New trial ordered.*

See INSURANCE, LIFE, 8.

46. *Verdict against evidence—Entries in books of third party—Admissibility as evidence—New trial refused.*

See EVIDENCE, 10.

47. *Marine insurance — Evidence — Recovery as for partial loss—New trial.*

See INSURANCE, MARINE, 41.

48. *Improper admission—Cross-examination—Conversation partly given on examination in chief—New trial refused.*

See EVIDENCE, 12.

49. *Improper rejection — Excessive damages—New grounds taken on appeal—Pleading—Refusal of new trial.*

See EVIDENCE, 3.

50. *Condition of new trial — Remittitur damna—Practice.*

See EVIDENCE, 14.

51. *Improper rejection of evidence — Delivery of policy of life insurance—R. S. N. S. (4 ser) c. 96, s. 41—New trial ordered.*

See EVIDENCE, 15.

52. *Deposit with bank for special purpose—Misapplication of funds — Evidence — Verdict—Supreme Court Act, s. 22—Exercise of discretion—Order for new trial sustained.*

See BANKS AND BANKING, 5.

53. *Improper admission of evidence — Objection at trial—Relevancy—New trial ordered.*

See EVIDENCE, 22.

54. *Negligence — Reasonable care — Question for jury—Withdrawal of case from jury — Evidence—Order for new trial sustained.*

See EVIDENCE, 163.

55. *Evidence — Oral agreement — Written contract—Withdrawal of questions from jury — New trial ordered.*

See EVIDENCE, 228.

56. *Evidence as to damages—Discretionary order — Reduction of verdict — New trial refused.*

See No. 27, ante.

AND see Nos. 57 66, *infra*, and also CRIMINAL LAW, 3, 4, 6, 8, 9, 16, 17, 22, 25.

7. FINDINGS OF FACT.

57. *Negligence — Joint tort feorsors — Joinder of defendants — B. C. Judicature Act — Motion for judgment — Findings of jury — New trial — Practice — Judgment by appellate court.*—In a case where a towing company made a contract and afterwards

engaged the assistance of another transportation company in carrying out the contract, the ship in tow was damaged through careless and improper navigation by the tugs of both companies employed about the work. *Held*, reversing the judgment appealed from, that an action in which both companies were joined as defendants was maintainable in that form under the B. C. Judicature Act; that the case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with the English order 40, rule 10 of the orders of 1875, the court could give judgment finally determining all matters in dispute, although the jury may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of the jury. In case the court considers particular findings to be against evidence, all that can be done is to order a new trial, either generally or partially, under the powers conferred by the rule similar to the English order 39, rule 40; and that the Supreme Court of Canada giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their doing so, and therefore, a judgment should be entered against both defendants for damages and costs. (See *The "Thrasher" Case*, 1 B. C. Rep. pt. I., 153.) *Sewell v. B. C. Towing Co. and The Moodyville Sawmill Co.*, ix., 527.

(The Privy Council granted leave to appeal but the case was settled before hearing.)

58. *Negligence —Contributory negligence—Findings of jury—Evidence.*—On the trial of an action against a street railway company for injuries through the negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "Could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the answer was, "We believe that it could have been possible." *Held*, that as the other findings established negligence in the defendant which caused the accident and amounted to a denial of contributory negligence; as there was no evidence of negligence on plaintiff's part in the record; and as the court had before it all the materials for finally determining the questions in dispute, a new trial was not necessary. *Rowan v. Toronto Ry. Co.*, xxix., 717.

59. *New trial — Verdict — Finding of jury—Question of fact—Misapprehension.*—Where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict. (Judgment appealed from, 32 N. S. Rep. 385, affirmed.) *Fraser v. Drew*, xxx., 241.

60. *Assessment of damages — Estimating by guess—Concurrent findings — Reversal on appeal—New trial.*—The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme

Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and, therefore, allowed the appeal and dismissed the action, thus reversing the concurrent findings of both courts below. *Armour, J.*, however, was of opinion that the proper course was to order a new trial. *Williams v. Stephenson*, xxxiii., 323.

61. *Insufficient answers by jury — Final judgment, R. S. C. c. 135, ss. 24 (g), 30, 61 — Jurisdiction to hear appeal.*

See APPEAL, 172.

62. *Evidence — Negligence — Reasonable care — Unsatisfactory findings.*

See RAILWAY, 102.

63. *Direction to jury — Condition precedent — Findings on evidence — Benefit from port performance — Rule for new trial discharged.*

See CONTRACT, 59.

64. *Employers' Liability Act — Injury to workmen — Evidence — Voluntary exposure — New trial ordered.*

See NEGLIGENCE, 87.

65. *Action on insurance policy — Findings of jury — Answers to questions — Evidence — New trial refused.*

See INSURANCE, FIRE, 23.

66. *Findings of jury — Answers to questions — Negligence — Railway company — Act of incorporation — Change of name.*

See RAILWAYS, 150.

8. MISDIRECTION.

67. *Ruling as to evidence — Refusal of witness to answer — Misdirection.*]—The plaintiff examined as a witness on his own behalf, did not, on cross examination, answer certain questions, relying upon advice of counsel, being interrogated as to his belief that his so doing would tend to criminate him, he remained silent and, on being pressed, refused to answer whether he apprehended serious consequences if he answered. The judge then told the jury that there was no identification of the money sought to be recovered, and directed them that if they should be of opinion that the money was obtained by force or duress they should find for the plaintiff. *Held*, *Henry, J.*, dissenting, that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him. New trial ordered. *Power v. Ellis*, vi., 1.

68. *Issues not submitted to jury — Misdirection.*]—Matters in reference to the nature of the terms on which brokers were employed to sell lands and whether the sale went off through the broker's neglect to take an agreement in writing to bind purchasers, or by reason of vendor's unwillingness or inability to complete title were not submitted to the jury. *Held*, that these matters should have been submitted with proper directions to the jury by the trial judge, that there had been misdirection and that the judgment appealed from, ordering a new trial, should be affirmed. *McKenzie v. Champion*, xii., 649.

69. *Application for insurance — Fair and truthful representations — Direction to jury.*]—In an action on a policy of life insurance, it is a proper direction to tell the jury that if there was wilful misrepresentation, or such representation as might mislead the insurer, they should find for defendant, but, if the representations in the application for insurance were reasonably fair and truthful, to the best of applicant's knowledge and belief, that their verdict should be for plaintiff. *Confederation Life Assur. Co. v. Miller*, xiv., 330.

70. *Deviation on voyage — Loading port — Misdirection — Application to vary or reverse judgment ordering new trial — Estoppel.*]—In an action on a policy of marine insurance, where there was a question raised as to "deviation;" *Held*, that whether or not Lobos was a "loading port" on the "western coast of South America," within the policy, was a question for the jury and a new trial was ordered on the ground of misdirection, because it had not been submitted to them. *Providence Washington Ins. Co. v. Gerow*, xiv., 731.

71. *Directions as to evidence — Giving of credit — Contradictory entries in books of account.*]—In an action against McK. & M., as against plaintiff's evidence corroborated by one of the defendants, that goods had been sold to the defendants on their credit, entries in plaintiff's books shewed the goods charged to C. McK. & Co. and credited the same way in the books of C. McK. & Co., and that notes of C. McK. & Co. were taken in payment. M. claimed that the goods had been sold to C. McK. & Co., of which firm he was not a member. The trial judge called the attention of the jury to the state of the entries, the taking of the notes and all the evidence for the defence, and left it entirely to the jury to say as to whom credit was given for the goods. *Held*, affirming the judgment appealed from (27 N. B. Rep. 42) *Strong and Patterson, JJ.*, dissenting, that the case was properly left to the jury and a new trial was refused. *Müller v. Stephenson*, xvi., 722.

72. *Mistrial — Libel — Improper direction — Excessive damages — Reduction of verdict.*]—*Per Strong, Fournier, Taschereau and Gwynne, JJ.*, where on the trial of an action for libel the case was improperly left to the jury, but the only prejudice occasioned to the defendant thereby was that of excessive damages, the verdict might stand on the plaintiff consenting to the damages being reduced to a sum named by the court.—*Per Ritchie, C.J.*, that as there had been a mistrial the consent of both parties to such reduction was necessary. *Higgins v. Walkem*, xvii., 225.

73. *Practice — N. S. Jud. Act, rule 476 — Disposal of whole case on motion for new trial — Directions to jury — Observations by judge on issue not pleaded — Dispensing with jury — Equity case.*]—In an action for winding up a partnership the defence was that there never was a partnership formed between the plaintiff and the defendants, or, if there was, that it had been put an end to by a verbal agreement between the parties. The case was tried by a jury and the result depended on the credibility to be attached to the respective witnesses on each side who gave evidence as to the agreement that had been entered into. No issue of fraud was raised

by the defendants but the trial judge, in charging the jury, made strong observations in respect to fraudulent concealment of facts from the plaintiff and submitted questions to the jury calling for findings in relation to such fraud. The plaintiff obtained a verdict which was sustained:—*Held*, reversing the judgment appealed from (22 N. S. Rep. 456), Gwynne, J., dissenting, that there should be a new trial.—*Per* Gwynne, J., unless either party desires to give further evidence the court should render the judgment which the court below ought to have given on the evidence as it stands.—*Per* Strong, J., under rule 476 of the Judicature Act the court can take a case which has been passed upon by a jury into its own hands and dispose of it if all the proper materials on which to decide are before it, but in this case the materials essential to the final disposition of the case are not before the court and there must be a new trial.—*Per* Ritchie, C.J. The Supreme Court, as an appellate court for the Dominion, should not approve of such strong observations being made by a judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings and not legitimately in issue in the cause.—*Per* Strong, Fournier, Taschereau, Gwynne and Patterson, J.J., that the case was essentially an equity case and one in which a jury could advantageously have been dispensed with. *Hardman v. Putnam*, xviii, 714.

74. *Charge to jury—Misdirection — Taking accounts.*—W., a trader, being in financial difficulties assigned all his property to B. who undertook to arrange with W.'s creditors. W. subsequently assigned his property in trust for the benefit of his creditors and the assignee and some of the creditors brought an action to have the transfer to B. set aside. On the trial, after the evidence on both sides was concluded, plaintiff's counsel asked the judge to instruct the jury as to what constituted fraud under the Statute of Elizabeth, and he also urged that an account should be taken of the dealings between W. and B. The judge refused to define fraud to the jury as requested and the jury stated that they were unable to deal with the accounts. Judgment having been given for the defendants and affirmed by the full court. *Held*, that the refusal of the judge to charge the jury as requested amounted to misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts; and that it could be more properly dealt with as an equity case. *Griffiths v. Boscowitz*, xviii, 718.

75. *Trespass to land—Misdirection — Misconduct of party at view of premises — Nominal damages.*—Action for trespass to land by placing ships' knees thereon whereby plaintiff was deprived of a use of a portion of said land and prevented from selling or leasing it. Defendants denied plaintiff's title. At the trial plaintiff gave no evidence of actual damage but claimed that an action was necessary to protect his title. Evidence was given to shew that the alleged trespass was committed beyond the street line, and plaintiff claimed that the street had never been dedicated to the public and his ownership extended to the centre. Before verdict the jury viewed the premises, one of the terms on which the view was granted being that "nothing said or done by any of the parties or their counsel should prejudice the verdict." The judge charged the

jury strongly against the plaintiff and a verdict was given in favour of defendants. Plaintiff moved for a new trial on grounds of misdirection and of improper conduct of one of the defendants at the view. The court below refused a new trial. *Held*, affirming the judgment appealed from (30 N. B. Rep. 303) that plaintiff was precluded by the terms on which the view was granted from setting up misconduct thereat in support of the application; that there was no misdirection, and that as all plaintiff could obtain at a new trial would be nominal damages it was properly refused by the court below. *Simonds v. Chesley*, xx., 174.

76. *Misdirection — Negligence — Damage by fire — Spark arrester.*—Action for damages to a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine in running a hay press in front of the barn. The main issue was as to sufficiency of a spark arrester, and the judge directed the jury that "if there was no spark arrester in the engine that, in itself, would be negligence for which defendants would be liable." Plaintiff obtained a verdict which was set aside and a new trial ordered for misdirection. *Held*, affirming the judgment appealed from (23 N. S. Rep. 276), Strong, J., dissenting, that the judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence and such direction may have influenced them in giving their verdict. *Peers v. Elliott*, xxi., 19.

77. *Light and air — Easement — Evidence for jury—Qualification in judge's charge.*—In a case where the complaint was as to closing windows which afforded light and air to an attic it was *Held*, that the duration of the tenancy of a person holding under the neighbouring proprietor when the windows were put into the attic gable was a proper question for the jury and should have been left to them without qualification as to the owner's knowledge of their existence. *Pugsley v. Ring*, Cass. Dig. (2 ed.) 241.

78. *Partnership — Bookkeeping — Change of system — Direction to jury respecting the keeping of accounts.*—In an action where questions arose as to a dissolution of partnership, *Held*, that it was not misdirection to tell the jury that in considering that question they might, in connection with other evidence, consider the methods of bookkeeping adopted, and whether or not there had been a change in the system at the particular date when the dissolution was alleged to have taken place. *O'Brien v. O'Brien*, Cass. Dig. (2 ed.) 297.

79. *Charge to jury — Advice leading attention from special issues—Misdirection.*—The judgment appealed from (Q. R. 6 Q. B. 534) affirmed the decision of the Court of Review at Montreal (Q. R. 10 S. C. 316), and a new trial was sought by defendants *inter alia*, upon the ground that the judge charged the jury in such terms as to lead them away from a proper appreciation of the special issues of fact and to divert their attention only to the general question of negligence.—In allowing the appeal the Supreme Court observed that the appellant's contention was well founded. *Cowans v. Marshall*, xxviii., at p. 172.

80. *Negligence — Action for damages—Improper evidence — Misdirection — 60 Vict. c. 24, s. 370 (N.B.).*—By 60 Vict. c. 24, s. 370 (N. B.) "a new trial is not to be granted on the ground of misdirection, or of the improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against the Electric Street Railway Company for damages on account of personal injuries, the vice-president of the company, called on plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company was making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures and on re-examination plaintiff's counsel interrogated him at length as to the selling price of the stock on the Montreal Exchange, and proved that they sold at about 50 per cent. premium. The judge, in charging the jury, directed them to assess the damages as "upon the extent of the injury plaintiff received independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages. *Held*, that on cross-examination of the witness by defendant's counsel, the door was not open for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages. — The injury for which plaintiff sued was that his foot had been crushed, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of the plaintiff's attorney, to co-operate with plaintiff's physician. Eventually the foot was amputated, and plaintiff made a good recovery. On the trial plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation, and three days before the amputation, when Dr. W. stated that if he could induce plaintiff's attorney to view it from a surgeon's standpoint, and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation. The judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible. *Held*, Strong, C.J., and Gwynne, J., dissenting, that as Dr. W. did not represent the company at the first consultation, when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.—To tell a jury to ask themselves "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction. *Hesse v. The Saint John Ry. Co.*, xxx., 218.

81. *Charge to jury — Libel suit — Evidence of malice—Direction as to issues.*—A plaintiff is entitled to an explicit direction stating the law on points directly affecting issues of which the burden of proof is upon him.—A judge's charge in a suit for libel is not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff.—Judgment appealed from, 32 N. S. Rep. 129, affirmed. *Green v. Müller*, xxxi., 177.

82. *Negligence — Pleadings — Issues—Evidence — Contributory negligence — Verdict—New trial—Operation of tramway.*—The action was for damages from injuries to a motor-man through a collision of his car with a special car returning to the car-barn at unusual speed on the wrong track. A verdict was entered for the plaintiff on the findings of the jury and, on appeal to the Court of Review, defendant objected (1) that plaintiff had not denied charges in the statement of defence that the accident had been caused by his fault; (2) that there was misdirection by the trial judge telling the jury that the plaintiff could succeed even if he had himself been negligent if they thought such negligence had not caused the accident; (3) that it had not been alleged that the car which came in collision with that of the plaintiff had no right to be in the place where it was at the time; (4) that, since the trial, defendant had discovered that plaintiff had stated his age at 47 instead of 45 years; and, (5) that the verdict was against the weight of evidence. Langelier, J., in delivering the judgment appealed from, *Held*, (1) that objection to the pleadings came too late, after the necessary proof had been made and an amendment permitted; (2) that, as in Quebec, contributory negligence would merely tend to reduction of damages, negligence not leading to injury could not be considered, and, seeing that the direction did not affect the verdict which attributed the injury solely to the negligence of the defendant, the verdict should not be disturbed; (3) that as evidence had been made without objection on the third point objected to, the objection came too late on the appeal; (4) that evidence discovered after trial must be of a nature tending to change the result of the trial, in order to obtain a new trial, and that the difference of a couple of years in plaintiff's age could not have that effect, and (5) as the evidence was such that a reasonable person could have concluded as the jury did, there could not be a new trial. The Supreme Court affirmed the judgment appealed from for the reasons stated by Mr. Justice Langelier. *Sherbrooke Street R. Co. v. Kerr*, 7th November, 1899.

83. *Délit — Assessment of damages — Material loss—Injured feelings—Misdirection as to solatium—New trial—Art. 1056 C. C.*—In an action of damages brought for the death of a person by the widow and relatives under art. 1056, C. C., which is a re-enactment and reproduction of the C. S. L. C. c. 78, damages by way of solatium for the bereavement suffered cannot be recovered. Judgment appealed from (*M. L. R. 2 Q. B. 25*) reversed and new trial ordered. *Canadian Pacific Ry. Co. v. Robinson*, xiv., 105.

84. *Mistrial — Answers by jury — Final judgment — Jurisdiction.*

See APPEAL, 174.

9. PRACTICE.

85. *Practice — Rule for new trial — Issues on appeal.*—A rule was taken out to set aside a verdict and enter a nonsuit, or for a new trial. The rule was discharged so far as it asked nonsuit, but was made absolute for new trial. On appeal, the Supreme Court held, that although the plaintiff was entitled to recover damages, yet, as he had not appealed from the rule ordering a new trial, that rule should be affirmed upon the dismissal of an appeal by the defendant from the judgment of the court below. *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2 ed.) 729.

86. *Practice — Rule for new trial — Order for nonsuit or verdict for defendant.*—Where the rule had been taken out for a new trial only, the Supreme Court refused to make an order for nonsuit or that verdict for the defendant should be entered, but merely affirmed the rule. *Jones v. DeWolff*, Cass. Dig. (2 ed.) 767.

87. *Evidence — Order for new trial—Practice on appeal.*—Where a verdict for plaintiff had been set aside by the judgment appealed from and a new trial ordered to try certain questions of fact in the case, such an order will not be interfered with on appeal to the Supreme Court. *Scott v. Bank of New Brunswick*, xxi., 30.

88. *Disagreement of jury — Motion for judgment — Amendment — New issues — Ontario Judicature Act—Rule 799.*—The judge left to the jury a question of negligence, only reserving other questions for his own decision. —The jury disagreed. Pending motion by defendant for judgment an amendment was allowed which had the effect of raising new issues but, before trial, judgment on the motion was pronounced dismissing the action. *Held*, affirming the judgment appealed from (which reversed this decision and ordered a new trial), that as whether or not the issues involved under the original action or amended pleadings had been considered as passed upon by the judge or jury before they were disposed of, the order for new trial was properly made, and that it was not a case for invoking the process to finally put an end to the action under rule 799. *Canadian Pacific Ry. Co. v. Cobban Mfg. Co.*, xxii., 132.

89. *New trial—Consent order—Negligence—Street railway — Accident to workman — Contributory negligence.*—Plaintiff was injured by a car striking him while working on the track. The defence was that he had not been reasonably careful in looking out for the cars. The trial judge, who held that plaintiff was the cause of his own misfortune and could not hold defendant liable, was affirmed by the Divisional Court but reversed by the Court of Appeal for Ontario, which ordered a new trial. On the latter decision being affirmed by the Supreme Court of Canada (Gwynne, J., dissenting), counsel for the company stated that a new trial was not desired, and judgment was entered for \$500, amount assessed by the jury at the trial. *Hamilton Street Ry. Co. v. Moran*, xxiv., 717.

89a. *Setting aside judgment for misdirection — Motion for new trial only — Entering judgment on motion or on appeal — Nova Scotia Judicature Act, O. 28, r. 10; O. 40, r. 10; O. 57, r. 5—Evidence for jury.*—On motion for new trial it appeared that there was no evidence to go to the jury. The majority

of the court (on an appeal from 35 N. S. Rep. 117), *Held*, that, as the defendant had asked only for a new trial, judgment could not be entered for defendant and, in allowing the appeal a new trial merely was granted. Girouard and Davies, J., *contra*, considered that, under the Nova Scotia Judicature Act rules, the court below could, *ex proprio motu*, have entered judgment for the defendant, under the circumstances of the case. *Per Armour, J.*—"The only course open to us is to allow the appeal, for we cannot, as I had hoped, make a final disposition of the case, for order 57, rule 5, of the Nova Scotia Judicature Act, applies only to cases tried by a judge without a jury, and order 38, rule 10, to cases tried with a jury." The Chief Justice and Mills, J., concurred with Armour, J. *Green v. Müller*, xxxiii., pp. 196, 198, 212, 213, 227.

90. *Equity suit — Construction of statute—Persona designata*—53 Vict. c. 4, s. 85 (N. B.)

See STATUTES, 140.

10. VERDICT.

91. *Action on contract — Unskilful work—Counterclaim — Verdict for plaintiff—Technical breach by plaintiff—Nominal damages.*—In an action on a contract and also on the common counts to recover the balance of the contract price for work done for the defendant, the evidence shewed that there was a technical breach of the contract by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff and a rule for a new trial was refused by the Divisional Court, and also by the Court of Appeal. *Held*, affirming the judgment appealed from, that a verdict would not be set aside merely to enter a verdict for nominal damages in favour of the other party. *Beatty v. Oille*, xii., 706.

92. *Uncorroborated testimony of plaintiff—Contradictory evidence — Verdict against weight of evidence.*—Action for goods sold by the plaintiff to defendant's brother; plaintiff gave evidence of an agreement with defendant whereby the latter undertook to give notes at four months to retire notes at three months given by his brother, the purchaser of the goods. This agreement was carried out for a time, but defendant finally refused to continue it any longer. The evidence shewed that defendant always gave his notes to his brother who carried them to plaintiff. Defendant, on the other hand, swore that he never made any such agreement, but only gave notes to his brother to help him in his business. The evidence of the plaintiff was entirely uncorroborated. A verdict was found for the plaintiff and new trial was refused. — *Held*, Ritchie, C.J., and Taschereau, J., dissenting, that the weight of evidence was not sufficiently in favour of the plaintiff to justify the verdict, and there must be a new trial.—Judgment appealed from (24 N. B. Rep. 482) reversed, and new trial granted. *Fraser v. Stephenson*, Cass. Dig. (2 ed.) 575.

93. *New trial—Negligence—Master and servant—Common fault—Jury trial—Assignment of facts—Arts. 353 & 414 C. C. P.—Art. 427 C. P. Q.—Inconsistent findings—Misdirection—Pleading.*—In an action for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to shew the breach of a duty

owed him by, and inconsistent with due diligence on the part of the defendant, and that the injuries were thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained and a new trial should be granted. Judgment appealed from, Q. R. 6 Q. B. 534, reversed. *Cowans v. Marshall*, xxviii., 161.

94. *Policy of insurance—Delivery in escrow—Judgment against evidence.*

See INSURANCE, LIFE, 7.

95. *Questions of law—Verdict against weight of evidence—Insurable interest—Appeal from order entertained.*

See APPEAL, 366.

96. *Practice—Court of Review—Verdict—Entering judgment—34 Vict. c. 4, s. 10 (Que.)—34 Vict. c. 6, s. 13 (Que.)*

See RAILWAY, 108.

97. *Collateral agreement to contract—Questions for jury—Verdict—New trial—Duty of appellate court.*

See No. 8, ante.

NONSUIT.

1. *Negligence—Adjoining land-owners—Damage from water collecting in cellars—Injurious user—Action on the case—Declaration.*—[Plaintiffs owned a lot in the City of St. John on which they excavated a cellar and erected a building. The soil of the bottom of the cellar and under the foundation was clay. Defendants owned the adjoining lot, on which, in 1848 (when their ancestors purchased it), there was a house with a cellar. S., or his tenant dug another cellar joining the first one, and put up another house on the same lot. Those houses stood until 1871, when they were burned, leaving the cellars uncovered, thus leaving one large uncovered hole, bounded on the west by Charlotte street, and on the north by the plaintiff's lot. This hole collected large quantities of water from the street and from the surface, and also by percolation from the land adjoining. When plaintiffs built, the cellars being co-terminous with the foundation of the plaintiffs' building, and the soil being clay, the hole retained the water until it gradually softened the clay under plaintiffs' foundation wall, and also gradually destroyed the foundation of the wall itself, and escaped in that way into the plaintiffs' cellar, and thereby caused the side of the plaintiffs' building to settle and the building itself to topple over and damaged it to a large extent.—The declaration had a first count for wrongfully, carelessly, negligently and improperly removing the earth and soil of defendant's lot, and negligently continuing it so removed so that there remained holes and excavations, which defendants so negligently managed and left uncovered that large quantities of water collected and remained in the holes, which water they permitted to flow and escape against, under and through plaintiffs' foundation wall and thereby did damage. Second count. The defendants improperly and negligently collected water, &c., and by their carelessness caused it to flow into the plaintiffs' premises and did damage.—The plea was the general issue of

not guilty. — A rule for nonsuit pursuant to leave reserved at trial was made absolute on the ground that damage and injury must both concur to afford a right of action, and the evidence shewed only an ordinary and legitimate use of the defendants' own land, which did not constitute an injury, and therefore they were not liable: *Held*, affirming the judgment appealed from (2 Pugs. & Bur. 523), that the declaration did not cover the appellant's case, and therefore the nonsuit was correct. *Trustees of St. John Young Men's Christian Ass'n v. Hutchinson*, 23rd February, 1880; Cass. Dig. (2 ed.) 210.

2. *Judge's notes—Voluntary order—Doubt as to consent—New trial.*—[On the trial plaintiff was nonsuited, and on rule to set such nonsuit aside, and for a new trial, it was contended that the nonsuit was voluntary. The minutes of the trial judge merely stated that a nonsuit was moved for, that the plaintiff's counsel replied, and that judgment of nonsuit was entered, and the judge himself said that he believed the understanding to be that a rule was to be granted. The Supreme Court of Nova Scotia held the judgment of nonsuit to be voluntary, and discharged the rule.—On appeal the Supreme Court *Held*, that as there was a doubt as to what took place at the trial, the parties were entitled to the benefit of that doubt, and the rule to set aside the nonsuit must be made absolute. *Levy v. Halifax and Cape Breton Ry. and Coal Co.*, 24th February, 1886; Cass. Dig. (2 ed.) 579.

3. *Defective sidewalk—Evidence—Findings against fact—Lawful use of street—Contributory negligence—Damages.*—[In an action for damages from an injury caused by a defective sidewalk, the evidence of the plaintiff shewed that the accident whereby she was injured happened while she was engaged in washing the windows of her dwelling from the outside of the house, that in taking a step backward, her foot went through a hole in the sidewalk and she was thrown down and hurt; she knew the hole was there. There was no evidence as to the nature or extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation.—No motion for nonsuit was made, and the jury were directed that if the plaintiff knew the hole was there, it was contributory negligence; but if she believed it was firm ground there was no contributory negligence. The jury awarded \$300 damages, and a rule nisi for a new trial was discharged. *Held*, reversing the judgment appealed from (23 N. B. Rep. 559), that there should be a new trial.—*Per Ritchie, C.J.*, and *Fournier, J.* That the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the street as alleged in the declaration, and she was, therefore, not entitled to recover. — *Per Ritchie, C.J.* The damages were excessive.—*Per Henry, J.* That the plaintiff was lawfully using the street, and there was evidence of negligence on the part of the corporation, but as the question of contributory negligence had not been left to the jury as it should have been, there must be a new trial.—*Per Taschereau and Gwynne, JJ.* That there was no evidence of negligence to justify the verdict, and a nonsuit should have been granted if moved for. *Town of Portland v. Griffiths*, xi., 333.

4. *Action for malicious prosecution—Probable cause—Inferences—Function of judge—New trial.*—[In an action for malicious prosecution, the existence or non-existence of rea-

sonable and probable cause is to be decided by the judge and not the jury.—A., staff inspector of police, laid an information charging M. with keeping a house of ill-fame. In laying the information, he acted on a statement made to him by D., a frequenter of the house, sufficient, if true, to prove the charge. A warrant issued, M. was arrested and brought before the magistrate, who, after hearing the evidence, dismissed the charge. — The action was tried three times, each trial resulting in a nonsuit, which was set aside and a new trial ordered. From the judgment ordering the third new trial A. appealed, and, the judges being equally divided, the order stood. On this last trial it was shewn that A. had requested the inspector for the division in which M.'s house was situate to inquire about it, and that, after the information, the inspector reported that there were frequent rows in the house, but he thought there was nothing in the charge. The trial judge held that want of reasonable and probable cause was not shewn and withdrew the case from the jury. The Divisional Court held that he should have asked the jury to find on the fact of A.'s belief in the statement on which he acted in bringing the charge. *Held*, Taschereau, J., dissenting, that A. was justified in acting on the statement, and, the facts not being in dispute, there was nothing to leave to the jury and the trial judge rightly held that no want of reasonable and probable cause had been shewn. *Lister v. Perryman* (L. R. 4 H. L. 521) followed; *Abrath v. North-Eastern Ry. Co.* (11 App. Cas. 247) considered. *Archibald v. McLaren*, xxi., 588.

NOTARY.

1. *Notarial profession in Quebec—Conveyancing—Duty in prevention of fraud—Illiteracy.—Insolvent succession—Acts of administration — Arts. 646, 650 C. C.]* — A notary, practising his profession as such in the Province of Quebec, when acting as a conveyancer for illiterate persons, has imposed upon him the duty of explaining to them the effect of the legal and equitable obligations consequent upon the execution of a deed. Judgment appealed from, 3 Dor. Q. B. 123, affirmed. *Ayotte v. Boucher*, ix., 460.

2. *Board of notaries—Disciplinary powers—R. S. Q. art. 3871.]*—When a charge derogatory to the honour of the profession of notary is made against a notary under the provisions of R. S. Q. art. 3871, which amounts to a crime or felony, the Board of Notaries has jurisdiction to investigate it without waiting for the sentence of criminal jurisdiction. Judgment appealed from, Q. R. 1 Q. B. 176; 17 Q. L. R. 185, affirmed. *Tremblay v. Bernier*, xxi., 409.

3. *Employment in professional capacity—Qualification to act as arbitrator—44 Vict. c. 43 (Que.)]*—An award was made by a majority of arbitrators on the 1st September, 1883, establishing at the amount of \$4,474 the indemnity to be paid to respondents for land of which they were dispossessed by appellants under 45 Vict. c. 23 (Q.). Action was taken for that sum and costs of arbitration and law costs, amounting altogether to \$4,658.20, and a judgment recovered with interest and costs, which was affirmed by the Queen's Bench. The principal defence was that C., being agent of respondents, was disqualified to act as their arbitrator. *Held*, that the evidence shewed

that C. was not in the continuous employ of respondents, but acted for them from time to time only, in his professional capacity as a notary public, and not in any other capacity; he was not disqualified. *North Shore Ry. Co. v. Ursuline Ladies of Quebec*, Cas. Dig. (2 ed.) 36.

NOTICE.

1. ASSESSMENT AND TAXES, 1, 2.
2. CHARGES ON LAND, 3-11.
3. CONDITION PRECEDENT, 12-19.
4. CONSTRUCTIVE NOTICE, 20-27.
5. EXEMPTION FROM LIABILITY, 28, 29.
6. PRACTICE AND PROCEDURE, 30-39.
7. SURETIES, NOTICE TO, 40-42.
8. OTHER CASES, 43-51.

1. ASSESSMENT AND TAXES.

1. *Sale of land for taxes — Defective proceedings — Halifax Assessment Act, 1883 — Healing clauses—Evidence.]* — The provision in the Halifax City Assessment Act, 1883, that a tax sale deed shall be conclusive evidence of compliance with all provisions of the statute, does not cover failure to give notice of assessment required before the taxes could be imposed. Judgment appealed from, 21 N. S. Rep. 155, 279, affirmed. *O'Brien v. Cogswell*, xvii., 420.

2. *Resolution of municipal council—Notice of assessment — Local improvements—Quashing roll—Payment in error of law—Répétition de l'indû.]*—An objection as to the invalidity of an assessment for want of notice which has not been charged in the pleadings nor relied upon at the trial is irrelevant upon an appeal. *Bain v. City of Montreal*, viii., 252.

AND see ASSESSMENT AND TAXES, 49.

2. CHARGES ON LAND.

3. *Trespass—Party wall — Constructive notice—Visible incumbrance.]—Per Ritchie, C.J.* Where an incumbrance upon a party wall is not so prominent and conspicuous as to be necessarily visible and a purchaser has not actual notice of its existence he is not liable as for the consequences of negligent ignorance on account of the want of extraordinary circumstance in examination of the premises at the time of purchase. Judgment appealed from, 2 Russ. & Geld. 44, reversed. *Ross v. Hunter*, vii., 289.

4. *Mortgage—Agreement to charge lands—Statute of Frauds—Registry.]*—The solicitor of the mortgagee wrote the memo. on one of his letter forms under the printed words "Dear Sir," his own name being at the bottom on the left side, and he made an affidavit, as subscribing witness, to have it registered. Lot 19 having been mortgaged to another person, one of the mortgagees of the Christopher farm brought an action to have it declared that she was entitled to a charge or lien thereon, in which action it was contended that the solicitor was not a subscribing witness but only the person to whom the letter was addressed. *Held*, affirming the judgment appealed from (22 Ont. App. R. 175), that the solicitor signed the agreement as a witness and the registration was, therefore, regular.

but if not, as the document was upon the registry the subsequent purchaser had actual notice by which he was bound notwithstanding the informality in the proof of execution which did not make the registration a nullity. —*Held, per Taschereau, J.*, that the agreement did not require attestation, and if the solicitor was not a witness it should have been indorsed with a certificate by a county court judge as required by R. S. O. (1887) c. 114, s. 45, and as the agreement had been registered the court would presume that the necessary certificate had been obtained. *Kooker v. Hoofstetter*, xxvi., 41.

5. *Registered deed — Actual and implied knowledge — Possession in bad faith — Interruption of prescription.*—Where the title to lands has been registered a person claiming adverse possession to the grantee is charged with notice either actual or implied as to the limits and boundaries of the lands therein described to such an extent as may affect the bona fides of his possession. *Chalifour v. Parent*, xxxi., 224.

6. *Equitable title—Registered deed—Actual notice — Constructive notice — Parol agreement.*

See REGISTRY LAWS, 1.

7. *Vendor's lien — Agreement for sale of land—Letter to attorney.*

See LIEN, 2.

8. *Assignee's sale — Conditions—Mistake—Description of mortgaged property—Estoppel.*

See VENDOR AND PURCHASER, 19.

9. *Legacy—Charge on realty—Priority.*

See EXECUTORS AND ADMINISTRATORS, 4.

10. *Registry laws — Registered deed—Priority over earlier grantee—Postponement.*

See REGISTRY LAWS, 28.

11. *Conveyance of trust estate — Notice to equitable owner—Estoppel.*

See TITLE TO LAND, 7.

3. CONDITION PRECEDENT.

12. *Fire insurance — Condition in policy—Notice of subsequent insurance—Inability of assured to give notice.*—By a condition in a policy of insurance against fire the insured was "forthwith" to give notice to the company of any other insurance made, or which might afterwards be made, on the same property and have a memorandum thereof indorsed on the policy, otherwise the policy would be void; provided that if such notice should be given after it issued the company had the option to continue or cancel it. *Held*, affirming the judgment appealed from, that this condition did not apply to a case in which the application for other insurance was accepted on the day on which the property insured was destroyed by fire and notice of such acceptance did not reach the assured until after the loss. *Commercial Union Assur. Co. v. Temple*, xxix., 206.

13. *Previous insurance — Verbal notice to agent—Representation in application.*

See INSURANCE, FIRE, 92.

14. *Condition in policy of fire insurance—Verbal notice to agent—Waiver—Estoppel.*

See INSURANCE, FIRE, 20.

15. *Guarantee policy—Honesty of employee—Notice of defalcation.*

See SURETYSHIP, 7.

16. *Condition in fire insurance policy—Notice of additional insurance — Loss before knowledge of acceptance—Duty of insured.*

See INSURANCE, FIRE, 42.

17. *Accident insurance—Condition in policy—Notice—Condition precedent—Action.*

See INSURANCE, ACCIDENT, 4.

18. *Fire insurance—Conditions of policy—Change in risk—Foreign statutory conditions—R. S. O. (1897) c. 203, s. 168.*

See INSURANCE, FIRE, 33.

19. *Landlord and tenant—Lease for eleven months — Monthly or yearly tenancy—Overholding.*

See LANDLORD AND TENANT, 2.

4. CONSTRUCTIVE NOTICE.

20. *Conveyance of land—Misrepresentation—Boundaries—Knowledge by purchaser—Inquiry—Rescission of contract.*

See TITLE TO LAND, 2.

21. *Shares held "in trust"—Sale of minor's stock—Purchase for value—Account.*

See TRUSTS, 7.

22. *Shares held in trust—Transfer by trustee—Duty as to inquiry.*

See PLEDGE, 5.

23. *Will — Executors and trustees under—Breach of trust by one — Inquiry — Dealing with assets as executor or trustee.*

See TRUSTS, 12.

24. *Principal and agent—Agent's authority—Representation by agent—Principal affected by — Advantage to other than principal — Knowledge of agent—Constructive notice.*

See PRINCIPAL AND AGENT, 25.

25. *Mortgage — Sale of mortgaged land for taxes — Purchase by mortgagor — Action to foreclose—Pleading.*

See MORTGAGE, 35.

26. *Bills and notes — Conditional indorsement—Principal and agent — Knowledge by agent — Constructive notice—Deceit by bank manager.*

See BILLS AND NOTES, 26.

27. *Registry laws—Prior conveyance—Constructive notice.*

See PRESCRIPTION, 19.

5. EXEMPTION FROM LIABILITY.

28. *Express company's receipt — Limitation of liability—Condition precedent — Notice of action.*

See CARRIERS, 12.

29. *Liability of Crown — Government railway — Negligence — R. S. C. c. 38, s. 50.*

See NEGLIGENCE, 219.

AND see Nos. 40 to 42, *infra*.

G. PRACTICE AND PROCEDURE.

30. *Action for false arrest*—*C. S. L. C. c. 101, s. 1—Practice—Question not directly before court*—*Art. 22 C. C. P.*—Plaintiff, while grand master of the Orange Order in Montreal, was arrested for disturbing the peace, and brought action against the mayor for false arrest. Notice of action was given as follows: "We give you notice that D. G., of the City of Montreal, salesman and trader, will claim from you personally the sum of \$10,000 damages, by him suffered from the abuse made of your authority in causing his arrest illegally and for no cause on the 12th of July last (1878), and that unless you make proper amend and reparation of such damages within a month, judicial proceedings will be adopted against you." (Sgd.) D., B. & McC., advocates for plaintiff." The Superior Court considered that the notice was insufficient in not stating the place where the alleged arrest was effected, and also in not stating the name and residence of plaintiff's attorney or agent, and this judgment was affirmed by the Court of Queen's Bench, which further held, that G. was properly arrested, being a member of an illegal association. (2 Dor. Q. B. 197). *Held*, affirming the judgment appealed from (2 Dor Q. B. 197; 2 Legal News 393; 4 Legal News 354), that the notice of action was insufficient, for the reasons given by the Superior Court, and also because the cause or causes of action, as set out in the declaration, were not sufficiently stated in the notice, and that any expression of opinion as to the legality or illegality of the Orange Association would be extra judicial and unwarranted. *Grant v. Beaudry*, Cass. Dig. (2 ed.) 581.

31. *Appeal — Dismissal for want of appearance — Application to reinstate—Notice — Practice — Costs.*—An appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs. — On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice.—The court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but under the circumstances the motion was dismissed without costs. *Hall Mines v. Moore*, 20th May, 1898.

32. *Question of local practice — Inscription for proof and hearing — Peremptory list — Notice—Requête civile.*—Where a grave injustice had been inflicted upon a party to a suit, the Supreme Court of Canada will inter-

fere for the purpose of granting relief, although the question involved upon the appeal may be one of mere local practice only. *Lambe v. Armstrong* (27 Can. S. C. R. 390) followed.—Under a local practice prevailing in the Superior Court in the District of Montreal, the plaintiff obtained an order from a judge fixing a day peremptorily for the adduction of evidence, and hearing on the merits of a case by precedence over other cases previously inscribed on the roll, and without notice to the defendant. The defendant did not appear, and judgment by default was entered in favour of the plaintiff. *Held*, reversing the judgment of both courts below, upon the defendant's *requête civile*, that the order was improperly made for want of notice to the adverse party, as required by the rules of practice of the Superior Court. *Eastern Townships Bank v. Swan*, xxix., 193.

33. *Hearing of appeal — Order extending time for notice—Discretion of trial judge.*

See ELECTION LAW, 7.

34. *Negligence — Non-repair of municipal drains — Damages — Mandamus — Notice of action—R. S. O. (1887) c. 184.*

See DRAINAGE, 2.

35. *Action for damages—Highways—Negligence — Pleading — 34 Vict. c. 11 (N. B.)*

See MUNICIPAL CORPORATION, 141.

36. *Suit against fishery officer — Trespass — Riparian owner—C. S. N. B. cc. 89, 90.*

See FISHERIES, 3.

37. *Bill of lading — Claim for loss — Time limit—Estoppel—Delivery — Bailment.*

See RAILWAYS, 3.

38. *Suits against Crown officers — "Employee" — Government Railways Act, 1881.*

See CROWN, 64.

39. *Bailees — Common carriers — Express company receipt for money parcel — Conditions precedent — Formal notice of claim — Pleading — Money counts — Special pleas.*

See ACTION, 21.

7. SURETY, NOTICE TO.

40. *Dishonour of note — Mailing notices in post office.*

See BILLS AND NOTES, 34.

41. *Principal and surety — Guarantee bond — Default of principal — Non-disclosure by creditor.*

See PRINCIPAL AND SURETY, 5.

42. *Suretyship — Conditional warranty — Notice — Possession of goods — Art. 1959 C. C.*

See SURETYSHIP, 10.

8. OTHER CASES.

43. *Mining regulations — Publication — Payment of royalties—Dominion Lands Act.*—The provision in s. 91 of the Dominion Lands Act that regulations made thereunder shall have effect only after publication for four

successive weeks in the *Canada Gazette* means that the regulations do not come into force on publication in the last of the four successive issues of the *Gazette*, but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of September 4th they were not in force until the 11th and did not affect a license granted on September 9th.—Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment. *The King v. Chappelle, &c.*, xxxii., 586.

44. *Term for redemption — Completion of building — Mise en demeure.*

See SALE, 83.

45. *Dissolution of partnership — Expulsion of partner—Waiver.*

See PARTNERSHIP, 23.

46. *Assignment of chose in action — Suit by assignee—R. S. N. S. (4 ser.) c. 94, ss. 355, 357.*

See CHOSE IN ACTION, 1.

47. *Defective use of machinery — Injury to workman — Employer's liability — Failure to report defect.*

See MASTER AND SERVANT, 32.

48. *Composition and discharge — Acquisition in new arrangement of terms of settlement — Notice of withdrawal from agreement.*

See COMPOSITION AND DISCHARGE.

49. *Negligence — Unsafe premises — Risk voluntarily incurred.*

See NEGLIGENCE, 5.

50. *Cancellation of contract — Gas supply — Shut off for non-payment of gas bill on other premises — Construction of contract — Construction of statute.*

See GAS COMPANY.

51. *Municipal corporation — Waterworks — Rescission of contract—Mise en demeure—Long user—Waiver—Art. 1067 C. C.*

See CONTRACT, 29.

AND see ACTION—APPEAL—ASSIGNMENT—CARRIERS — MUNICIPAL CORPORATION—PLEADING—PRACTICE—REGISTRY LAWS—TITLE TO LAND.

NOVATION.

1. *Indication of payee — Delegation — Exemption by obligee—Arts. 1174, 1180 C. C.*—The consent of an insurance company to pay the amount of a policy of life insurance, in case of death, to a beneficiary indicated by the person insured does not effect novation in the case of a policy void *ab initio*, and the provisions of art. 1180 C. C. do not apply in such a case. *Venner v. Sun Life Ins. Co.*, xvii., 394.

2. *Dissolution of partnership — Assets and liabilities — New firm of continuing partner.*

See TRUSTS, 10.

3. *Unpaid note — Security for by deed — Interruption of prescription — Art. 2264 C. C.*

See PRESCRIPTION, 6.

4. *Vendor and purchaser — Agreement for sale of lands — Assignment — Principal and surety — Deviation from terms of agreement — Giving time — Creditor depriving surety of rights — Secret dealings with principal—Release of lands — Arrears of interest—Novation — Discharge of surety.*

See PRINCIPAL AND SURETY, 4.

5. *Prescription — Arts. 2188, 2262, 2267 C. C.—Waiver—Failure to plead limitation — Defence supplied by court—Reservation of recourse for future damages — Judicial admission—Interruption of prescription—Costs.*

See LIMITATION OF ACTIONS, 23.

AND see CONTRACT, 182, 183.

NUISANCE.

1. *Tannery — Pollution of running stream —Long user — Injunction.*—V. acquired a lot adjoining a small stream and finding the water polluted from noxious substances thrown into the stream brought an action in damages against C., the owner of a tannery situated fifteen arpents higher up the stream, and asked for an injunction. C. and his predecessors had from time immemorial carried on tanning there, using the water for tanning purposes to the knowledge of all the inhabitants without complaint on their part; it was the principal industry of the village; the stream was partly used as a drain by the other proprietors of lands adjoining the stream and manure and filth were thrown in, but every precaution was taken by C. to prevent any solid matter falling into the creek. W. had acquired the property long after C. had been using the stream for tannery purposes, and there was no evidence that the property had depreciated in value by the use C. made of the stream. *Held*, affirming the judgment appealed from (M. L. R. 4 Q. B. 197) that W., under the circumstances proved in this case, was not entitled to an injunction to restrain C. from using the stream as he did. *Weir v. Claude*, xvi., 575.

2. *Municipal drains — Flooding lands — Action by adjoining municipality.*—Damages for flooding lands cannot be recovered by an adjoining municipality against the municipality constructing drainage works even though the nuisance occasioned was general, but compensation for repairs to roads washed away might be recovered. *Township of Nombra v. Township of Chatham*, xxi., 305.

3. *Livery stable — Offensive odours—Noise of horses.*—Though a livery stable is constructed with all modern improvements for drainage and ventilation, if offensive odour therefrom, and the noise made by the horses are a source of annoyance and inconvenience to the neighbouring residents, the proprietor is liable in damages for the injury caused thereby. *Gwynne, J.*, dissenting. *Drysdale v. Dugas*, xxvi., 20.

Followed in *Gareau v. Montreal Street Ry. Co.* (31 Can. S. C. R. 463), No. 6, *infra*.

4. *Constitutional law — Navigable waters — Title to bed of stream — User — Obstruc-*

tion to navigation — Public nuisance—Balance of convenience.]—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of a very great public benefit, and the obstruction of the slightest possible degree. *The Queen v. Moss*, xxvi., 322.

5. *Municipal corporation — Highway—Encroachment upon street — Negligence — Obstruction of show-window — Municipal officers — Action for damages — Misfeasance during prior ownership — Nonfeasance—Statutable duty.*]—An action does not lie against a municipal corporation for damages in respect of mere non-feasance, unless there has been a breach of some duty imposed by law upon the corporation. *The Municipality of Pictou v. Geldert* (1893) A. C. 524, and *The Municipal Council of Sydney v. Bourke* (1895) A. C. 433, followed.—An action does not lie against a municipal corporation by the proprietor of lands for damages in respect thereof, through the mistake or misfeasance of the corporation or its officers, alleged to have occurred prior to the acquisition of his title thereto.—A municipal corporation is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such. *City of Montreal v. Mulclair*, xxviii., 458.

6. *Operation of electric railway — Power house machinery — Vibrations, smoke and noise — Injury to adjoining property—Evidence — Assessment of damages—Reversal on questions of fact.*]—Notwithstanding the privileges conferred by its Act of incorporation, upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of the city, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and values thereby occasioned. *Drysdale v. Dugas* (26 S. C. R. 20) followed.—In an action by the owner of adjoining property for damages thus caused the evidence was contradictory and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality. *Held*, *Taschereau, J.*, dissenting, that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations.—In reversing the judgment appealed from, the Supreme Court, in the interest of both parties, assessed damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise the record was ordered to be transmitted to the trial court to have the amount of damages determined. *Gareau v. Montreal Street Ry. Co.*, xxxi., 463.

7. *Embankment — Flooding premises—Obstruction — Trespass — Continuing damages.*]—In 1888 the Canada Atlantic Railway Company ran their line through Britannia Terrace, a street in Ottawa, in connection with which they built an embankment and raised

the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their foundry business. In 1900 they brought an action against the Canada Atlantic Railway Company alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work. *Held*, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained. *Chaudière Machine & Foundry Co. v. Canada Atlantic Ry. Co.*, xxxiii., 11.

8. *Suffrance — Public property — Long user—Possession.*

See ESTOPPEL, 1.

9. *Discharge of steam—Injury to neighbour — Sic utere tuo ut alieno ne lœdas.*

See NEGLIGENCE, 3.

10. *Level of street—Fence on embankment —Access cut off—Powers and duty of municipal council.*

See MUNICIPAL CORPORATIONS, 163.

11. *Street obstruction — Street railway — Height of rails — Statutory obligation—Accident to horse.*

See NEGLIGENCE, 242.

12. *Municipal corporation — Public market —Licensing traders and hucksters—Obstructing streets and sidewalks—Loss of rents — Damages.*

See MUNICIPAL CORPORATIONS, 155.

13. *Expropriation of lands — Uses injurious to adjacent property—Depreciation in prospective value.*

See RIFLE RANGES.

NULLITY.

1. *Assignment — Prête-nom—Notice—Registration — Action to annul — Parties in interest.*]—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. *Guertin v. Gosselin*, xxvii., 514.

2. *Donation in form of sale — Gifts in contemplation of death — Moral illness of donor — Presumption of nullity — Validating circumstances — Dation en paiement — Arts. 762, 939 C. C.*]—During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee, and the consideration acknowledged by the deed was never paid. *Held*, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void under the provisions of article 762 of the Civil Code, as the circumstances tended to shew that the

transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid. *Valade v. Lalonde*, xxvii., 551.

3. *Local improvements — Notice — Illegal assessment — Payment in error of law — Proof—Répétition de l'indû.*

See ASSESSMENT AND TAXES, 49.

4. *Prohibitive law — Parol testimony — Written instrument—Arts. 14, 1234 C. C.*

See APPEAL, 212.

5. *Bond to sheriff — Fraud — New evidence—Requête civile.*

See SHERIFF, 10.

6. *Evidence—Estoppel—C. C. arts. 311 and 1243.*

See EVIDENCE, 49.

7. *Assignment for benefit of creditors—Preferences—Moneys paid under voidable assignments—Liability of assignee.*

See ASSIGNMENTS, 6.

8. *Title to lands—Sheriff's deed — Limitation of actions—Equivocal possession.*

See EVIDENCE, 239.

9. *Life insurance — Wagering policy — Waiver — Estoppel — 14 Geo. III., c. 48 (Imp.)—Arts. 2480, 2590 C. C.*

See INSURANCE, LIFE, 21.

10. *Fraudulent preference — Bribery — Illegal consideration—Costs.*

See ASSIGNMENTS, 7.

11. *Co-relative agreements — Illegal consideration—Judicial notice of invalidity.*

See LOTTERY.

12. *Penal statute — Prohibited contract — Railway director — Partnership with contractor — Action pro socio—"The Consolidated Railway Act, 1879."*

See STATUTE, 20.

13. *Husband and wife — Judicial separation as to property—Debts incurred by husband before dissolution of community—Obligation by wife—Art. 1301 C. C.—Public policy.*

See HUSBAND AND WIFE, 8.

OATH.

Adverse mineral claim—Form of affidavit—Right of action — Condition precedent—Blank in jurat—61 Vict. c. 33, s. 9 (B.C.)—B. C. Supreme Court rule 415 of 1890.

See MINES AND MINERALS, 15.

ONTARIO FACTORIES ACT.

Negligence — Injury to workman — Proximate cause—Ontario Factories Act—Fault of fellow-workman.

See NEGLIGENCE, 19, 21.

OPPOSITION.

1. COLLOCATION AND DISTRIBUTION, 1.

2. (ON) EXECUTIONS, 2-10.

(a) *Afin d'annuler*, 2-5.

(b) *Afin de charge*, 6.

(c) *Afin de conserver*, 7.

(d) *Afin de distraire*, 8-10.

3. (TO) JUDGMENTS, 11-15.

4. OPPOSITIONS EN SOUS ORDRE, 16.

5. WRITS OF POSSESSION, 17.

1. COLLOCATION AND DISTRIBUTION.

1. *Appeal — Collocation and distribution—Hypothecs—Arts. 20, 144 and 761 C. C. P.—Assignment — Notice — Registration—Prête-nom — Action to annul deed — Parties in interest—Incidental proceedings.]*—The appeal from judgments of distribution under art. 761 C. C. P. is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provisions of art. 144 C. C. P. that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. *Guertin v. Gosselin*, xxvii., 514.

2. (ON) EXECUTIONS.

(a) *Afin d'annuler.*

2. *Practice—Tierce opposition—Opposition afin d'annuler—Will—Exemption from seizure—Judgment in respect to matters dehors the succession—Locus standi of beneficiaries—Res inter alios acta.]*—The will declared the property devised *insaisissable*, save for debts of the succession. Upon seizure of property of the estate in execution of a judgment obtained in respect of a debt contracted by the executor and one of the beneficiaries in a transaction *dehors* the succession, the beneficiaries under the will contested the execution by *opposition afin d'annuler*. *Held*, that the beneficiaries were not obliged to contest by means of *tierce opposition* and were entitled to oppose the execution as they had done on the ground that the judgment was the result of *res inter alios acta* and the property could not be seized thereunder. *Lionais v. Molsons Bank*, x., 526.

3. *Appearance by attorney without authority — Judgment by default — Disavowal—Opposition afin d'annuler — Arts. 483, 484 505 C. C. P.—Con. S. L. C. c. 83, s. 112.]*—Appellant, jointly with S. J. D., signed a note in favour of Angus McDonald, in his lifetime of Bécancour, in the Province of Quebec, at Three Rivers, on 20th February, 1862, for \$800, payable at the Bank of Upper Canada in Three Rivers, on 25th June, 1862.—On 1st April, 1874, the sheriff of Three Rivers wrote to appellant that a judgment against him had been placed in his hands for execution, and this, he alleged, was the first he had ever heard of the note since the day he had signed it.—Appellant being absent at the time and ignorant of any proceedings against him, on receipt

of this letter filed an opposition *afin d'annuler* and petition.—It appeared that a summons issued out of the Superior Court at Three Rivers on 10th October, 1866, against the appellant and S. J. D. was served at the domicile of S. J. D., but the bailiff returned that he had served a copy at *their* domicile (although the appellant alleged he had no domicile in Three Rivers at the time) and on the 26th October, 1886, an appearance was filed for the defendants by D., an advocate, but without any authority from the appellant, who knew nothing of the proceedings.—The next proceeding, after this appearance, was by a notice served on D., on 5th January, 1874, without any step having been taken by the plaintiff in the meantime.—Proceedings were carried on and services effected on D., of which he appears to have taken no notice up to judgment by default on 2nd March following, of all which the appellant alleged he was in utter ignorance, until apprised of the execution as above.—D., upon oath, stated that he was never employed by appellant, never had any communication with him upon the subject of this suit and never informed him of the proceedings when served with notices in continuation of the suit in 1874, and that shortly after the appearance was filed by him in October, 1866, he was informed by the other defendant, who alone had employed him, that the case was settled.—Polette, J., dismissed the opposition with costs, and this judgment was affirmed by the Court of Queen's Bench. *Held*, affirming the judgment appealed from, that the opposition could not be taken to have been made under art. 484 C. C. P., the judgment of 2nd March, 1874, having been rendered by the court in term, and against such a judgment this opposition does not lie. That under C. S. L. C. c. 83, s. 112, the appellant should have proved that the place where the process was served was not his real domicile, and this he had not attempted to do. That if made under art. 505 C. C. P., the appearance by attorney covered any defect in the signification or the bailiff's return, or even an entire want of signification, and this would be fatal under art. 505, as well as art. 483. That the only way the appellant could get rid of the appearance was by a regular disavowal, according to arts. 192 *et seq.* C. C. P. No such disavowal having been made, he must be taken to have waived, by the appearance filed in his name, all the irregularities in the service and even the entire absence of service. *Dawson v. MacDonald*, Cass. Dig. (2 ed.) 586.

4. Amount in controversy—Right of appeal—Setting aside order of provincial judge.

See APPEAL, 320.

5. Seizure for less than \$2,000—Amount in controversy.

See APPEAL, 47.

(b) *Afin de Charge.*

6. Pledge of railway property — Judgment creditor—Remedy of lien-holder—Oppositions *afin de charge* or *afin de conserver*.—[Art. 419 C. C. does not give a registered pledgee a right of retention against execution creditors, but the remedy of the pledgee is by opposition *afin de conserver*. *Great Eastern Ry. Co. v. Lambe*, xxi., 431.

AND see LIEN, 7.

(c) *Afin de Conserver.*

7. Pledge of railway property — Judgment creditor—Remedy of lien-holder.

See LIEN, 7, and No. 6, *ante*.

(d) *Afin de Distraire.*

8. Appeal—Jurisdiction—Amount in controversy — Opposition *afin de distraire*—Judicial proceeding—Demand in original action—R. S. C. c. 135, s. 29.—[An opposition *afin de distraire*, for the withdrawal of goods from seizure, is a "judicial proceeding" within the meaning of s. 29 of "The Supreme and Exchequer Courts Act," and on an appeal to the Supreme Court of Canada, from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure and not the amount demanded by the plaintiff's action or for which the execution issued. *Turcotte v. Dansereau* (26 Can. S. C. R. 578), and *McCorkill v. Knight* (3 Can. S. C. R. 233; Cass. Dig. 2 ed. 694), followed; *Champoux v. Lapeirre* (Cass. Dig. 2 ed. 426), and *Gendron v. McDougall* (Cass. Dig. 2 ed. 429), discussed and distinguished. *King v. Dupuis dit Gilbert*, xxviii., 388.

9. Seizure of land — Amount in dispute—Supreme Court Act (1879) s. 8 — Appeal—Jurisdiction.

See APPEAL, 49.

10. Insolvency of execution debtor—Incomplete assignment—Art. 772 C. C. P.

See EXECUTION, 5.

3. (To) JUDGMENTS.

11. Appeal—Jurisdiction—Judicial proceeding—Opposition to judgment.—[An opposition to judgment under art. 484 C. C. P. is a "judicial proceeding" within the meaning of s. 29 of "The Supreme and Exchequer Courts Act," and there is an appeal to the Supreme Court if, at the filing of the opposition, the principal and interest due under the judgment sought to be annulled amount to \$2,000, where such appeal depends upon the amount in controversy. *Turcotte v. Dansereau*, xxvi., 578.

12. Service of action—Judgment by default—Opposition to judgment — Reasons of—"Rescisoire" joined with "rescindant"—Arts. 16, 89 *et seq.*, 483, 489 C. C. P.—False return of service.—[No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.—The provisions of arts. 483 and following of the Code of Civil Procedure of Lower Canada (respecting oppositions to judgment) relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment by opposition, and have it set aside notwithstanding that more than a year and a day may have elapsed from

the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.—An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescisoire* had thus been improperly joined with the *rescindant*. *Turcotte v. Dansereau*, xxvii., 583.

13. *Revocation of judgment — Pleading — Cross-demand*—Art. 1164 C. P. Q.]—In forming an opposition or petition in revocation of judgment the defendant, in order to comply with art. 1164 C. P. Q., is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right. Judgment appealed from, Q. R. 16 S. C. 22, reversed. *Magann v. Auger*, xxxi., 186.

14. *Setting aside judgment — Escheat to Crown*—*Locus standi* of possessor—*Intervention* — *Collusion* — *Champerty* — *Litigious rights*.

See TITLE TO LAND, 131.

15. *Revocation of judgment*—*Requête civile*—*Nullity* — *New evidence* — *Res judicata*—*Fraud*.

See SHERIFF, 10.

4. OPPOSITIONS EN SOUS ORDRE.

16. *Sub-collocation — Attorney's lien for costs*—*Opposition en sous ordre*—*Moneys deposited in hands of prothonotary* — Art. 753 C. C. P.]—*Held, per Ritchie, C.J., Strong and Taschereau, JJ.*, affirming the judgment appealed from (M. L. R. 3 Q. B. 348), *Fournier and Gwynne, JJ.*, dissenting, that where moneys have been voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition *en sous ordre*.—*Fournier and Gwynne, JJ.*, dissenting, on the ground that as the moneys were still subject to the control of the court at the time the opposition *en sous ordre* was filed, such opposition was not too late. *Barnard v. Molson*, xv., 716.

5. WRITS OF POSSESSION.

17. *Opposition*—*Action confessoire*—*Execution of judgment therein*—*Localization of right of way*—*Writ of possession*—*Appeal to Supreme Court of Canada*.

See TITLE TO LAND, 40.

ORDINANCES.

See STATUTES.

ORDNANCE LANDS.

1. *Petition of Right Act, 1876*—*Limitation of actions*—*Litigious rights*—*Maintenance*—*Public uses*—*Reversion*—*Trusts*—*Fiduciary agent of the Crown*.

See RIDEAU CANAL LANDS, 1.

2. *Laying out and ascertaining*—*Re-vesting of title*—*Lands not used for canal purposes*—*Vesting in Crown for use of Canada*—*Purchase in conflict with public use*.

See RIDEAU CANAL LANDS, 2.

OWNERSHIP.

1. *Railways*—*Expropriation*—*Tenants in common*—*Propriétaires par indivis*—*Construction of agreement*—*Misdescription*—*Plans and books of reference*—*Indemnity*—*Registry laws*—*Estoppel*.

See RAILWAYS, 32.

2. *Joint speculation*—*Partnership or ownership par indivis*.

See PARTNERSHIP, 5.

3. *Emphyteutic lease*—*Action pétitoire*—*Right of action for damages*—*Legal and beneficial estates*.

See TITLE TO LAND, 8.

PARDONS.

Representative of Crown — Prerogative—Legislative authority.]—*Quære*, Is the legislative power of conferring the prerogative of pardoning upon the representative of the Crown, such as a colonial governor, in the Imperial Parliament only, or, if not, in what legislature does it reside? *Attorney-General of Canada v. Attorney-General of Ontario*, xxiii., 458.

PARLIAMENTARY PRACTICE.

Trespass—*Assault*—*Legislative assembly—Powers*—*Punishment for contempt*—*Removal of member from his seat*—*Action against speaker and members*—*Damages*.]—W., a member of the Legislative Assembly of Nova Scotia, on the 16th April, 1874, charged the provincial secretary, without being called to order for doing so, with having falsified a record. The charge was subsequently investigated by a committee of the House, who reported that it was unfounded. Two days after the House resolved that, in preferring the charge without sufficient evidence to sustain it, W. was guilty of a breach of privilege. On the 30th April, W. was ordered to make an apology dictated by the House, and, having refused to do so, was declared, by another resolution, guilty of a contempt of the House, and requested forthwith to withdraw until such apology should be made. W. declined to withdraw, and thereupon another resolution was passed ordering the removal of W. from the House by the sergeant-at-arms, who, with his assistant, enforced such order and removed W. W. brought an action of trespass for assault against the speaker and certain members

of the House, and obtained a verdict of \$500 damages. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, that the Legislative Assembly of the Province of Nova Scotia has, in the absence of express grant, no power to remove one of its members for contempt, unless he is actually obstructing the business of the House; and *W.* having been removed from his seat, not because he was obstructing the business of the House, but because he would not repeat the apology required, the defendants were liable. *Kielley v. Carson* (4 Moo. P. C. 63), and *Doyle v. Falconer* (L. R. 1 P. C. 328), commented on and followed. *Landers v. Woodworth*, ii., 158.

PARTIES.

1. *Action for account — Provisional possession—Executors.*

See EXECUTORS AND ADMINISTRATORS, 8.

2. *Assignment — Hypothecs — Prête-nom — Notice—Action to annul deed.*

See NULLITY, 1.

AND see ACTION — PLEADING — PRACTICE OF SUPREME COURT OF CANADA — PRACTICE AND PROCEDURE.

PARTITION.

1. *False inventory—Action to annul—Fraud — Concealment — Error — Compromise — Duress—Setting aside for fraud and coercion.]*—Two appeals argued together. One in an action by Jane C., wife of A., to set aside a *partage* of the intestate succession of her brother Arsène C., to which she was party, dated 4th November, 1870, taken 4th June, 1879, after her marriage with A. It set up that the inventory was made by Hyacinthe C., that he had all his late brother's property in his hands, that he and his brother were co-partners, and that the family had trusted him entirely in all the matters relating to the estate. That being so trusted he had taken the opportunity to defraud his co-heirs by representing that he had an equal share in the business as partner; that he had not accounted for the capital invested by his brother; that he had undervalued the goods, possessed himself of the ready money and debts, and had augmented the liabilities of the partnership; that he had fraudulently estimated land at less than half its real value; that he had affected to buy the shares of two sisters, who had no rights, as they were civilly dead, being nuns of an order which prevented them holding property, and that he had offered to give up the advantages from this transaction to induce the rest of the family to agree to the *partage* he was desirous of making. The other members, and particularly respondent, were induced by false representations to agree to the *partage*.—It was alleged that this inventory was not regularly made as one of the sisters was a minor, and there had been no *expertise* or curator appointed, and therefore the whole proceeding was null.—The conclusions were that the inventory and deed of *partage* should be set aside as fraudulent and null, defendant condemned to make a new inventory of the partnership effects, and that there should be a new inventory of the other property and effects of the succession, and a

new *partage* of the whole.—The action was principally directed against Hyacinthe C.; the other members of the family were made parties to be subject to the new inventory and *partage*.—On 19th November, 1879, the Superior Court set aside the inventory and partition of the estate of the late Arsène Charlebois on the ground of fraud, concealment and *recel*, practiced by Hyacinthe Charlebois. Pending an appeal Hyacinthe C. made with defendant A. and plaintiff, on 5th May, 1880, a deed entitled "Compromise between Jane C., wife of A., and Hyacinthe C.," by which in consideration of \$700, paid to plaintiff, and costs in said cause until judgment and those of appeal paid to the attorneys, the plaintiff desisted from, and renounced her judgment and assigned and transferred to the defendant Hyacinthe C. all rights she might have in the estate of Arsène C., her brother, and in the estate of her father, Arsène C., sr.—The other action was by Jane C. to set aside the deed of compromise for *crainte* (duress), error and fraud. She contended that she was intimidated by her husband (who was on the point of leaving the country with another woman), into passing this deed with the object, on his part, of procuring money to run off with this other person, and that the money was never paid to her but to her husband.—The Superior Court annulled the compromise and restored the parties to the position they occupied previously, reserving to defendant his recourse to be reimbursed what he paid by virtue of this deed.—In the first case the Court of Queen's Bench reversed the Superior Court and dismissed the action and in the other dismissed the action, on the ground that plaintiff received the consideration money for the deed, which could not be set aside unless she brought back all she received under it. *Held*, that the evidence did not establish fraud, undue influence, nor pressure in the execution of the deed of compromise, and both appeals must fall together and stand dismissed. *Fournier and Henry, J.J.*, dissented. *Charlebois v. Charlebois*, Cass. Dig. (2 ed.) 592.

2. *Legacy — Alienation of property bequeathed—Partition of proceeds—Estoppel.*

See WILL, 26.

3. *Devise of lands—Severance of tenancy—Evidence.*

See TENANTS IN COMMON, 1.

4. *Intestate estate — Feme covert—Statute of Frauds — Statute of Distributions—Revision of statutes—Repeal — Revival of former law—Next of kin—Residue.*

See HUSBAND AND WIFE, 4.

5. *Action for account — Parties—Transfer of shares—Substitution—Specific performance—Mandate.*

See ACCOUNT, 4.

6. *Constitution of will — Devise to children and their issue—Distribution—Per stirpes or per capita.*

See WILL, 13.

7. *Partnership — Division of assets — Art. 1898 C. C.—Mandate—Debtor and creditor—Account.*

See PARTNERSHIP, 7.

8. *Will—Construction of—Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees.*

See SUBSTITUTION, 5.

9. *Construction of deed—Charge on lands.*

See DEED, 1.

10. *Opening of substitution—Legacy to substitutes—Partition per stirpes or per capita.*

See WILL, 22.

PARTNERSHIP.

1. ACTIONS BETWEEN PARTNERS, 1-15.
2. AGENCY OF PARTNERS, 16-19.
3. CONSTITUTION OF PARTNERSHIP, 20-22.
4. DISSOLUTION OF PARTNERSHIP, 23-33.
5. PARTNERS AND THIRD PARTIES, 34-46.

1. ACTIONS BETWEEN PARTNERS.

1. *Division of assets—Valuation of plant supplied—Lien—Payment with partnership moneys.*—The bill filed by M. against W. asked a decree declaring him entitled to a credit of \$40,000, value of plant, used in the works done by them together in partnership. The articles of partnership declared that the stock consisted of the whole of the plant, tools, horses and appliances used for the works by M., also quarries, steam tugs, scows, &c., the whole valued at \$40,000, and contained in an inventory annexed for reference, signed by the parties, but that whereas the said plant and other items were subject to a lien to secure claims against M., to the extent of \$24,000; and whereas W. paid said amount and redeemed said plant, &c., and now stands the proprietor of the same under a deed of conveyance; it was agreed that the said plant should continue to be the property of W., until he received out of the business and profits of the partnership a sum sufficient to reimburse said \$24,000 and interest, after which the whole of the stock should become the property of the firm, one-half to belong to M., and the other half to W., who had a full half-interest in the contract and all its profits, losses and liabilities. The plant had cost originally \$57,000, and was valued at \$40,000 at the request of W.; it was admitted that the profits were sufficient to reimburse W. the \$24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership. *Held*, Henry and Gwynne, JJ., dissenting, that the plant, furnished by the respondents having been inventoried and valued in the articles of partnership at \$40,000, the respondents had thereby become creditors of the partnership for the \$40,000, but as it appeared by the articles that the plant was subject at the time to a lien of \$24,000, and that said lien had been paid off with partnership moneys, the respondents were only entitled to be credited, as creditors of the partnership, with \$16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been so estimated. Judgment of the Court of Appeal for Ontario (7 Ont. App. R. 531) varied. *Worthington v. MacDonald*, ix., 327.

2. *Contract—Mining land—Joint speculation—Agreement lapsing—Renewal option.*—T. discovered a mine of pyrites in Newfoundland and on returning to Nova Scotia proposed to A. that they should buy it on speculation. A. agreed, and advanced money towards paying T.'s expenses in going to Newfoundland to secure the title. T. made the second journey and obtained an agreement of purchase from the owner of the mine for a limited time, but failing to effect a sale within that time the agreement lapsed. It was renewed, two or three times, A. continuing to advance money for expenses. Finally T. effected a sale of the mine at a profit and had the necessary transfers made for the purpose, keeping the matter of the sale secret from A. On an action by A. for his share of the profit under the original agreement, *Held*, affirming the Supreme Court (N.S.), that the sale related back, as between T. and A., to the date of the first agreement, and A. could recover. *Tupper v. Annand*, xvi., 718.

3. *Joint account—Purchase of debentures—Interest in margin deposited—Partner withdrawing more than his share—Reimbursement.*—In May, 1876, W. authorized McC., his broker, to bid for debentures, amounting to \$220,000, then about to be issued, in the purchase of which he did not wish his name to appear; McC. accordingly bid for them, and his bid of 88½ per cent. was accepted. When bidding for them McC. was under the impression that he was doing so for W., although McC.'s name was put forward as purchaser. W. was only willing to take a half-interest in the debentures. In order to raise \$219,486 to pay for them, negotiations took place between McC. and different banks and at one time it was thought they would be completed with the Bank of Montreal upon the deposit of \$13,000 by way of margin, together with the debentures themselves when obtained, and an agreement as to their sale. McC. appears to have had difficulty in raising the one half of the \$13,000. W., after being written to by McC. and seeing him on the subject, gave him a cheque for \$3,250 with a paper containing the following directions: "Please apply \$3,250 out of the balance in your hands due to me along with cheque for \$3,250 on Molsons Bank of this date, making in all \$6,500, as margin on my half of transaction of City of London debentures." In return he took from McC. his receipt in the terms following: "Received from Major Walker the sum of \$6,500, being his proportion of margin on \$219,486, City of London debentures, bought on joint account." At this time it was expected that the amount required for margin would be \$13,000. It was understood between W. and McC. that the latter was to do the best he could to obtain the amount necessary to secure the debentures. He accordingly applied to C. to become the purchaser of a half-interest, informing him that W. would be interested in the other half, and as he did not wish his name to appear in the transaction, McC. requested C. to keep the information to himself. C. agreed to become purchaser of the half, leaving the negotiations for the loan to McC. Negotiations with the Bank of Montreal having fallen through, an arrangement was made with the Bank of Commerce by a letter signed by C. on his own behalf, and by McC. in his own name, but for W. The margin, \$10,000, was paid by C., but one-half (\$5,000) was reimbursed to him by McC. Upon close of the

transaction by sale of debentures there remained in the bank \$6,600 of the margin paid. McC. having become insolvent, W. procured the bank to pay him 65 per cent. of his balance upon the pretence that he was interested to that amount because of his having McC.'s receipt for \$6,500 above mentioned.—The Supreme Court affirmed the judgment appealed from, which held that this payment by the bank to W. was not authorized, but W. and C. having been interested in the bonds jointly, and after re-payment to C. of half of the \$10,000, having been also interested jointly in the amount in the bank to the credit of the margin, he was entitled to be reimbursed by W., the sum required to make up half the amount so remaining to credit of margin. *Walker v. Cornell*, Cass. Dig. (2 ed.) 595.

4. *Public works — Agreement as to tenders — Breach of contract — Fraud by partners — Sub-contract — Rejection of tenders — Damages.*—Action by Kane against Wright and Moore for breach of contract. In 1877, the Quebec Harbour Commissioners advertised for tenders for public works at the mouth of the St. Charles River. — The plaintiffs, the defendants, and A. P. Macdonald, associated themselves as partners, as "Moore, Wright & Co.," to tender, contract for and execute the works for common profit, share and share alike. It was agreed that they should exert themselves to secure the contract for the whole of the works if possible, but, if that were not possible, to secure what could be obtained by direct contract with the commissioners, by sub-contract with the successful tenderer, or in such other manner as the same might be obtainable, more especially the dredging. The plaintiff procured the necessary information to tender for said works, by and in the name of Moore, Wright & Co., exerted himself to promote success, and kept defendants informed of progress of events connected with the letting out of the work. A tender was made by and in the name of Moore, Wright & Co., and, at request of the harbour commissioners, a supplementary tender was likewise made in their name, but seeing that the commissioners favoured one Peters, and was disposed in case he reduced his prices to give him the contract, defendants, in violation of the agreement with plaintiff and Macdonald, combined with Peters to secure part of the works through him, and communicated to him the prices at which they were willing to dredge, which were much below the prices, and enabled him to lower his tender, so that the work was, through him, given to a firm composed of the defendants and Peters, under the name of Peters, Moore & Wright. To effect this defendants withdrew the tenders of Moore, Wright & Co., and fraudulently secured the contract to Peters, Moore & Wright, with the understanding that defendants would have the performance of and profits from the larger portion of said works, especially the dredging, to the exclusion, and in prejudice of the rights of plaintiff and Macdonald.—After the defendants had so secured the greater part of said works they offered participation therein and of the profits to plaintiff and Macdonald, which they accepted, yet defendants failed and refused to fulfil their offer. Plaintiff had always been willing, and offered to perform his part of the agreement, and was entitled to one-fourth of the advantages and profit from said contract.—The contract was for over \$500,000, and the prospective profits were presently worth \$100,000, whereof plaintiff

claimed \$25,000.—Defendants admitted the first and supplementary tender with the plaintiff and Macdonald, but denied that said tenders were withdrawn; averred that they were not successful, that no part of the work was or could be secured thereunder, and that they had a right to combine with and secure the work through Peters; that it was awarded to him, and not to him and them jointly, but Peters sub-let the dredging and concrete work to them and it was nominally arranged that they should be joint contractors with the harbour commissioners, and by agreement with Peters they would divide and separate the dredging and concrete work to be done by them, and this separation was effected by contract, that they were in good faith in procuring the work through Peters, and were under no obligation whatever to allow the plaintiff or Macdonald to participate; nevertheless, they had offered to do so, but the plaintiff and Macdonald failed to accept within reasonable time, and they were obliged to act independently for themselves.—The principal contention was whether or not the partnership was limited to the tenders put in in conjunction with plaintiff and Macdonald.—The Superior Court held that the evidence so limited the partnership and that defendants had not fraudulently or otherwise obtained the rejection of said tenders, and dismissed Kane's action.—The Court of Queen's Bench (1 Dor. Q. B. 297) reversed this judgment, holding that the agreement was that they should be jointly interested, not only in the profits of the entire work, but in such portion as could be secured either directly or by sub-contract; that defendants in fraud of plaintiff, procured the contract for a large proportion of the works with Peters; that defendants afterwards offered a share in the contract to plaintiff and Macdonald, which offer was accepted, but which the defendants refused to carry out; and awarded the plaintiff \$2,500.—On appeal the Supreme Court affirmed the judgment appealed from, *Taschereau, J.*, dissenting. (See 1 Legal News 482; 4 Legal News 15). *Wright v. Kane*, Cass. Dig. (2 ed.) 596.

5. *Joint speculation — Partnership or ownership [par indivis].* — W. & D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. & D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M. N. D., who looked after the business of the representatives of D., paid diligent attention to the interests confined to him

and received their share of such profits, but J. C. B., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses:—*Held*, affirming the judgment appealed from, that the facts did not establish a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them. Even if the partnership existed, there would be none in the moneys paid over to the parties after a division made. *Archbald v. deLisle*; *Baker v. deLisle*; *Mowat v. deLisle*, xxv., 1.

6. *Judicial abandonment — Dissolution — Composition — Subrogation — Confusion of rights — Compensation — Arts. 772 and 778 C. C. P.*—A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm and, with the approval of the court, the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," . . . "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect to the partnership. *Held*, affirming the decision appealed from (Q. R. 3 Q. B. 434), that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estate of each partner as well as the partner's individual rights as between themselves. *Held*, reversing the decision appealed from, Strong, C.J., and Taschereau, J., dissenting, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that, in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion. *McLean v. Stewart*, xxv., 225.

7. *Partnership — Division of assets — Art. 1898 C. C. — Mandate — Debtor and creditor — Account.*—In the Province of Quebec, when there is no other arrangement between the partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the Civil Code in relation to the partition of successions, in so far as they can be made to apply.—Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the mandatory of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or for money had and received. *Lefebvre v. Aubry*, xxvi., 602.

8. *Settled accounts — Release — Setting aside releases and opening accounts.*—One of two members of a firm not possessing busi-

ness capacity, the other managed and controlled all the affairs, presenting at intervals to his partner statements of accounts which the latter signed on being assured of their correctness. In 1891 mutual releases of all claims and demands against each other, based upon statements so submitted by the active partner, were executed by each. In an action against the active partner to set aside these releases and open up the accounts.—*Held*, that all it was necessary to establish was, that in the accounts as settled there were such errors and mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed. *West v. Benjamin*, xxix., 282.

9. *Constitutional law — Powers of Canadian Parliament — Prohibited contract — Consolidated Railway Act, 1879.*—For the reasons given by the judgment appealed from (Q. R. 8 Q. B. 555) the Supreme Court of Canada affirmed the judgment appealed from which had held, that the "Consolidated Railway Act, 1879," s. 19, s.s. 16, was within the legislative jurisdiction of the Parliament of Canada which, having power to legislate on railway matters, could also legislate on all incidents required to carry out the objects it had in view connected with and primarily intended to assist in carrying out such principal object; that the capacity of directors was such an object essentially connected with the internal economy of a railway company; that a contract prohibited by statute is void although not specially stated to be so in the statute, which merely provides a penalty against an offender, and that, where the president of a railway company, subject to that Act, entered secretly into partnership with contractors for the construction of the railway, no action could be maintained upon the partnership contract by him against his partners. *Macdonald v. Riordon*, xxx., 619.

10. *Account — Action pro socio—Procedure — Art. 1898 C. C.*—The judgment appealed from held that in an action *pro socio*, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify an inquiry into all the affairs of the partnership and for the liquidation of the same without producing full and regular accounts of the partnership affairs. *Held*, that the appeal involved merely a question of procedure in a matter where the appellant had suffered no wrong and, therefore, that the appeal should be dismissed. *Higgins v. Stephens*, xxxii., 132.

11. *Interest in partnership lands—Dealings between partners — Laches and acquiescence.*

See STATUTE OF LIMITATIONS, 2.

12. *Real estate transaction — Signification of transfer — Condition precedent to right of action — Act of resiliation.*

See SIGNIFICATION, 1.

13. *Construction of statute—20 & 21 Vict. c. 54, s. 12 (Imp.)—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy — Stifling prosecution—Partnership.*

See CRIMINAL LAW, 18.

14. *Accounting for moneys — Error as to fact — Payment under threat of prosecution — Ratification — Transaction — Arts. 1047, 1049, 1140 C. C. — Action conductio indebiti.*

See MISTAKE, 3.

15. *Contract under seal — Undisclosed principal — Partnership — Amendment.*

See ACTION, 107.

2. AGENCY OF PARTNERS.

16. *Implied authority — Buying and selling land — Stock in trade — Banker — Payment of borrowed money — Joint payees of cheque — Indorsement — Acquiescence in payment — Monthly receipts — Estoppel.*—When a partnership is entered into for the purpose of buying and selling lands, the lands acquired in the business of such partnership are, in equity, considered as personalty, and may be dealt with by one partner as freely as if they constituted the stock in trade of a commercial partnership.—The active partner in such business has an implied authority to borrow money on the security of mortgages acquired by the sale of partnership lands.—An amount so borrowed was paid by a cheque made payable to the order of all the partners by name. The active partner had authority, by power of attorney, to sign his partners' names to all deeds and conveyances necessary for carrying on the business, but had no express authority to indorse cheques. *Held*, that having authority to effect the loan and receive the amount in cash he could indorse his partners' names on the cheque, and the drawees had a right to assume that he did it for partnership purposes and were justified in paying it on such indorsement. *Held*, also, that if the payment by the drawees was not warranted, the drawers having, for two years after, received monthly statements of their account with the drawees, and given receipts acknowledging the correctness of the same, they must be held to have acquiesced in the payment. *Manitoba Mortgage Co. v. Bank of Montreal*, xvii., 692.

17. *Dissolution — Settlement of accounts — Prior debt of partner for firm's business — Release of maker of collateral note.*

See No. 34, *infra*.

18. *Use of firm name — Fraud against partners — Authority to sign notes.*

See No. 36, *infra*.

19. *Agency of partner — Factor — Pledge — Right of action.*

See No. 43, *infra*.

3. CONSTITUTION OF PARTNERSHIP.

20. *Working of mine — Interest in mine — Agreement — Evidence.*—In a suit for a share of the profits of a gold mine where the plaintiff relied on an agreement by the defendant for a transfer of a portion of the latter's interest in such mine for valuable consideration, the evidence was not sufficient to establish a partnership between the parties in the working of the mine and the suit was dismissed.—Judgment appealed from (23 N. S.

Rep. 524) affirmed. (Compare 23 Can. S. C. R. 153, 384). *Stuart v. Mott*, xiv., 734.

21. *Contract — Dealing in land — Statute of Frauds — British Columbia Mineral Act.*—Sections 50, 51 of the Mineral Act of 1896 (B. C.) which prohibit any person dealing in a mineral claim who does not hold a free miner's certificate, does not prevent a partner in a claim recovering his share of the proceeds of a sale thereof by his co-partner, though he held no certificate when he brought his action, having allowed the one he had up to the time of sale to lapse.—A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. Judgment appealed from (6 B. C. Rep. 260) affirmed, *Gwynne and Sedgewick, J.J.*, dissenting. *Archibald v. McEnerhamie*, xxix., 564.

22. *Joint speculation — Relation of parties — Partnership or owners par indivis.*—W. & D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. & D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were equally divided between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M. N. D., who looked after the business of the representatives of D., paid diligent attention to the interests confined to him and received their share of such profits, but J. C. B., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses:—*Held*, affirming the judgment appealed from, that the facts did not establish a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them. Even if the partnership existed, there would be none in the moneys paid over to the parties after a division made. *Archibald v. deLisle; Baker v. deLisle; Mowat v. deLisle*, xxv., 1.

4. DISSOLUTION OF PARTNERSHIP.

23. *Dissolution — Breach of conditions — Expulsion of partner — Notice — Waiver — Goodwill.*—Partnership articles for a firm of

three persons provided that if any partner should violate certain conditions the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken such conditions the other verbally notified him that he must leave the firm and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business and the assignee brought an action against the remaining partners for its value. *Held*, reversing the judgment appealed from (15 Ont. App. R. 103), Fournier, J., dissenting, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from shewing that it took place in consequence of misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to expel could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited. *Held*, also, that if it was a dissolution by one partner voluntarily retiring no claim could be made by the retiring partner in respect to goodwill, as the account to be taken under the partnership articles in such cases does not provide therefor. —*Seem*, that the goodwill consisted wholly of the trade name of the firm. *O'Keefe v. Curran*, xvii., 596.

24. *Dissolution — Change of name—Acquiescence by partners—Account—Costs.*—The plaintiff, L., alleged that he and defendants, McL., H., and S., entered into partnership in 1881, and that a written agreement was shortly thereafter entered into. This agreement recited that the parties owned timber limits on Shell River (Man.) in certain proportions and it was agreed that they were to provide means for the erection of a sawmill and for procuring a plant and supplies for the working of the mill; a quantity of sawlogs being then in process of being got out for the purpose of being sawn at the mill. (This mill was afterwards erected at Brandon (Man.) instead of at Shell River). They were to contribute equally for these purposes and to share equally in the profits; they were to appoint a manager who was to make a requisition for money which each party was to supply equally; it was agreed that as soon as practicable, they should form themselves into a joint stock company, limited, to be known as the N. W. Milling Co., limited, and that in the meantime the business should be conducted under the name of the N. W. Milling Co. The capital was not to exceed \$12,000 without the consent of all parties, and no one without the consent in writing of the others should make any contract in the name of the company except so far as might be necessary for the purchase of supplies or transporting material. There was provision made for building the mill and for carrying on the business until the incorporation should be obtained.—Plaintiff alleged that McL. and H. refused to carry out the agreement or to put up the capital, and he prayed that the ordinary partnership accounts should be taken and a receiver appointed.—S. in his answer admitted

s. c. d.—33

the partnership, and stated the business of the partnership was carried on by L. under the different names of L., McL. & Co., S. & L., L. & S. and S. & Co., and S. McL. and H. were cognizant of the same during the carrying on of the business, and from time to time recognized the same, and he further stated that the business became financially embarrassed in 1883, and acting for himself and at the request of McL. and H., though only in his own name, he and L. consented to the appointment of a manager of the business and advertised in the ordinary way that the firm of S. & Co., under which name the business was running, was mutually dissolved. And he further alleged that the incorporation of the company was prevented by McL. and H., and he assented to the taking of the partnership accounts.—McL. and H. set out the said agreement in full and alleged that they never entered into any agreement of partnership with L. or S., other than the one set out. They charged L. with acts of misconduct, conversion of money to his own use, refusal in 1881 to give any account of the business of the partnership during the year, and that he refused to give any account until after the formation of the firm of S. & Co. They charged about November, 1881, L. and S. in fraud of the partnership and of McL. and H., and with the intent and design of depriving the said last mentioned defendants of their just rights formed a new firm under the name of S. & Co., of which firm they charge the fact to be that L. and S., and no other persons were members, and under the said firm name of S. & Co., proceeded to get out, and did get out a large quantity of sawlogs upon the limits belonging to the firm of the N. W. Milling Co., and converted the same into lumber at the sawmill, and converted the lumber, proceeds thereof, into money, which they appropriated to their own use. McL. and H. denied that they ever became members of the firm of S. & Co., or ever consented to the operations of the firm of S. & Co., and also refused to have anything to do with it, and they claimed that L. and S. should account to them for the values of the properties of the N. W. Milling Co. used by L. and S. They denied all charges of the breach of the partnership agreement, and said they were willing to perform the same until they discovered the extravagant conduct of L. and his reckless violation of the agreement. They claimed that L. and S. incurred large liabilities and attempted to incumber by chattel and other mortgages, the property of the partnership and asked to be indemnified against the same, and finally after asking damages of L. and S. submitted to an account of the N. W. Milling Co.—At the trial Wallbridge, C.J., *Held*, that McL. and H. prevented the incorporation of the defendants and the plaintiff under the name of the N. W. Milling Co. and were liable to S. and L. for such damages as they might prove to have been occasioned thereby; that up to 15th December, 1881, the business carried on was that of the N. W. Milling Co., composed of the plaintiff and defendants; that subsequent to 15th December, 1881, the business was that of the plaintiff alone; that the mill and property were the property of the plaintiff and defendants; that the defendants never were nor was any of them, members or a member of the firm of L., McL. & Co., or S. & Co., or any combination of the name of S., used by the plaintiff in carrying on said business at any time either before or after 15th December, 1881;

that as between the parties, McL. and H. and S. were not chargeable with the liability of S. & Co. or of the plaintiff arising out of the business carried on by the plaintiff in connection with the Shell River limits or Brandon mill from and after 15th December, 1881; that defendants had a right to elect whether they would recognize or assume the business carried on by plaintiff or claim payment for the partnership property used by him as from 15th December, 1881, and that they had elected to claim such payment from plaintiff from said last mentioned date, and that *inter se* defendants were not partners with plaintiff from that date; that any moneys which S. might have paid or might pay in consequence of the carrying on of the business since 15th December, 1881, were a charge on the interest of plaintiff and the proceeds and assets of the business carried on by him since the beginning of the partnership formed between the parties; that defendants were entitled to have the plaintiff charged on his partnership account with their value of their three shares of all the logs and timber cut upon the partnership timber limits and with the net value of the logs and lumber of the partnership cut and manufactured by the N. W. Milling Co. on and prior to 15th December, 1881, and used by plaintiff on and after that date, and also with the use of defendant's undivided interest in the sawmill property at Brandon; and a reference was directed to the master to take the accounts, defendants to have a first lien on the assets of plaintiff in connection with the N. W. Milling Co. for the amount found due to them respectively; that plaintiff should pay to defendants respectively their costs of the suit, such costs to be charged to plaintiff, and credited to defendants, in taking the accounts as an additional remedy for the recovery of such costs. And further directions were reserved with liberty to apply.—The cause was re-heard at the instance of the defendants McL. and H., the plaintiff also giving notice of re-hearing before Dubuc, Taylor, and Killam, JJ., who agreed in finding that McL. and H. were in fault in preventing the incorporation of the partnership as found by the Chief Justice, but Taylor and Killam, JJ., came to the conclusion that the business carried on subsequently to 15th December, 1881, was the business of the plaintiff and defendant S., instead of the business of the plaintiff alone, and the decree was therefore varied to work cut, on this basis, the liabilities as between plaintiff and S. on the one part and McL. and H. on the other, and also as between the plaintiff and S.—Dubuc, J., dissented, being of opinion that as regards L. and S., no fraud whatever could be imputed to them; that if there had been any concealment or misrepresentation, it had been on the part of the defendants McL. and H., who by their conduct, acquiescence and actions misled L. and S. making them believe that they were willing partners of the business under the name of S. & Co., or other combination of that kind. He thought the decree should declare all the parties to the suit partners in the business no matter under what name it was carried on, and that as McL. and H. had charged fraud and had failed to prove it, and were the cause of the suit, they should bear the costs up to the conclusion of the hearing and also the costs of re-hearing.—S. appealed to the Supreme Court of Canada, and L. gave notice that upon such appeal he also would ask for a variation of the decree of the court below. *Held*, per Fournier, Gwynne and Patterson, JJ.,

(Strong and Taschereau, JJ., dissenting), that upon a consideration of the evidence as a whole and the inferences to be drawn therefrom the view taken by Dubuc, J., was correct, and that the original decree of 19th June, 1885, should be varied by changing it into an ordinary partnership decree, regarding the partnership as existing until dissolved by the proceedings taken in the suit; that McL. and H. should pay to appellant his costs of appeal to the Supreme Court and that each party should pay the costs incurred by him subsequent to the decree of 19th June, 1885, and prior to the commencement of the appeal. *Shields v. Leacock*, Cass. Dig. (2 ed.) 604.

[The Privy Council granted leave to appeal in this case, but the appeal was not prosecuted.]

25. *Dissolution — Winding-up—Extra services of one partner—Contract to pay for.*—If the business of winding-up a partnership concern is apportioned between the partners and each undertakes to perform the share allotted to him, one of them cannot afterwards claim to be paid salary or other remuneration merely for the reason that his share of the work has been more laborious or difficult than that performed by his co-partner, in the absence of any express agreement to that effect, or one to be implied from the conduct of the parties. *Liggett v. Hamilton*, xxiv., 665.

26. *Retired partner — Continuance of firm name—Notice of dissolution—Promissory note—Bill heads—New business.*—Action against S. W., as a member of the firm of S. W. & Son, on notes by firm in favour of plaintiff. Defence that defendant had retired from the firm long before the notes were given, and although his son had carried on the business under the name of S. W. & Son, he had no interest in it; also that at the most he could only be liable in respect to the business of a general country store, which was the business of the firm before he withdrew, and not for that of buying and selling real estate and investing in securities, which his son alone had carried on and in respect of which the notes in question were given. The Supreme Court affirmed the judgment appealed from, which held that public notice of dissolution of partnership between defendant and his son had not been given; that defendant was aware that his name still appeared as a member of the firm on the bill heads and in other ways; that he was aware of the general nature of the new business carried on by his son in the firm name, and that he was, therefore, liable on the notes. *Wigle v. Williams*, xxiv., 713.

27. *Construction of deed—Continuance after expiry of term — Deceased partner—Purchase of share—Discount—Goodwill.*—A deed providing for a partnership during 7 years from its date provided for purchase by the survivors of the share of a deceased partner with a special provision that if one partner should die the value of his share should be subject to a discount of 20 per cent. After 7 years had expired the partners continued the business by verbal agreement for an indefinite period and while it so continued K. died. *Held*, varying the judgment appealed from, that, even if the parties had not admitted that the business was continued under the terms of the partnership deed, such terms would still govern as there was nothing in the deed repugnant to a partnership at will; that the sur-

viving partners had, therefore, a right to purchase the share of K. and to be allowed the deduction of 20 % therefrom as the deed provided; and that in the absence of any stipulation in the deed to the contrary the goodwill of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. *Hibben v. Collister*, xxx., 459.

28. *Death of partner—Dissolution—Surety bond to firm—Continuing security—New firm—Liability of surety.*

See SURETYSHIP, 1.

29. *Dissolution—Formation of new firm—Resulting liability—Assets of old firm.*

See TRUSTS, 10.

30. *Partner continuing business after dissolution—Settlement of firm debts—Blending old and new accounts.*

See No. 38, *infra*.

31. *Simulated dissolution—Benefit to wife—Fraud on creditors.*

See No. 39, *infra*.

32. *Dissolution—Terms of—Change of relations—Principal and surety—Discharge of principal.*

See MORTGAGE, 62.

33. *Insurance of members—Registered declaration—Evidence to contradict.*

See EVIDENCE, 21.

5. PARTNERS AND THIRD PARTIES.

34. *Settlement of accounts—Prior debt of partner—Promissory note—Collateral for partnership debt—Release of maker.*—P. lent N. an accommodation note which N. deposited with R. as collateral for the mortgage debt. N. and B. afterwards went into partnership and a new mortgage on partnership property was given to R. for N.'s debt, the note being still left with R. The partnership being dissolved, B. agreed to pay all debts of the firm, including the mortgage, and in settling the accounts between himself and the mortgagees, B. was given credit for the amount of the note which P. had paid to the mortgagees. P. sought to recover from B. the amount so paid. *Held*, reversing the judgment appealed from (15 Ont. App. R. 244), Ritchie, C.J., and Fournier, J., dissenting, that N. having authority to deal with the note as he pleased, and having given it as collateral security for the joint debt of himself and B., on such security being realized by the mortgagees and the amount credited on the joint debt, P., the surety, could recover it from either of the debtors.—*Semble*, Assuming P. not to have been liable to pay the note to the mortgagees and that it was a voluntary payment, it having been credited on the mortgage debt, and B. having adopted the payment in the settlement of the accounts between him and the mortgagee, he was liable to repay it. *Purdum v. Baechler*, xv., 610.

35. *Personal loan to partner—Funds used by partnership—Art. 1867 C. C.]*—Where a member of a partnership borrows money upon his own credit by giving his own promissory note for the sum so borrowed, and afterwards

uses the proceeds of the note in the partnership business of his own free will without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for such a loan under art. 1867 C. C. *Maguire v. Scott* (7 L. C. R. 451) distinguished. Judgment appealed from (M. L. R. 4 Q. B. 246) affirmed, Strong and Patterson, JJ., dissenting. *Shaw v. Cadwell*, xvii., 357.

36. *Fraud against partners—Use of firm name—Promissory note—Authority to sign—Notice—Inquiry.*—E. was a member of the firm of C. & Co. and also a member of the firm of E. & Co., and, in order to raise money for the use of E. & Co., he made a promissory note which he signed with the name of the other firm and, indorsing it in the name of E. & Co., had it discounted. The officers of the bank which discounted the note knew the handwriting of E. with whom the bank had had frequent dealings. In an action against the makers of the note, C. pleaded that it was made by E. in fraud of his partners and the jury found that C. & Co. had not authorized the making of the note, but did not answer questions submitted as to the knowledge of the bank of want of authority. *Held*, reversing the judgment appealed from (22 N. S. Rep. 321), that the note was made by E. in fraud of his partners and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the bank could not recover against C. *Creighton v. Halifax Banking Co.*, xviii., 140.

37. *Separate business—Identity of style—Different partners—Dissolution of one firm—Note subsequently made—Debt of subsisting firm.*—Action on a promissory note for \$1,260.40. Dunham carried on business in Montreal under the name of J. E. Dunham & Co., in which the defendant Park had no interest. While carrying on this business at Montreal, Dunham entered into partnership with Park, on 1st May, 1886, for carrying on similar business at Toronto under the name of J. E. Dunham & Co.; partnership to be dissolved on 1st August following, if notice given. Notice was given, the Toronto business being, however, still continued, for the purpose of winding it up. On 12th August, while both firms were thus carrying on business separately at Montreal and Toronto respectively, a person named Isaacs fraudulently procured Dunham to make the note sued on, ante-dating it to the previous 29th July. The note was afterwards indorsed over to G., and by G. to the plaintiff. *Held*, affirming the Court of Appeal for Ontario, that the note was given by Dunham with reference to the business carried on at Montreal, and came within the principle of *Standard v. Dunham* (14 Opt. R. 67), which was an action brought on another note, given under the same circumstances and at the same time as the one sued on in the present case. *Danks v. Dunham*, Cass. Dig. (2 ed.) 89.

38. *Dissolution—Partner continuing business—Settlement of firm debts—Giving time—Blended accounts—Payment.*—H. & McG., in partnership, became indebted to B., plaintiffs, for goods purchased for which they gave notes of the firm. They dissolved in October, 1876, with the knowledge and approval of B. who assisted in arranging the dissolution.

McG. continued the business alone; B. continued to deal with him; McG. continued to receive goods on credit, until he became insolvent, in the early part of 1880, and thereupon B. brought action against H. & McG. on the notes given by the firm. See 31 U. C. C. P. 430. *Held*, reversing the judgment appealed from (7 Ont. App. R. 33), Ritchie, C.J., and Strong, J., dissenting, that H. was entitled to a verdict on the ground that by the course of dealings of the plaintiffs with McG. subsequently to the dissolution, viz.: by plaintiffs blending the two accounts, and taking McG.'s paper on account of the blended accounts, upon which paper McG. from time to time made sufficient payments to pay any balance remaining due on the paper of McG. and H. which was in existence at the time of the dissolution, it must be held, as a matter of fact as well as of law arising from the course of the said dealings, that the paper of the firm of McG. and H. had been fully paid. *Birkett v. McGuire*, Cass. Dig. (2 ed.) 598; 19 C. L. J. 275.

39. *Dissolution of partnership — Married woman—Benefit conferred during marriage—Simulation—Fraud.*—On 10th April, 1886, J. S. M., a retired partner of the firm of McL. & B., composed of himself and W. M., his brother, agreed to leave his capital, for which he was paid interest, in the new firm to be constituted of the said W. M. and one R., an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full. The new firm was to carry on business under the same firm name up to 31st December, 1889. J. S. M. died on 18th November, 1886. His wife, separate as to property, had an account in the books of both firms. On 16th April, 1890, an agreement was entered into between the new firm and the estate of J. S. M., and his widow, by which a large balance was admitted to be due by them to the estate and the widow. The new firm was declared insolvent in January, 1891. Claims were filed by the widow and the estate of J. S. M. against the insolvents, and the Merchants Bank of Canada contested them on the ground, *inter alia*, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886, that the widow's moneys formed part of the capital of J. S. M., and that the dissolution was simulated.—The Supreme Court reversed the judgment appealed from (Q. R. 2 Q. B. 431), and restored that of the Superior Court. Fournier and King, JJ., dissenting, and *Held*, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to the widow, after having credited her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her, during marriage, benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors. *Merchants Bank of Canada v. McLachlan*; *Merchants Bank of Canada v. McLaren*, 2nd April, 1894; xxiii., 143.

40. *Judgment against firm—Liability of reputed partner—Action on judgment.*—Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker.—In an action upon a promissory note against M. I. & Co., as makers, and J. I. as indorser,

judgment was rendered by default against the firm, and a verdict was found in favour of J. I. as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note. *Held*, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as a maker or indorser.—Judgment appealed from (22 Ont. App. R. 12) affirmed. *Isbester v. Ray, Street & Co.*, xxvi., 79.

41. *Will—Legacy—Bequest of partnership business — Acceptance by legatee—Right of legatee to an account.*—J. and his brother carried on business in partnership for over 30 years and the brother died, his will containing the bequest: "I will and bequeath unto my brother J., all my interest in the business of J. & Co., in the said City of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible." *Held*, affirming the judgment appealed from, that J., on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson v. Junkin*, xxvi., 192.

42. *Insolvent firm—Assignment for benefit of creditors—Composition—Discharge of debt —Release of debtor.*—T. and C. doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T. then induced the Dueber Co., a creditor, to pay off a chattel mortgage on the stock, and a composition of 25 cents on the dollar of unsecured claims, the company to receive its own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the Dueber Co., and the arrangement was carried out, the company eventually, as provided in a contemporaneous deed executed by the parties interested, re-conveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action by the company against T. & Co. on the original debt: *Held*, affirming the judgment appealed from (26 Ont. App. R. 295), that the original debt was extinguished and C. was released from all liability thereunder. *Dueber Watch Case Mfg. Co. v. Taggart*, xxx., 373.

43. *Mandate — Agency—Factor—Pledge—Lien—Notice—Right of action—Intervention —Res judicata—Arts. 1739, 1740, 1742, 1795 C. C.*—A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods notwithstanding notice that the contract was with an agent only. *Dingwall v. McBean*, xxx., 441.

44. *Names of partners—Letter heads—Presumption—Representations*—The represen-

tation of an agent that his principals are a firm in a distant province, and that such firm is composed of A. and B., coupled with the evidence of receipt by the person to whom the representation is made of letters from one of the alleged members of the firm, written on paper on which the names of such members are printed, in answer to letters from such persons, is *prima facie* evidence that A. and B. constitute said firm. (See 28 N. B. Rep. 102.) *McDonald v. Gilbert*, xvi., 700.

45. *Partners dealing in land — Borrowing funds — Indorsement of cheque by one of the joint payees — Estoppel.*

See No. 16, *ante*.

46. *Retirement of partner — Notice of dissolution — Continuance of business in firm name — Liability of old partner.*

See No. 26, *ante*.

PARTY WALL.

1. *Mitoyenné — Payment of indemnity — Art. 518 C. C. — Common wall.* — An owner of property adjoining a wall cannot make it common unless he first pays indemnity to the proprietor for the part he wishes to render common, and half the value of the ground on which such wall is built. *Joyce v. Hart*, l., 321.

2. *Easement — Registration — Notice — Trespass — Conveyance.*

See REGISTRY LAWS, 23.

3. *Tenant in common — Trustees' powers.*

See TRUSTS, 24.

PATENT OF CROWN LANDS.

See CROWN, 77 to 108; and TITLE TO LANDS.

PATENT OF INVENTION.

1. *Infringement — "Flour Dressing Machine" — Co-operation of constituents — Combination of old elements — Novelty — Patent Act, 1872, 35 Vict. c. 26, ss. 6, 28 (D.) — Use in Canada — Jurisdiction of commissioner — Judgment in rem — Res judicata — Manufacture before application — Use before patent.* — An invention consisted of the combination in a machine of three parts or elements, A., B. and C., each of which was old and of which A. had been previously combined with B. in one machine and B. and C. in another machine, but the united action of which in the patented machine produced new and useful results. *Held*, reversing the judgment appealed from (7 Ont. App. R. 628), Strong, J., dissenting, that the combination was in itself a novelty and a proper subject of a patent of invention; that the words in the 6th section of the Patent Act, 1872, "not being in public use or on sale for more than one year previous to his application, in Canada," are to be read as meaning "not being in public use nor on sale in Canada for more than one year previous to his application."

that the Minister of Agriculture, as Commissioner of Patents, or his Deputy, has exclusive jurisdiction over questions of forfeiture under the 28th section of the Patent Act, 1872, and a defence on the ground that a patent has become forfeited for breach of the conditions in the said 28th section cannot be supported after his decision declaring it had not been forfeited by reason of such breach. *Smith v. Goldie*, ix., 46.

[NOTE.—The headnote in the report is apparently based to some extent upon matter not referred to in the statement of the case nor commented upon directly in the judgment reported. Compare Cass. Dig (2 ed.) pp. 608-609 and 689-692.]

See No. 8, *infra*.

2. *Validity of patent — Infringement — Want of novelty.* — C. obtained a patent for the Paragon Black Leaf Check Book, and in his specification claimed as his invention, "in a black leaf check book of double leaves, one-half of which are bound together, while the other half fold in as fly leaves torn out: the combination of the black leaf bound into the book next the cover and provided with tape across its ends, the said black leaf having the transferring composition on one of its sides only." A half-interest in this patent was assigned to the defendant, with whom C. was in partnership, and on the dissolution of such partnership said half-interest was re-assigned to C., who assigned the whole interest in the patent to plaintiffs. Prior to the said dissolution defendant obtained a patent for what he called "Butterfield's Improved Paragon Check Book," claiming as his invention the following improvements on check books previously in use: "A kind of type effecting a saving of labour; a membrane hinge and a protector; and, a totalling sheet." After the dissolution he proceeded to manufacture check books under his patent, and plaintiffs brought suit for an injunction, claiming that their patent was infringed. The Chancellor decreed the relief prayed for, and the Court of Appeal reversed this decision, holding that the plaintiff's patent was void for want of novelty. *Held*, reversing the judgment appealed from (11 Ont. App. R. 145), that the patent under which the plaintiff's claimed was a valid patent, and as there was no doubt that it was infringed by the manufacture and sale of defendant's books, the judgment of the Chancellor should be restored. *Grip Printing and Publishing Co. v. Butterfield*, xi., 291.

3. *Infringement — New invention — Combination — Parts not patentable — New result — Want of novelty.* — In a suit by H. for infringement of his patent for a baker's oven, his claim of invention was: 1. A fire pot, or furnace, placed within a baker's oven, below the sole thereof, and provided with a door situated above the grate. 2. A fire pot, or furnace, placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide. 3. In a baker's oven, a flue leading from below the grate to the main flue. 4. A baker's oven provided with a circular tilting grate, situated below the sole of the oven, and provided with a door. 5. In a baker's oven, a cinder grate placed beneath the fire grate, in combination with a flue leading from below the grate to the main flue. In the specifications the patentee said:

"What I claim as my invention is—in combination with a baker's oven a furnace set within the oven, but below the sole." *Held*, affirming the judgment appealed from (10 Ont. App. R. 449), Strong, J., dissenting, that the combination being a mere aggregation of parts not in themselves patentable and producing no new result due to the combination itself, was no invention, and consequently could not form the subject of a patent. *Hunter v. Carrick*, xi., 300.

See No. 8, *infra*.

4. *Sale of patent rights—Specific performance—Agreement partly executed and partly executory—32 & 33 Vict. c. 11, s. 17 (Patent Act)—Consolidation of suits—Mortgage suit.*—On 1st June, 1877, Powell, the owner of a patent for an improved pump which had only about a month to run, but was renewable for two further terms of five years each, agreed to sell to Park his pump patent for five counties, and by deed of same date granted, sold and set over to Peck "all the right, title, interest which I have in the said invention as secured by me by said letters patent for, to and in the said limits of the counties of," &c. The habendum was "to the full end of the term for which the letters patent are granted; consideration \$4,500, of which \$1,500 paid, mortgages given on land and chattels for the residue. The patent expired 19th July, 1877, and Powell renewed it in his own name for the further term of five years. Peck having made default in 1878, Powell filed his bill for the balance of purchase money, or sale of the land. About the same time Peck brought a suit for specific performance of the agreement for sale of the patent right for the full period to which Powell was entitled to renew under the patent laws. The causes were heard together in the Court of Chancery and in the Court of Appeal and there was but one judgment (26 Gr. 322; 8 Ont. App. R. 498). *Held*, in the suit *Peck v. Powell*, reversing the judgment appealed from, that under the agreement and assignment plaintiffs were entitled to the extension as well as the current term.—And, in the suit *Powell v. Peck*, affirming the Court of Appeal, that Powell was entitled to a decree for the redemption or foreclosure of the mortgaged premises with costs.—*Per* Strong, J., according to the principles upon which a court of equity acts in carrying into execution by its decree such contracts and agreements as are properly the subjects of its jurisdiction, the court will always execute the whole or such parts of the agreement as remain executory, but if the parties have thought fit, before the institution of the suit, to carry out any of the terms of the contract, such executed portions will not be disturbed.—*Per* Henry and Gwynne, JJ., that the decrees in the Court of Chancery should be consolidated and the decree for sale in default of payment in the suit of *Powell v. Peck*, delayed until Powell had assigned the renewal term. *Peck v. Powell*; *Powell v. Peck*, xi., 494.

5. *Infringement—Mechanical equivalent—Want of novelty—Element of invention—Substituted material—Principle void of invention.*—In a suit for infringement, the alleged invention was the substitution in the manufacture of corsets of coiled wire springs, arranged in groups and in continuous lengths, for india-rubber springs previously so used. The advantage claimed by the substitution was that

the metal was more durable, and was free from the inconvenience arising from the use of india-rubber caused by the heat from the wearer's body. *Held*, affirming the judgment appealed from (12 Ont. App. R. 738), Fournier and Henry, JJ., dissenting, that this was merely the substitution of one well known material, metal, for another equally well known material, india-rubber, to produce the same result on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of india-rubber, and it was, consequently, void of invention and not the subject of a patent. *Ball v. Crompton Corset Co.*, xiii., 469.

6. *Old elements—Want of novelty—Combination—Colourable imitation—Subsequent patent—Setting aside patent—Scire facias—Infringement—Measure of damages.*—In 1877, L. obtained a patent of invention for new and useful improvements in candle making apparatus. In 1879, C. obtained a patent for a machine to make candles. L. claimed that C.'s patent was a fraudulent imitation of his patent, and prayed that C. be condemned to pay him \$13,200 for profits realized by C. in making and selling candles with his patented machine, and also \$10,000 exemplary damages. C. contended his patent was valid as a combination patent of old elements; that there could be no action for infringement of L.'s patent until C.'s patent was repealed by *scire facias*; and also that L.'s patent was not a new invention. At the trial there was evidence that there were other machines known and in use for making candles, but there was no evidence as to the cost of making candles with such machines, or what would have been a fair royalty to pay L. for the use of his patent. And it was proved also that L.'s trade had been increasing. The Superior Court found that C.'s patent was a fraudulent imitation of L.'s patent, granted an injunction and condemned C. to pay L. \$600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the Court of Queen's Bench. *Held*, affirming the judgment appealed from (5 Legal News 412), Henry, J., dissenting, that C.'s machine was a mere colourable imitation of L.'s, based upon the same principles, composed of the same elements, differing from it only in the arrangement of those elements, and producing no results materially different; therefore L.'s patent had been infringed, and there was no necessity in order to recover damages for infringement that C.'s patent should first be set aside by *scire facias*. *Held*, also, reversing the judgment appealed from, that in this case the profits made by the defendants was not a proper measure of damages; that the evidence furnished no means of accurately estimating the damages, but substantial justice would be done by awarding \$100. *Collette v. Lasnier*, xiii., 563.

7. *Patentable device—Carriage tops—Combination of elements—Previous use—Novelty.*—D. obtained a patent for an improvement in the construction of carriages by the combination of a folding sectional roof joined in the carriage posts in such a way and in such an arrangement of sections of the roof and of the carriage posts that the whole carriage top could be made entirely in sections of wood or other rigid materials with glass sashes all round, so that the carriage could be opened in the centre into two principal

parts and at once converted into an open uncovered carriage. In an action for infringement, *Held*, reversing the judgment appealed from (18 R. L. 250) and restoring the judgment of the Superior Court, Ritchie, C.J., and Gwynne, J., dissenting, that the combination was not previously in use and was a patentable invention. *Dansereau v. Bellemare*, xvi., 180.

8. *Combination — Old elements — New and useful results — Previous use.*—In an application for patent the object of the invention was stated to be the connection of a spring tooth with the drag-bar of a seeding machine and the invention claimed was "in a seeding machine, in which independent drag-bars are used, a curved spring tooth, detachably connected to the drag-bar in combination with a locking device arranged to lock the head block to which the spring tooth is attached, substantially as and for the purpose specified." In the action for infringement of this patent, it was admitted that all the elements were old but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new and useful combination and patentable as such. *Held*, affirming the decision appealed from, Gwynne, J., dissenting, that the alleged invention being the mere insertion of one known article in place of another known article was not patentable. *Smith v. Goldie* (9 Can. S. C. R. 46), and *Hunter v. Garrick* (11 Can. S. C. R. 300), referred to. *Wisner v. Coulthard*, xxii., 178.

See Nos. 1 and 3, *ante*.

9. *Patent of invention — Similar device — Previous use — Same result — Novelty — Infringement.*—C. & Co., were assignees of a patent for a check book used by shopkeepers in making out duplicate accounts of sales. The alleged invention consisted of double leaves, half being bound together and the other half folded in as fly leaves, with a carbonized leaf bound in next the cover and provided with a tape across the end. What was claimed as new in this invention was the device, by means of the tape, for turning over the carbonized leaf without soiling the fingers or causing it to curl up. H. made and sold a similar check book with a like device, but instead of the tape the end of the carbonized leaf, for about half an inch, was left without carbon and the leaf was turned over by means of this margin. In an action by C. & Co. against H. for infringement of their patent. *Held*, affirming the decision appealed from (3 Ex. C. R. 351), that the evidence at the trial shewed the device for turning over the blank leaf without soiling the fingers to have been used before the patent of C. & Co. was issued, and it was therefore not new; that the only novelty in the said patent was in the use of the tape, and that using the margin of the paper instead of the tape was not an infringement. *Carter & Co. v. Hamilton*, xxiii., 172.

10. *Canadian patent — Expiration of foreign patent — Construction of statute — R. S. C. c. 61, s. 8—55 & 56 Vict. c. 24, s. 1.*—The Exchequer Court declared a patent good, valid and subsisting and that it had been infringed by defendants and held that, the expression "any foreign patent" occurring in the concluding clause of s. 8 of the "Patent Act," must be limited to foreign patents in existence when the Canadian patent was granted. The Supreme Court affirmed the

judgment appealed from (6 Ex. C. R. 55), and dismissed the appeal with costs. *Dreschel v. Auer Incandescent Light Mfg. Co.*, xxviii., 608.

See amendment to Patent Act passed in 1903.

11. *Contract—Sale of patent—Future improvements—Transferee taking benefit—Variation from caveat.*—By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine for which he had applied and a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The latter received an assignment of the Canadian patent and paid a portion of the purchase, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat, and they refused to pay the balance, and in an action by M. to recover the same, they demanded by counterclaim a return of what had been paid on account. *Held*, reversing the judgment appealed from, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement; and that as the evidence shewed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover. *Held*, further, Gwynne, J., dissenting, that as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof and as they took the benefit of it, worked it for their own profit and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. *Bingham v. McMuray*, xxx., 159.

12. *Option as to priority — Expiration of foreign patent — Construction of statute — R. S. C. c. 61, s. 8—55 & 56 Vict. c. 24, s. 1.*—Under s. 8 of the "Patent Act" as amended by 55 & 56 Vict. c. 24, s. 1 (D.), it is only in the case of the applicant exercising the option of obtaining a foreign patent before the issue of a Canadian patent for his invention that the Canadian patent will expire by reason of the expiration of a foreign patent in existence at the time the Canadian patent is granted.—Where several applications are made in different countries upon the same day, the applicant cannot be said to have exercised an election to obtain any one patent before obtaining another. Judgment appealed from (6 Ex. C. R. 357) reversed. *General Engineering Co. v. Dominion Cotton Mills Co.*, xxxi., 75.

Reversed on appeal by the Privy Council. See [1902] A. C. 570.

See also the amendment to the Patent Act by statute of 1903.

13. *Patent of invention — Combination of known devices — Novelty — New result—Infringement.*—Action for damages and injunction for violation of patent of invention for soldering oval cans by causing them to revolve with regularity and to be evenly dipped in a bath of solder. The defence was that

defendant was making use of another patent with the consent and license of the patentee and that the machine so used possessed advantages superior to the plaintiff's patent. The Supreme Court affirmed the judgment appealed from (7 B. C. Rep. 197) which granted the injunction and condemned defendant for nominal damages. *Federation Brand Salmon Canning Co. v. Short*, xxxi., 378.

14. *Subject of patent — Known properties — New purpose — Cleaning pickled eggs — Novelty — Patentable invention.*—The Supreme Court affirmed the judgment appealed from (7 Ex. C. R. 198) which held, (1) that the application of well known things to a new analogous use is not properly the subject of a patent, and (2) that, where a solution of hydro-chloric acid was employed to remove carbonate deposits on pickled eggs and from the known properties of the acid and its use for analogous purposes this could be accomplished, the purpose being new and defendants the first to discover and use the process safely and with advantage in the preservation and marketing of eggs, that as there was nothing in the mode of employing the solution requiring the exercise of inventive faculties, there was no invention, and that a patent for the process could not be sustained. *Wilson v. Meldrum*, 7th October, 1902.

15. *Expiry of patent of invention—Manufacture — Extension of time — Acting officer.*—A patent of invention expires in two years from its date or at the expiration of a lawful extension thereof if the inventor has not commenced and continuously carried on its construction or manufacture in Canada so that any person desiring to use it could obtain it or cause it to be made.—A patent is not kept alive after the two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it if he has not commenced to manufacture in Canada. *Barter v. Smith* (2 Ex. C. R. 455) overruled on this point.—The power of extension beyond the two years given to the Commissioner of Patents or his deputy can only be exercised once.—*Quære*, Can it be exercised by an acting-deputy commissioner? *Power v. Griffin*, xxxiii., 39.

See amendment to Patent Act by statute of 1903.

16. *Patent of invention — Transfer of interest — Promissory note given for consideration—Bills of Exchange Act, 53 Vict. c. 33, s. 30, s.-s. 4.*—A promissory note given for the purchase of an interest in a patent of invention was held to be void under the Bills of Exchange Act because the words "given for a patent right" were not written across its face. *Craig v. Samuel*, xxiv., 278.

AND see BILLS AND NOTES, 40.

17. *Patent of invention — Manufacture and sale under—Failure of patent—Guarantee.*—

See GUARANTEE, 2.

18. *Statute, construction of — Patent of invention — Expiration of foreign patent — "The Patent Act," R. S. C. c. 61, s. 8—55 & 56 Vict. c. 24, s. 1.*

See STATUTE, 69.

19. *Appeal — Jurisdiction — Amount in controversy — Affidavits — Conflicting as to amount — The Exchequer Court Acts—50 & 51 Vict. c. 16, ss. 51-53 (D.)—54 & 55 Vict. c. 26, s. 8—The Patent Act—R. S. C. c. 61, s. 36.*

See APPEAL, 79.

PATERNITY.

See ALIMENTARY ALLOWANCE.

PAWNING.

See PLEDGE.

PAYMENT.

1. *Debtor and creditor — Payment by debtor — Appropriation — Preference — R. S. O. (1887) c. 124.*—A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months afterwards the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods under an order of the court, the balance remaining due on his mortgage. See *Horsfall v. Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors. *Held*, affirming the decision of the Court of Appeal, that there was no preference to B. within R. S. O. (1887) c. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue, and there had been one sale of both stocks of goods, realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to the payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt, under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off. *Stephens v. Boisseau*, xxvi., 437.

2. *Debtor and creditor — Appropriation of payments — Error in appropriation — Arts. 1160, 1161 C. C.*—A bank borrowed from the Dominion Government two sums of \$100,000

each, giving deposit receipts respectively numbered 323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made on the guarantee of O., one of the directors of the bank, who became personally responsible for re-payment, and the receipt for such last loan, upon the guarantee, was numbered 246. The Government having demanded payment of \$50,000 on account, that sum was transferred in the bank books to the general account of the Government, and a letter from the president to the Finance Department stating that this had been done, enclosed another receipt numbered 358 for \$50,000 on special deposit, and concluded: "Please return deposit receipt No. 323—\$100,000 now in your possession." Subsequently \$50,000 more was paid and a return of receipt No. 358 requested. The bank having failed the Government took proceedings against O., on his guarantee for the last loan made to recover the balance after crediting said payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guarantee loan and that the president had instructed the accountant so to apply the two sums of \$50,000 paid, but he had omitted to do so. The trial judge gave effect to this objection and dismissed the information of the Crown.—*Held*, reversing the judgment appealed from (6 Ex. C. R. 21), Taschereau and Girouard, JJ., dissenting, that as the evidence shewed that the president knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within art. 1160 C. C., no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant unless the Government could be restored to the position it would have been in if no imputation at all had been made, which was impossible, as the Government would then have had an option which could not now be exercised. *The Queen v. Ogilvie*, xxix., 299.

3. *Money paid—Voluntary payment—Insolvency of debtor—Action by assignee—Status.*—S., a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claims and took from S. notes aggregating in amount \$708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for benefit of his creditors when the arrangement between him and V. first became known and the assignee and other creditors brought an action to recover the said sum of \$708 from V. as part of the insolvent estate. *Held*, affirming the judgment of the Court of Appeal (3 Ont. L. R. 5), and that at the trial (32 O. R. 216), that S. having paid the notes voluntarily without oppression or coercion could not himself have recovered back the amount and his assignee was in no better position. *Held*, per Taschereau, J. As anything recovered by the assignee would be for the benefit of his co-plaintiffs only who would thus be

ceive what would have been an unjust preference if stipulated for by the agreement for extension the plaintiffs had no *locus standi in curia*. *Langley v. Van Allen*, xxxii., 174.

4. *Mining regulations—Dominion Lands Act—Payment of royalties—Voluntary payment.*—Where mining regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment. *The King v. Chappelle; The King v. Carmack; The King v. Tweed & Woog*, xxxii., 586.

5. *Appropriation—Settlement of accounts—Omission of overdue note.*

See LIMITATION OF ACTIONS, 2.

6. *Duress—Illegal tax—Protest—Payment to avoid execution—Subsequent proceedings to quash—Estoppel—Waiver.*

See ASSESSMENT AND TAXES, 8.

7. *Purchase of land—Note given to agent—Sale under powers—Giving credit—Power of attorney.*

See PRINCIPAL AND AGENT, 5.

8. *Partnership debts—Dissolution of firm—Dealings with partner continuing business—Settlement of old liabilities—Appropriation of payments.*

See PARTNERSHIP, 38.

9. *Sale of timber limits—Bonus on transfer—Statement of account—Payment to Commissioner of Crown Lands.*

See SALE, 75.

10. *Appropriation of payments—Imputation of payment—Reference to take account.*

See PRINCIPAL AND SURETY, 2.

11. *Suretyship—Continuing security—Imputation of payments—Reference to take account.*

See PRINCIPAL AND SURETY, 2.

12. *Appropriation in proportionate ratio—Vendor and purchaser—Agreement for sale of land—Assignment—Terms of agreement—Giving time—Depriving surety of rights—Secret dealings—Release of lands—Arrears of interest—Novation—Discharge of surety.*

See PRINCIPAL AND SURETY, 4.

13. *Debtor and creditor—Security for debt—Security realized by creditor—Appropriation of proceeds—Res judicata.*

See BANKS AND BANKING, 19.

14. *Mines and minerals—Lease of mining areas—Rental agreement—R. S. N. S. (5 ser.) c. 7—52 Vict. c. 23 (N.S.).*

See LEASE, 19.

15. *Sale—Donation in form of—Mortal illness of donor—Nullity—Dation en paiement—Arts. 762, 989 C. C.*

See SALE 86.

16. *Action—Condictio indebiti—Répétition de l'indu—Evidence—Fictitious claims—Misrepresentation—Onus probandi—Railway subsidies—Insolvent company—Payment of claims by the Crown—Transfer by payee—Art. 1090 C. C.—54 Vict. c. 88 (Que.)*

See ACTION, 14.

17. *Municipal corporation—Railways—Taxation—By-laws—Construction of statute—Voluntary payment—Action en répétition—29 Vict. c. 57, s. 21 (Can.)—29 & 30 Vict. c. 57 (Can.)*

See ASSESSMENT AND TAXES, 14.

18. *Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.*

See INSURANCE, FIRE, 1.

19. *Joint stock company—Payment for shares—Equivalent for cash—Written agreement—Winding up.*

See COMPANY LAW, 45.

20. *Life insurance—Condition of policy—Payment of first premium—Delivery of policy—Art. 1233 C. C.*

See INSURANCE, LIFE, 32.

21. *Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition—Presumption of good faith—Arts. 1047, 1049 C. C.*

See CUSTOMS DUTIES, 5.

22. *Debtor and creditor—Accord and satisfaction—Mistake—Principal and agent.*

See MISTAKE, 7.

PENALTY.

Statutory prohibition—Penal statute—Wholesale purchase—Guarantee—Validity of contract—Forfeiture—Nova Scotia Liquor License Act—Practice.

See STATUTE, 37.

PENSION ALIMENTAIRE.

See ALIMENTARY ALLOWANCE.

PENSION DE RETRAITE.

Commutation—Transfer or Cession—R. S. Q. arts. 676 to 691.]—D. a retired employee of the Government of Quebec in receipt of a pension under arts. 676, 677 R. S. Q. surrendered his pension for a lump sum, and subsequently he and his wife brought action to have it revived and the surrender cancelled. By art. 690 R. S. Q., pensions are not transferable nor subject to seizure, and by art. 683, the wife of D. on his death, would have been entitled to an allowance equal to one-half of his pension.—Held, reversing the decision appealed from (Q. R. 4 S. C. 426), Strong, C.J., and Sedgewick, J., dissenting, that D. after his retirement was not a permanent official of the Government of Quebec, and the transaction was not therefore, a resignation by him

of office and a return by the Government, under art. 688 R. S. Q., of the amount contributed by him to the pension fund, that the policy of the legislation in arts. 685, 690 R. S. Q. is to make the right of a retired official to his pension inalienable even to the Government; that D.'s wife had a vested interest jointly with him during his life in the pension and could maintain proceedings to conserve it; and therefore that the surrender of the pension should be cancelled. *Dionne v. The Queen*, xxiv., 451.

AND see CIVIL SERVICE.

PEREMPTION D'INSTANCE.

*Abatement of action—Retrospective legislation—Arts. 1 and 279 C. P. Q.—Art. 454 C. C. P.]—When the period of peremption commenced after the promulgation of the new Code of Procedure of the Province of Quebec the exceptions declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at the time it came into force under the limitation provided by art. 279. *Cooke v. Millar* (3 R. L. 446; 4 R. L. 240) referred to. *Schwob v. Town of Farnham*, xxxi., 471.*

PERILS OF THE SEAS.

See INSURANCE, MARINE.

PERJURY.

*Criminal law—Judicial proceeding—De facto tribunal—Misleading justice—Jurisdiction—Construction of statute—R. S. Q. arts. 5551, 5561—Criminal Code, s. 145.]—The hearing of a charge by a magistrate assuming to act as a Justice of the Peace having authority to hear it, is a judicial proceeding within the meaning of s. 145 of the Criminal Code and a person swearing falsely upon such hearing may be properly convicted of perjury, notwithstanding that the magistrate had no jurisdiction over the subject matter of the complaint. Judgment appealed from (Q. R. 11 K. B. 477) affirmed, the Chief Justice and Mills, J., dissenting. *Drew v. The King*, xxxiii., 228.*

AND see CRIMINAL LAW.

PETITION OF RIGHT.

1. *Appeal—Expiration of time limit—Forfeiture—Waiver—Arts. 1020, 1209, 1220 C. P. Q.]—Art. 1220 C. P. Q. applies to appeals in cases of petition of right in the Province of Quebec. *Lord v. The Queen*, xxxi., 165.*

2. *Agreement for continuous possession of Government railway—Breach of assertion of supposed rights—Joint misfeasance—Reduction of damages—37 Vict. c. 16 (D.)*

See TORT, 1.

3. *Suit against Crown—46 Vict. c. 27 (Que.)—Appeal to Supreme Court of Canada.*
See APPEAL, 384.

4. *Remedy against Crown—Title to land—Re-vesting of lands not use for canal purposes—Statute of Limitations—Petition of Right Act.*

See RIDEAU CANAL LANDS, 2.

5. *Contract for public work — Extras—Final certificate—Pleading.*

See CONTRACT, 61.

6. *Railway subsidy — Application—Discretion of Crown—Trust.*

See CONSTITUTIONAL LAW, 55.

7. *Constitutional law—Powers of executive councillors—"Letter of credit"—Obligations binding on provincial legislatures — Government expenditures — Negotiable instrument—"Bills of Exchange Act," 1890—"The Bank Act," R. S. C. c. 120.*

See CONSTITUTIONAL LAW, 26.

8. *B. N. A. Act, 1867, s. 111—Deferred liability of Province of Canada, 8 Vict. c. 90 (Can.)—Arbitration and award -- Condition precedent—Remedial process.*

See STATUTE, 154.

PETITORY ACTION.

See ACTION—TITLE TO LAND.

PHARMACY.

1. *Quebec Pharmacy Act, 48 Vict. c. 36, s. 8 [Partnership.]—48 Vict. c. 36, s. 8 (Que.), which provides that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising, are entitled to be registered as licentiates of pharmacy, applies to a person who had, during more than five years before the coming into force of the Act, practised as chemist and druggist in partnership with his brother and in his brother's name, and that he was entitled under that section to be registered as licentiate of a pharmacy. Judgment appealed from (M. L. R. 2 Q. B. 362) affirmed. L'Association Pharmaceutique de la Province de Quebec v. Brunet, xiv., 738.*

2. *Unlicensed sale of drugs—Second offence—"Quebec Pharmacy Act"—Suit for joint penalties.*

See STATUTE, 36.

PHOSPHATE.

Condition of marine policy — Overloading with "stone or ores."

See INSURANCE, MARINE, 15.

And see BOUNDARY—MINES AND MINERALS—TITLE TO LANDS.

PLANS.

1. *Reference in deed — Re-subdivision—Courses and distances—Computed area—Evidence of boundaries.*

See BOUNDARY, 1, 3, 5, 7—SURVEY, 2—TITLE TO LANDS, 87, 101, 129, 135.

2. *Subdivision of lands — Registration of plan—Grant by specific description—Evidence to explain plan—Boundaries.*

See TITLE TO LAND, 129.

3. *Sale of land—Lanes on sale plan—Lease by new plan with lane closed—Estoppel.*

See TITLE TO LAND, 33.

4. *Expropriation of land—Tenants in common—Propriétaires par indivis—Construction of agreement — Misdescription — Plans and books of reference—Surveys—Registry laws—Satisfaction of condition as to indemnity.*

See RAILWAYS, 32.

5. *Cadastre — Variation of description of lands—Possession beyond boundaries in deed—Notice by registration—Bona fides—Prescription.*

See TITLE TO LAND, 87.

6. *Plan of subdivision—Title to land—Legal warranty—Description—Change in street line—Accession—Troubles de droit—Eviction.*

See TITLE TO LAND, 125.

7. *Mines and minerals — Adverse claim — Form of plan — Right of action — Condition precedent—Necessity of actual survey—R. S. B. C. (1897) c. 135, s. 37—R. S. B. C. (1897) c. 3, s. 16.*

See MINES AND MINERALS, 15.

8. *Contract for construction of works—Specifications—"From" and "to" streets—Reference to plan annexed—Construction of deed—Mistake—Costs.*

See CONTRACT, 179.

PLEADING.

1. STATEMENT OF CLAIM OR DEMAND, 1-18.

2. DEFENCE, EXCEPTIONS, OPPOSITIONS, &C., 19-65.

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1. STATEMENT OF CLAIM OR DEMAND.

1. *Statement of claim—Exchequer Court—Insufficiency—Appeal from order in chambers.]—A statement of claim was filed by the Attorney-General for Ontario in the Exchequer Court of Canada, praying "that it may be declared that the personal property of persons domiciled within Ontario, dying intestate and leaving no next of kin or other persons entitled thereto other than Her Majesty, belongs to the province or to Her Majesty in trust for the province." The Attorney-General for Canada in answer prayed that "it be declared the personal property of persons who have died intestate in Ontario since confederation, leaving no next of kin or other person entitled thereto except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada."—No reply was filed, and on an application in cham-*

bers for summons for order to fix time and place of trial or hearing, the summons was discharged by Gwynne, J., on the ground that the case did not present a proper case for the decision of the court. Motion was then made before the Exchequer Court (Ritchie, C.J.), by way of appeal, for an order to fix the time and place of trial, which was dismissed with costs, on the ground that he was not prepared to interfere with the order of another judge of the same court.—On appeal to the full court, *Held*, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect. *Attorney-General of Ontario v. Attorney-General of Canada*, xiv., 736.

2. *Libel—Special damages—General claim—Verbal slander—Particulars—Loss of custom—Evidence.*—By s. 11 of the Libel Act of Manitoba, 50 Vict. c. 22, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed. *Held*, affirming the judgment appealed from (6 Man. L. R. 578), that a general allegation of damages by loss of custom is not a claim for special damages under that section. *Per Strong, J.*, where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is inadmissible. *Ashdown v. Manitoba "Free Press" Co.*, xx., 43.

3. *Injunction obtained maliciously—Disso- lution—Non-pros.—Loss of trade—Statement of claim—Suggestio falsi—Suppressio veri—Discretion—Demurrer.*—Action for maliciously obtaining an *ex parte* injunction order from a judge, whereby the plaintiff was restrained from disposing of lumber and sustained damage. It was alleged that plaintiff was possessed as of his own property of lumber, the defendants maliciously and without reasonable or probable cause, and without any notice to plaintiff, made an *ex parte* application for an injunction in a suit commenced by them in which defendants were plaintiffs and the plaintiff with others defendants, and procured an *ex parte* order of injunction and caused it to be served on plaintiff; that plaintiff appeared and put in his answer, but defendants did not further prosecute their suit, which was dismissed with costs and the injunction became of no further effect; that by reason of obtaining and service on plaintiff of said order he was hindered and prevented from manufacturing said lumber for a long space of time whereby said lumber was greatly injured and part thereof lost and the plaintiff lost large gains. A demurrer was sustained.—*Held*, affirming the judgment appealed from (18 N. B. Rep. 469), that the declaration disclosed no cause of action.—By R. S. N. B. vol. 2 (1854) c. 18, s. 6, (C. S. N. B. [1877] c. 49, s. 24), such an order is granted on a sworn bill, or on the bill and an affidavit, and may be granted *ex parte*, subject to be dissolved on sufficient ground shewn by affidavit on the part of defendant. Here there was no allegation that the injunction was dissolved, or that any application was made for its dissolution, or that the order was obtained by any *suggestio falsi*,

or *suppressio veri* on the part of plaintiff, and for aught that appeared in the declaration, the judge exercised a sound discretion in granting the order. *Collins v. Everitt*, Cass. Dig. (2 ed.) 210.

4. *Malicious proceedings in insolvency—Declaration—Demurrers—Final judgment—Trespass—Order for payment of part of verdict as condition of stay of execution—Practice.*—In an action for malicious proceedings in insolvency the declaration contained eight counts:—1. For falsely, maliciously, and without reasonable or probable cause, on 18th April, 1879, issuing a writ of attachment under the Insolvent Act of 1875, &c., against plaintiff, then a trader, &c., residing and carrying on business in Cariboo, and serving, publishing and executing the same, causing plaintiff's property to be taken from him; but that on petition by the plaintiff praying that the writ and the attachment made thereunder might be set aside, the court ordered that the proceedings on the writ and procedure thereon should be ended and determined upon judgment setting them aside on appeal, and by reason of the premises, plaintiff was put to expense, inconvenience, anxiety, pain and distress of body and mind, and was prevented from transacting business, collecting debts, and lost many debts, &c., &c., and was injured in credit and business, &c., &c.—2. Setting out proceedings same as the first count: And afterwards the judge, on 8th May, 1880, set aside and annulled the attachment, and defendants appealed and set down the appeal for hearing but did not proceed with their appeal and, on application of plaintiff, it was ordered that the record be returned, and condemned defendants to pay costs (the alleged expenses, &c.)—3. Alleging the proceedings as in first count:—And defendants maliciously appeared before the judge, and opposed the petition to set aside the writ and caused the judge to decline to hear or adjudicate upon the petition. That defendants maliciously opposed an application to shew cause, &c., and thereupon the County Court Judge was ordered to proceed to hear and adjudicate upon the petition. And defendants maliciously, &c., appealed, but the Supreme Court confirmed the order and dismissed the appeal. That afterwards when the petition came before the County Court Judge for hearing, defendants again maliciously, &c., opposed it, and caused the judge to dismiss it with costs and direct proceedings in insolvency to go on. That plaintiff appealed and defendants again maliciously, &c., opposed the appeal, but the Supreme Court set aside the decision of the County Court Judge.* (Conclusion as in first count.)—4. (Same as 3rd to asterisk.) "And thereupon plaintiff applied to said County Court Judge in pursuance of said petition to set aside, &c., and defendants again maliciously, &c., opposed such application, but the County Court Judge . . . made an order annulling the writ and attachment, and defendants maliciously, &c., appealed . . . to the Supreme Court, and . . . caused the appeal to be set down for hearing on 14th June, 1880. That on 14th June, 1880, it was considered by the Supreme Court, that the defendants had not proceeded with the appeal according to law or the rules of practice, and on application of plaintiff . . . ordered that the record (if any) be returned, &c." (Conclusion is in the other counts.)—5. "And plaintiff also sues defendants for that, after issuing writ of attachment as in 3rd count

mentioned, defendants maliciously, &c., advised and procured alleged creditors to prove alleged claims . . . and procured such creditors to support the attachment, and said writ was determined as in 3rd count mentioned, and by reason of the premises the said writ remained in force for a longer time than otherwise it would, and the plaintiff was put to expense, inconvenience, anxiety, &c. (Conclusion as in other counts.)—6. Same as 5th except that it referred to the issuing and determination of the writ "as in the fourth count mentioned." — 7. "And plaintiff also sues defendants for that at the time of the grievance hereinafter mentioned plaintiff was a trader, &c., in Cariboo, and defendants maliciously, &c., caused and procured plaintiff's houses, at Cariboo, to be entered and plaintiff to be dispossessed thereof for a long time, and his goods and chattels, mines and books of account to be seized and taken from him, and plaintiff to be deprived of the use and enjoyment of the same respectively for a long time, and by reason of the premises plaintiff was put to expense, inconvenience, &c. (as before.)

. . . —"8. And plaintiff also sues defendants for that defendants with force and arms broke and entered plaintiff's houses and mines at Cariboo, dispossessed plaintiff thereof respectively, and remained therein and in possession thereof respectively for a long time, . . . and also seized and took and detained all his books of accounts, goods, chattels and effects, consisting principally of merchandise and furniture, whereby plaintiff lost and was deprived of the use of the said houses, goods, mines, chattels and effects and thereby the same were greatly damaged, and divers of book debts lost." — "And the plaintiff claimed \$30,000."—Pleas, "not guilty," traverse of allegations in the several counts, and, as to 7th and 8th counts, justifying under the writ of attachment. Defendants also demurred to all the counts, except 7th and 8th. The jury returned: "we find a verdict for the plaintiff and award him no damages before the 16th of May, 1879. Subsequent to that date we award him \$5,000." The demurrers were overruled and on the same day plaintiff moved for judgment on the verdict, which was ordered for \$5,000 with costs. On 11th July, 1881, the Chief Justice granted defendants a stay of execution until the cause could be reheard before the full court, on condition of payment of \$1,000 and taxed costs to the plaintiff.—An appeal to the Supreme Court of Canada was confined to the judgment on the demurrers, and there was no appeal from the judgment ordered to be entered on the verdict. *Held*, that defendants were entitled to judgment both on the demurrers and on the facts. That the 3rd, 4th, 5th and 6th counts of the declaration were admittedly bad, and the 1st and 2nd counts were also bad. It was not alleged that defendants procured the writ of attachment to issue by any false statement, there was no allegation that defendants were not creditors of plaintiff, or that he had not failed to meet his engagements as they became due, or that he was not liable to be put into insolvency. That as to the 7th and 8th counts, the jury having confined the damages to acts done subsequently to 16th May, 1879, and defendants by their plea to these counts justifying under the writ of attachment, and the acts complained of having been committed on the 3rd May, 1879, under the writ while in force, the finding, which was a general one, was in effect a finding in favour of the defendants upon the issue joined on the plea to the

said counts. That plaintiff should be ordered to re-pay to defendants \$1,000 paid by them under the order of 11th July, 1881, there being nothing in the law to justify the court below in ordering such a payment.—Appeal allowed with costs in both courts; judgment on the demurrers overruled and demurrers allowed; judgment ordered to be entered for defendants upon demurrers and upon the 7th and 8th counts; the order of 11th July, 1881, set aside; and plaintiff ordered to re-pay \$1,000 with interest at 6 % from that day, together with the sum paid for costs of suit under that order. *Bank of B. N. A. v. Walker*, Cass. Dig. (2 ed.) 214.

5. *Status of plaintiff—Special denial—Art. 144 C. C. P.*—The quality assumed by the plaintiff in the writ and declaration is considered admitted unless it be specially denied by the defendant. (Judgment appealed from, Q. R. 1 Q. B. 144, affirmed.) *Martindale v. Powers*, xxiii, 597.

6. *Railway company—Carriers—Connecting lines—Special contract—Loss by fire—Negligence.*—In a statement of claim, to anticipate and reply to matters of defence is a highly improper practice. *Lake Erie and Detroit River Ry. Co. v. Sales*, xxvi, 663.

7. *Action—Condition precedent—Allegation of performance.*—Under the Ontario Judicature Act the performance of conditions precedent must still be alleged and proved by the plaintiff. *Home Life Ass'n v. Randall*, xxx, 97.

8. *Action on foreign judgment — Original consideration — Ontario Judicature Act — Counts in declaration.*—Under Ont. Jud. Act, as before it, the declaration in an action on a foreign judgment may include counts claiming to recover on the original consideration.—Judgment appealed from (*Bugbee v. Clergue*, 27 Ont. App. R. 96) affirmed. *Clergue v. Humphrey*, xxxi, 66.

9. *Admissions in declaration — Agreement as to evidence—Estoppel.*—In one count of his declaration plaintiff admitted a breach of said condition but alleged that it was waived; on the trial counsel agreed that the facts proved in the case against the Commercial Union Insurance Company should be taken as proved in the present case. These facts shewed, as held by the decision in the previous case, that there was no breach. *Held*, that the agreement at the trial prevented the present appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition. *Western Assur. Co. v. Temple*, xxxi, 373.

10. *Controverted election — Form of petition — Jurat — Preliminary objections.*—The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne." — *Per Gwynne, J.* An objection to the regularity of the subscription to the jurat does not constitute proper matter to be inquired into by way of preliminary objection to the petition. *Two Mountains Election Case; Ethier v. Le-gault*, xxxi, 437.

11. *Voluntary assignment — Form of action — Setting aside deed.*

See ASSIGNMENTS, 1.

12. *Practice in Nova Scotia — Improper joinder — Co-plaintiffs — Abatement—Amendment of record.*

See HUSBAND AND WIFE, 2.

13. *Proceedings in foreign tribunal — List of contributories—Calls on past members of company—Action thereon—Demurrer.*

See WINDING-UP ACT, 11.

14. *Petition of right — Statement of claim Condition precedent — Amendment of claim.*

See CONTRACT, 58.

15. *Petitory conclusions — Recovery of church property—Removal of trustee—38 Vict. c. 72 (Q.)*

See ACTION, 119.

16. *Supplemental claim — New matter in reply — Ultra petita — Failure to demur — Estoppel.*

See No. 30, *infra*.

17. *Cumulative demand — Incompatible pleas — Pétitoire — Possessoire — Réintégrande—Dénonciation de nouvel œuvre.*

See TITLE TO LAND, 138.

18. *Operation of tramway — Negligence—Issues as tried—Verdict—Objections taken on appeal.*

See NEW TRIAL, 82.

2. DEFENCE; EXCEPTIONS; OPPOSITIONS, &C.

19. *Insolvency — Puis darrein continuance—Composition and discharge pending suit — Estoppel — “Final judgment” — Appeal — Supreme Court Act, s. 17.]—W. sued B., and in June, 1873, B. assigned under the Insolvent Act of 1869. On 6th August B. secured a deed of composition, and in October pleaded *puis darrein continuance*, that since action he assigned under the Act, and by deed of composition and discharge was discharged of all liability. In November the Insolvent Court confirmed the deed of composition and discharge, but B. neglected to plead this confirmation. Judgment was given in favour of W. in January, 1874, and in May, 1876, execution issued. In June, 1876, a rule *nisi* to set aside judgment and execution was obtained and made absolute. *Held*, Strong, J., dissenting, that the rule or order of the court below was one from which an appeal would lie. *Held*, also, reversing the Supreme Court of Nova Scotia, that B. having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution. *Wallace v. Bosson*, ii., 488.*

20. *Amending pleas — Point not urged in court below—Justification under statute.]—In a suit to recover damages for obstruction of a river, the pleas were not guilty, and leave and license. On the trial counsel proposed to add a plea, that the wrong complained of was occasioned by extraordinary freshet, and being objected to as such plea might have been demurred to, the judge refused the application, because he intended to admit the evidence under the plea of not guilty. On appeal to the Supreme Court of Canada, it was contended that the obstruction complained of*

was justified by the statute 17 Vict. c. 10 (N. B.), incorporating the South-West Boom Company. *Held*, that the defendant, not having pleaded justification by statute, nor applied to the Supreme Court of New Brunswick *en banc*, for leave to amend the pleas, could not rely on that ground upon the appeal. *South-West Boom Co. v. McMillan*, iii., 700.

21. *Exchequer Court practice — Petition of right — Demurrer — Exception à la forme—Art. 116 C. C. P.]—Suppliant claimed certain parcels of land and the rents, issues and profits derived therefrom by the Government during illegal detention thereof.—The Crown pleaded 1st, by demurrer, alleging that the description of the property was insufficient; 2nd, that the conclusions of the petition were insufficient and vague; 3rd, that in so far as respects the rents, issues and profits there had been no signification upon the Government of the transfer to the suppliant. *Held*, that the objection should have been pleaded by *exception à la forme*, pursuant to art. 116, C. C. P., and as the demurrer was to all the rents, issues and profits as well as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer was necessary with respect to rents, issues and profits accrued previous to the sale to suppliant. *Chevrier v. The Queen*, iv., 1.*

22. *Joint defence — Separate counsel at trial—Cross-examination — Matter of procedure — Discretion.]—The defendants appeared and pleaded jointly by the same attorney, their defence being in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness, both counsel claimed the right to cross-examine. *Held*, affirming the ruling of the judge at the trial, that this was a matter of procedure and within the discretion of the trial judge and that moreover he was right in refusing to allow more than one counsel to cross-examine the witness. *Walker v. McMillan*, vi., 241.*

23. *Claim by assignee of insolvent estate—Traverse of allegation of assignment—Issue—Insolvent Act, 1875—Trader—Onus of proof.]—The action was brought by an assignee, under the Insolvent Act of 1875, for trespasses, and for conversion by defendants of ice taken off the property. The last plea was that “the said plaintiff was not, nor is such assignee as alleged.” It was agreed that a verdict could be entered for the plaintiff with \$10 damages, subject to the opinion of the full court. A rule *nisi* was taken out that the verdict so entered by consent should be set aside with costs, and for a new trial. The rule was made absolute with costs and judgment entered for the defendants against the plaintiff with costs. On appeal to the Supreme Court of Canada:—*Held*, Henry, J., dissenting, that by traversing the allegation of plaintiff being assignee, the defendants put in issue the facts implied in the averment, that the plaintiff was assignee in insolvency, and that the assignor was a trader within the meaning of the Act, and, further, as the evidence did not establish that the assignor bought or sold in the course of any trade or business or got his livelihood by buying and selling that the plaintiff failed to prove this issue. *Creighton v. Chittick*, vii., 348.*

24. *Unstamped bill — Double stamping — “Knowledge”—42 Vict. c. 17, s. 13.]—The want of proper stamping at the time the state*

of the bill came to the knowledge of the holder is a question for the judge at the trial and not for the jury and is not a defence that need be pleaded. (Gwynne, J., dissented.) *Chapman v. Tufts*, viii., 543.

25. *Reddition de compte — Incompatible pleas — Practice — Right of action.*—In an action *en reddition de compte*, the defendant denied the right of action, but also claimed that he had already rendered an account and provided an unsworn statement. *Held*, that, although issue had been joined and *enquête* made upon the pleadings as filed, the plaintiff was entitled first to have an adjudication as to his right of action, and an order for the production of a sworn account supported by vouchers. Judgment appealed from (11 Q. L. R. 342) reversed. *L'Heureux v. Lamarche*, xii., 460.

26. *Payment into court — Conditional plea — Plaintiff withdrawing deposit.*—In an action for account defendant after setting up a discharge by plaintiff of his cause of action against defendant pleaded: "In case this court should be of opinion that defendant is still liable . . . defendant now brings in to court, &c., the sum of, &c., and states that the same is sufficient, &c. The plaintiff took the money out of court." *Held*, affirming the judgment appealed from (12 Ont. App. R. 1), Strong, J., dissenting, that this was a payment into court in satisfaction which plaintiff had a right to retain, notwithstanding his action was dismissed at the hearing. *Held per* Strong, J., that this plea only recognized plaintiff's right to the money in the event of the court deciding that defendant was not discharged from his liability, but that on the facts presented plaintiff was entitled to judgment for the same amount as the sum paid into court. *Fraser v. Bell*,., xiii., 546.

27. *Action for bodily injuries — Claim by representatives of deceased employee — Prescription — Judicially noticed.*—Action by a widow for compensation for death of husband from injuries received in the employ of defendant. *Held*, Fournier, J., dissenting, that as at the time of the husband's death his right of action was prescribed under art. 2262. C. C., and that this prescription was one to which the courts were bound to give effect although not pleaded. *Canadian Pacific Ry. Co. v. Robinson*, xix., 292.

[Reversed, as to the holding on the question of the operation of prescription, on appeal to the Privy Council; (1892), A. C. 481.]

28. *Trespass — Justification by statute — Averment in plea — Necessity of act complained of — Demurrer.*—A plea justifying the cutting of trees under authority of 34 Vict. c. 52, s. 20 (D.) is bad for want of averment that it was necessary to cut the trees; it is insufficient to aver merely that the cutting of the trees was deemed necessary. *Dominion Telegraph Co. v. Gûchrist*, Cass. Dig. (2 ed.) 844.

29. *Sheriff — Trespass — Sale of goods by insolvent — Bona fides — Judgment of inferior tribunal — Estoppel — Bar to action — Res judicata — Fraudulent preferences — Pleading.*—K. was a trader and in insolvent circumstances when he sold the whole of his stock in trade to D. At the time of this sale D. was aware that two of K.'s creditors had recovered judgments against him. The sheriff

afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court and the judgment was affirmed by the Supreme Court (B. C.) *en banc*.—In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict, which was, however, set aside by the court *en banc*, a majority of the judges holding that the County Court judgment was a complete bar to the action. *Held*, reversing the judgment appealed from, that as the evidence shewed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. Taschereau, J., dissented (See 3 B. C. Rep. 35). *Davis v. McMillan*, 1st May, 1893.

Appeal to Privy Council dismissed
30. *New matter set up in reply — Failure to demur — Ultra petita — Issues joined — Estoppel.*—Where the plaintiff has supplemented his claim by setting up new matter in reply, and the defendant has failed to demur to the reply or object to evidence being adduced upon the issues generally, it is too late afterwards to take objection on the ground that, if the plaintiff had any other claim than the one sued for, it should have been set forth in the declaration. *Gilbert v. Lionais* (7 R. L. 339) referred to. Judgment appealed from affirmed. *Kingston Forwarding Co. v. Union Bank of Canada*, 9th December, 1895.

31. *Immoral contract — Foreclosure — Order for possession — Pleading — Parties.*—Under the Judicature Act (Ont.) an action for foreclosure is not to be regarded as including a right to recover possession of the mortgaged premises as in ejectment, and the rule that in such action the plaintiff may obtain an order for delivery of possession does not apply to a case in which the mortgage sought to be foreclosed is held void and plaintiff claims possession as original owner and vendor.—Under said Act, as formerly, the plea to an action on a contract that it was entered into for an immoral or illegal consideration must set out the particular facts relied upon as establishing such consideration.—Judgment appealed from affirmed.—*Quere*, Can the purchaser of the equity of redemption set up such defence as against a mortgagee seeking to foreclose, or is the defence confined to the immediate parties to the contract? *Clark v. Hagar*, xxii., 510.

32. *Sufficient traverse of allegation by plaintiff — Objection first taken on appeal.*—The plaintiff by his statement of claim alleged a partnership between two defendants, one be-

ing married whose name on a re-arrangement of the partnership was substituted for that of her husband without her knowledge or authority. *Held*, reversing the judgment appealed from (3 B. C. Rep. 149), that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant" was a sufficient traverse of plaintiff's allegation to put the party to proof of that fact. *Held*, also, that an objection to the sufficiency of the traverse would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient. *Mylius v. Jackson*, xxiii., 485.

33. *Status of plaintiff — Special denial — Art. 144 C. C. P.*]—*Auf defense en fait* is not a special denial within the meaning of art. 144 C. C. P. (Judgment appealed from, Q. R. 1 Q. B. 144, affirmed.) *Martindale v. Powers*, xxiii., 597.

34. *Signification of transfer — Issue — Defense au fonds en fait.*]—The want of signification of a transfer or sale of a debt as a bar to an action by the transferee is put in issue by a *defense au fonds en fait*. *Murphy v. Bury*, xxiv., 668.

35. *Bailees — Common carriers — Express company—Receipt for money parcel — Conditions precedent — Formal notice of claim—Pleading — Money had and received — Special pleas — "Never indebted."*]—An express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed. *Held*, reversing the judgment appealed from (10 Man. L. R. 595), that in an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted," put in issue all material facts necessary to establish the plaintiff's right of action. *North-eastern Pacific Express Company v. Martin*, xxvi., 135.

36. *Joint stock company — Irregular organization — Subscription for shares—Withdrawal — Surrender — Forfeiture — Duty of directors — Powers — Cancellation of stock — Ultra vires — "The Companies Act" — "The Winding-up Act" — Contributories—Construction of statute.*]—After the issue of an order for the winding-up of a joint stock company incorporated under "The Companies Act," (R. S. C. c. 119), a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company as, under the provisions of the Act, such grounds may be taken only upon direct proceedings at the instance of the Attorney General. (Judgment appealed from, Q. R. 8 Q. B. 128, reversed.) *Common v. McArthur*, xxix., 239.

37. *Life insurance — Benefit association—Payment of assessments — Forfeiture — Waiver.*]—A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived. *Held*, reversing the judgment appealed from, that the waiver not having been pleaded it could not be relied on as an answer

to the plea of non-payment. *Allen v. Merchants' Marine Insurance Company* (15 Can. S. C. R. 488) followed. *Knights of Macabees v. Hilliker*, xxix., 397.

38. *Leave to amend—Mortgage—Sale of mortgaged land for taxes—Purchase by mortgagor—Action to foreclose—Pleading.*]—Lands under mortgage were offered for sale by the municipality for arrears of taxes and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife and L. for foreclosure the mortgagor alleged that the purchase at the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage, and the trial judge so held in giving judgment for the mortgagor. The Court of Queen's Bench did not pronounce on the question of fraud, but affirmed the judgment on other grounds. *Held*, affirming the decision appealed from (12 Man. L. R. 290), that L. could not claim to have been a purchaser for value without notice, as such defence was not pleaded, and it was not a case in which leave to amend should be granted. *Lawlor v. Day*, xxix., 441.

39. *Appeal — Jurisdiction — Amount in dispute — Question raised by plea — Incidental issue.*]—Issues raised merely by pleas cannot have the effect of increasing the amount in controversy so as to give the Supreme Court of Canada jurisdiction to hear an appeal. *Girouard, J., dubitante. Standard Life Assur. Co. v. Trudeau*, xxx., 308.

40. *Appeal — Jurisdiction — Final judgment — Plea of prescription — Judgment dismissing plea—Costs—R. S. C. c. 135, s. 24—Art. 2267 C. C.*]—A judgment affirming the dismissal of a plea of prescription when other pleas remain on the record is not a final judgment from which an appeal lies in the Supreme Court of Canada. *Hamel v. Hamel* (26 Can. S. C. R. 17) approved and followed. *Griffith v. Harwood*, xxx., 315.

41. *Appeal — Jurisdiction — Action for penalties — Plea of ultra vires of statute — Judgment on other grounds — R. S. C. c. 135, s. 19 (a).*]—To an action claiming \$325 as penalties for an offence against the Pharmacy Act, the pleas were: 1. General denial. 2. That the Act was *ultra vires*. In the court below the action was dismissed for want of proof of the alleged offence. *Held*, Strong, C.J., and Gwynne, J., dissenting, that an appeal would lie to the Supreme Court; that if the court should hold that there was an error in the judgment which held the offence not proved the respondent would be entitled to a decision on his plea of *ultra vires* and the appeal would therefore lie under s. 29 (a) of the Supreme Court Act. *L'Association Pharmaceutique de Québec v. Livernois*, xxx., 400.

42. *Conversion — Evidence — Defect in plaintiff's title—Statute of Frauds.*]—In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded.—It is only where the action is between the parties to the contract which one of them seeks to enforce

against the other that the defendant must plead the Statute of Frauds if he wishes to avail himself of it.—Judgment appealed from (32 N. S. Rep. 549) affirmed. *Kent v. Ellis*, xxxi., 110.

43. *Cross-demand—Set-off—Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction—Domicile—Procedure—Opposition to judgment—Arts. 85, 94, 129, 1164, 1173, 1175, 1176 C. P. Q.*—In forming an opposition or petition in revocation of judgment the defendant, in order to comply with art. 1164 C. P. Q., is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right. — A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court.—In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers.—Judgment appealed from, affirming Q. R. 16 S. C. 22, reversed. *Magann v. Auger*, xxxi., 186.

44. *Doctrine of ultra vires—Objection taken in master's office and on appeal from master's report.*

See MORTGAGE, 19.

45. *Action in name of corporation—Authorization—Stay of proceedings.*

See ACTION, 70.

46. *English practice in 1870—38 Vict. c. 12 (Man.)—Ejectment—Equitable defence.*

See TITLE TO LAND, 27.

47. *Action on insurance policy—Shabby defence—"Want of a seal"—Equitable replication—Repression of fraud—Estoppel.*

See COMPANY LAW, 28.

48. *Statute of Limitations—Petition of Right.*

See RIDEAU CANAL LANDS, 1.

49. *Equitable pleas—Rules in Nova Scotia.*

See BANKS AND BANKING, 35.

50. *Proceedings against holder of unpaid stock—Transfer as mortgage—Pleas setting up illegal issue.*

See COMPANY LAW, 36.

51. *Bill of exchange—Want of stamp—Non-fevit—Issue—Special plea.*

See BILLS AND NOTES, 42.

52. *Set-off—Pleading—Equitable assignment.*

See SET-OFF, 2.

53. *New grounds taken on appeal—New trial.*

See EVIDENCE, 13.

54. *Notice of action—Defence not pleaded—34 Vict. c. 11 (N. B.)*

See MUNICIPAL CORPORATIONS, 141.
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55. *Estoppel—Traverse of vendor's title—Act confirming title—Crown lands—B. N. A. Act, 1867.*

See TITLE TO LAND, 132.

56. *Policy of insurance—Representations in application—Admission of parol evidence—Findings of jury.*

See INSURANCE, FIRE, 78.

57. *Libel—Public affairs—Fair comment—Justification—General issue—Rejection of evidence—Verdict.*

See NEW TRIAL, 33.

58. *Demurrer—Husband and wife—Trial—Recovery of land.*

See EJECTMENT, 1.

59. *Temporary exception—Deficiency in area of land sold—Arts. 1501, 1502 C. C.*

See SALE, 109.

60. *Petition of right—Contract for public work—Final certificate—Extras—Certificate not pleaded.*

See CONTRACT, 61.

61. *Plea of litigious rights—Usurper in possession—Title to lands—Art. 1582 C. C.—Impeachment of title by warrantor.*

See LITIGIOUS RIGHTS, 2.

62. *Exception à la forme—Arts. 14, 116, 119 C. C. P. (Old Test)—Procedure.*

See ACTION, 84.

63. *Plea of res judicata—Estoppel—Right of action—Intervention—Pledge.*

See RES JUDICATA, 19.

64. *Prescription—Arts. 2188, 2262, 2267, C. C.—Waiver—Failure to plead limitation—Defence supplied by court—Reservation of recourse for future damages—Judicial admission—Interruption of prescription—Novation—Costs.*

See ACTION, 47.

65. *Operation of tramway—Contributory negligence—Pleadings—Issues—Evidence—Verdict—New trial—Objections taken on appeal.*

See NEW TRIAL, 82.

3. COUNTERCLAIM; SET-OFF; INCIDENTAL DEMAND.

66. *Solicitor and client—Signed bill of costs—Sheriff's fees—Counterclaim for overcharges.*—In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of costs prior to the filing of the counterclaim. *Taylor v. Robertson*, xxxi., 615.

67. *Action for libel—Defamatory plea—Incidental demand for additional damages.*

See DAMAGES, 7.

68. *Declinatory exception—Opposition to judgment—Cross-demand—Incompatible pleas.*

See No. 43, ante.

69. *Pledge—Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Set-off—Restitution of thing pleaded—Practice of appellate court—Irregularity of issues in trial court.*

See ACTION, 49.

4. AMENDMENTS.

70. *Pleading—Estoppel—Failure to deny allegation in statement of claim—Amendment of defence.*—An acceptance which had been discharged by an agreement between the drawer and the acceptor, was subsequently put in suit by the cashier of a bank to which it had been indorsed, and the acceptor was obliged to pay the same. He then brought action against the drawer to recover the amount so paid, alleging that the acceptance was indorsed as mentioned. The Supreme Court affirmed the judgment appealed from (28 N. S. Rep. 210), which held, *per* Graham, C.J., and Henry, J., that the defendant having neglected to reply to the paragraph in the statement of claim, alleging the indorsement, was estopped from denying it; and *per* Meagher, J., that the defendant was entitled to amend his defence in that behalf, and that there should be a new trial. *Cox v. Seeley*, 6th May, 1896.

71. *Breach of contract—Evidence—Local usage—Damages—Practice—Amendment of claim after enquête closed—Arts. 1234, 1235 C. C.*—On appeal the Supreme Court affirmed the judgment of the Court of Queen's Bench (Q. R. S. Q. B. 221), by which it was held that a demand after enquête closed and final hearing to amend a declaration upon a written contract so as to make it agree with the facts proved, by substituting therefor a verbal contract of another date, ought not to be allowed without permission to the other party to plead *de novo*, and, where the evidence relied on for the change was inadmissible, it must be refused. *Leggatt v. Marsh*, xxix., 739.

72. *Clerical error—Amendment after hearing—Discharge of délibéré—Reprise d'instance.*

See HUSBAND AND WIFE, 1.

73. *Délaissement en justice by part owner—Joint hypothecary obligation—Eviction as to part of property only—Exception in action on personal covenant—Amendment of pleas—Costs.*

See MORTGAGE, 50.

74. *Seizure of logs—Possession—Replevin—Justification by sheriff—Amendment on appeal.*

See SHERIFF, 9.

75. *Administration of Justice Act—Amendment—Order by Court of Appeal.*

See MORTGAGE, 34.

76. *Amendment—Appeal in Supreme Court—Adapting allegations to evidence.*

See TORT, 4.

77. *Petition of right—Condition precedent—Amendment of claim.*

See CONTRACT, 58.

78. *Sale of land for taxes—Foreclosure—Purchase of delinquent lands by mortgagor—Amendment of plea.*

See No. 38, ante.

79. *Amendment ordered on appeal—Supreme and Exchequer Courts Act, s. 63—Costs.*

See PRACTICE OF SUPREME COURT, 218.

5. PLEADINGS GENERALLY.

80. *Mandamus—Want of notice—Point not taken in pleas.*—Where a petitioner for mandamus does not take the ground of want of prior notice in the court below he cannot be permitted to do so on appeal. *L'Union St. Joseph de Montréal v. Lapierre*, iv., 164.

81. *Res judicata—Defence by—Judicature Act.*—Under the Judicature Act of Ontario *res judicata* cannot be relied on as a defence unless specially pleaded. Judgment appealed from. 23 Ont. App. R. 146, reversed. *Cooper v. Molsons Bank*, xxvi., 611.

82. *Levy under execution—Charging lands under Territories Real Property Act—Indemnity to sheriff—Pleading joint pleas—Interpleader.*—In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead but may be joined properly in a defence with the execution creditor. *Taylor v. Robertson*, xxxi., 615.

83. *Demurrer to part of action—Final judgment—Appeal—Confession and avoidance.*

See APPEAL, 163.

84. *Tender—Payment into court—Acknowledgment of liability—Estoppel.*

See ACTION, 128.

85. *Condition in policy—Waiver—Appeal—Limitation of liability.*

See INSURANCE, MARINE, 12.

86. *Bond of insurance—Misstatement in application—Variance in plea.*

See INSURANCE, LIFE, 25.

87. *Demurrer—Judgment—Appeal—Res judicata.*

See RAILWAYS, 3.

88. *Prescription judicially noticed though not pleaded—Art. 2188 C. C.*

See PRESCRIPTION, 28.

89. *Jurisdiction of county court (N.S.)—Proceedings after demurrer sustained.*

See PROHIBITION, 2.

90. *Condition of policy of fire insurance—Breach—Further insurance—Interest of insured—Mortgagor as owner—Practice—Waiver—Estoppel.*

See ESTOPPEL, 68.

91. *Title to land—Legal warranty—Troubles de droit—Eviction—Issues on appeal—Parties.*

See APPEAL, 394.

92. *Lost record—Substituted copy—Discretion of court below—Appeal—Jurisdiction.*

See APPEAL, 291.

PLEDGE.

1. *Security for indorsement—Deposit to credit of indorser—Acts in contemplation of insolvency—Preference—Arts. 1966, 1969, 1970 C. C.]—G. applied to his creditors for extension of time, shewing a surplus of \$6,000. The creditors agreed to accept G.'s notes at 4, 8, 12 and 16 months, the last of them satisfactorily indorsed. N. agreed to indorse on condition that G. should deposit in N.'s name in a bank \$75 per week to secure him for such indorsement, and G. signed an agreement to that effect. N. indorsed G.'s notes for over \$4,000, and they were given to G.'s creditors. G., after depositing \$2,007.87 in N.'s name in the bank, failed, and N. paid the notes he had indorsed, partly with the \$2,007.87. The assignee of G. claimed that the payments made to N. by G. were fraudulent, and claimed the money deposited for the benefit of all G.'s creditors. Held, (affirming the Court of Queen's Bench, Ritchie, C.J., and Fournier, J., dissenting), that the arrangement between G. and N. by which the moneys deposited in the bank by G. became pledged to N., was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstraction of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of G.'s assets in furtherance and not in contravention of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference. *Beausoleil v. Normand*, ix., 711.*

2. *Delivery of thing pledged—Possession—Insolvency—Rights of creditors—Arts. 1968-1970 C. C.]—B., the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company with his own. He bought locomotives which were delivered to, and used openly and publicly by the company as their own property for several years. In January and May, 1883, B., by documents *sous seing privé*, sold with the condition to deliver on demand, ten of these locomotives to F., to guarantee an indorsement of his notes for \$50,000, but reserved the right on payment of the notes to have the locomotives redelivered to him. B. became insolvent and F. by action against B., the S. E. Railway Company, and trustees of the company under 43 & 44 Vict. c. 49 (Que.), asked delivery of the locomotives, which were at the time in open possession of the railway company, unless the debt was paid. B. did not plead. The railway company and trustees pleaded a general denial, and during the proceedings an intervention was filed by a judgment creditor of B., alleging notorious insolvency at the time of the alleged sale to F. Held, affirming the judgment appealed from (M. L. R. 2 Q. B. 332), that the transaction amounted only to a pledge not accompanied by delivery, and, therefore, F. was not entitled to the possession*

of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against a judgment creditor of the insolvent. *Fairbanks v. Barlow*, xiv., 217.

3. *Insolvency—Claim against insolvent—Collateral security—Collocation—Joint and several liability.]—A creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of goods and promissory notes indorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realized upon the goods. Judgment appealed from (M. L. R. 5 Q. B. 425; 17 R. L. 173) affirmed. — Fournier, J., dissented, on the ground that the notes having been indorsed over to the creditor, as additional security, all the parties thereto became jointly and severally liable, and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of his co-debtors for the full amount of his claim until he has been paid in full without being obliged to deduct therefrom any sum received from the estates of the co-debtors jointly and severally liable therefor, and Gwynne, J., dissented, on the ground that there being no insolvency law in force the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment, to collocate the appellants upon the whole of their claim as secured by the deed. *Benning v. Thiбаudeau*, xx., 110.*

4. *Lien for debt—Building society—C. S. L. C. c. 69—By-laws—Transfer of shares—Arts. 1970, 1981 C. C.—Insolvent—Redemption.]—A by-law of a building society required that a shareholder should satisfy all his obligations to the society before he should be at liberty to transfer his shares. P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to a bank as collateral security for money borrowed, and it was not till P.'s assignment for benefit of creditors that the other directors knew of the transfer. At the time of his assignment P. was indebted to the society in \$3,744, for which amount under the by-law his shares were charged as between him and the society. The society immediately paid the bank and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. claimed the shares as part of the estate and with action tendered the amount due by P. to the bank. The society claimed that the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws. Held, reversing the judgment appealed from (M. L. R. 7 Q. B. 417), Fournier and Taschereau, JJ., dissenting, that the shares had always remained charged under the by-laws with the amount of P.'s debt to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he assigned, viz., to get the shares upon payment of P.'s debt to the society. *Société Canadienne-Française de Construction de Montreal v. Daveluy*, xx., 449.*

5. *Transfer of stock—Shares held in trust—Notice—Transferee put to inquiry.]—D.*

transferred to brokers, as security for a loan, shares in a joint stock company, the transfer expressing on its face that it was in trust. The brokers pledged these shares with other stock to a bank as security for advances, and from time to time transferred them to other financial companies, each transfer on its face purporting to be "in trust." Eventually, the Federal Bank being the holders assigned D.'s shares, and others pledged by the brokers, by a transfer signed "B. manager in trust," to T. the manager of the respondent company, who accepted the transfer "in trust." D. brought action to redeem on payment of the loan to him from the brokers. *Held*, reversing the judgment appealed from (18 Ont. App. R. 305), *Taschereau and Patterson, JJ.*, dissenting, that the form of the transfer to the loan company was sufficient to put it on inquiry as to the nature of the trust indicated, and it was entitled to hold the shares of D. subject to payment of the amount he had borrowed on them. *Sweeney v. Bank of Montreal* (12 Can. S. C. R. 661; 12 App. Cas. 617) followed. *Held*, *per Taschereau and Patterson, JJ.*, that "manager in trust" on the transfer to the loan company only meant that the manager held the stock in trust for his bank, and that the transferee had a right so to regard it and was not put on inquiry, even if such inquiry would have been possible in view of the shares not being numbered or identified in any way by which they could be traced. *Duggan v. London and Canadian Loan and Agency Co.*, xx., 481.

(Reversed on appeal to Privy Council, [1893] A. C. 506.)

6. *Mortgage—Security for advances—Purchase by mortgagee—Trust—Hypothecation of bonds—Banking—Sale of securities.*—W. agreed to advance money to a railway company for completion of its road; an agreement was executed reciting the agreement so made and that a bank undertook to discount W.'s notes indorsed by E. to enable W. to procure the advances. The railway company appointed the bank its attorney irrevocable, in case of failure to repay the advances as agreed, to receive bonds of the railway company (on which W. held security) from a trust company, with which they were deposited, and sell them to the best advantage, applying the proceeds as set out in the agreement. The railway company did not re-pay W. as agreed and the bank obtained the bonds from the trust company and, having threatened to sell the same, the manager of the railway company wrote to E. & W. requesting that the sale be not carried out, but that the bank should substitute E. & W. as attorney irrevocable of the company for such sale, under a provision in the agreement, and if that were done the company agreed that E. & W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the re-payment of the advances. E. & W. consented, extended the time for payment of their claims and made further advances and, as the last mentioned agreement authorized, they re-hypothecated the bonds to the bank.—At the expiration of the extended time the railway company again made default and notice was given by the bank that the bonds would be sold unless the debt was paid on a day named. The railway company then

brought action to have such sale restrained. *Held*, affirming the judgment appealed from (23 N. S. Rep. 172), that the bank and E. & W. were respectively first and second incumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell or E. & W. to purchase under that sale. *Held*, further, that if E. & W. should purchase at such sale, they would become absolute owners of the bonds and not liable to be redeemed by the company. *Held*, also, that the dealing by the bank with the bonds was authorized by the Banking Act. *Nova Scotia Central Ry. Co. v. Halifax Banking Co.*, xxi., 536.

7. *Trustees and administrators—Fraudulent conversion—Past due bonds, transfer of—Negotiable security—Commercial paper—Debentures transferable by delivery—Equity of previous holders—Art. 2287 C. C.—Estoppel—Brokers and factors—Pledge—Implied notice—Duty of pledgee to make inquiry—Innocent holder for value—Arts. 1487, 1490 and 2202 C. C.*—Quebec Turnpike Trusts bonds issued under special Acts and Ordinances (Rev. Stats. Que., 1888, Sup. p. 505), are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in the case of *Young v. Rattray*, and having been afterwards lost were advertised for in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate and had the bonds in his possession as such, pledged them to a broker for advances on his own account, the bonds being then long past due, but payment being provided for under the above cited statutes. *Held*, affirming the judgment of the Court of Queen's Bench, Fournier and Taschereau, JJ., dissenting, that neither the advertisement nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a *bonâ fide* holder. *Held*, also, (affirming the opinion of the trial judge), that a *bonâ fide* holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper but also to those of all parties having an interest therein. *In re European Bank; Ex parte The Oriental Commercial Bank* (5 Ch. App. 358) followed. *Young et al. v. MacNider*, xxv., 272.

8. *Title to land—Sale—Right of redemption—Effect as to third parties—Pledge—Delivery and possession of thing sold.*—Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited, and S. took possession of the property, which was subsequently seized under an execution issued by V., a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed. *Held*, reversing the judgment of the Court of Queen's

Bench, that as it was shewn that the parties were acting in good faith, and that they intended the contract to be, as it purported to be, *une vente à rémère*, it was valid as such, not only between themselves but also as respected third persons. *Salvas v. Vassal*, xxvii., 68.

9. *Pledge—Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Compensation and set-off—Restitution of thing pledged—Arts. 1966, 1969, 1971, 1972, 1975 C. C.—Practice on appeal—Irregular procedure.*—C. on behalf of J. C. & Co., a firm of contractors of which he was a member, deposited a sum of money with the City of Montreal as a guarantee of the good faith of J. C. & Co. in tendering to supply gas for illuminating and other purposes to the city and the general public within the city limits at certain fixed rates, lower than those previously charged by companies supplying such gas in Montreal, and for the due fulfilment of the firm's contract entered into according to the tender. After the construction of some works and laying of pipes in the public streets, J. C. & Co. transferred their rights and privileges under the contract to another company and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit which was refused by the city council which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by J. C. & Co. of their contract. After the transfer, however, the companies supplying gas in the city reduced the rates to a price below that mentioned in the tender so far as the city supply was affected, although the rates charged to citizens were higher than the price mentioned in the contract. *Held*, that the deposit so made was a pledge subject to the provisions of the sixteenth title of the Civil Code of Lower Canada and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor and the debtor was entitled to its restitution although the obligation for which the security had been given had not been executed.—On a cross-demand by the defendant for damages, to be set-off in compensation against the plaintiff's claim; *Held*, that, as the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city; and that the breach of contract in respect to supplying the public did not give the corporation any right of action for damages suffered by the citizens individually. *Held*, further, that prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set-off in compensation of the claim for the return of the deposit.—The court also decided that, following its usual practice, it would not, on the appeal, interfere with the action of the courts below in matters of mere procedure where no injustice appeared to have been suffered in consequence although there might be irregularities in the issues as joined which brought before the trial court a *demande* almost different for the matter actually in controversy. *Finnie v. City of Montreal*, xxxii., 335.

10. *Banking—Security for debt of trustee—Transfer of shares—Notice—Precarious title—Arts. 1755, 2268 C. C.*

See TRUSTS, 2.

11. *Bank shares—Pledge as security to another bank—Nullity—Loss of shares—Restitution.*

See BANKS AND BANKING, 16.

12. *Advances of insolvent railway company—Fraudulent preference—Registration—Priority.*

See LIEN, 7.

13. *Construction of contract—Agreement to secure advances—Sale—Delivery—Possession—Bailment to manufacturer.*

See CONTRACT, 86.

14. *Scire facias—Title to land—Annulment of letters patent—Sale of pledge—Vente à rémère—Concealment of material facts—Arts. 1274-1279 R. S. O.—Registration—Transfer of Crown lands—Art. 1007 C. P. O.—Art. 1553 C. C.*

See CROWN, 93.

15. *Agency—Mandate—Factor—Arts. 1737, 1740, 1742, 1975 C. C.*

See PARTNERSHIP, 43.

POLICE OFFICER.

1. *Assault on constable—Serving summons—Indictable offence—Competency of wife as witness—Defendant—R. S. C. c. 162, s. 34; R. S. C. c. 174, s. 216.*—An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of the Canada Temperance Act is an assault on a peace officer in the due execution of his duty and indictable under R. S. C. c. 162, s. 34.—On the trial of an indictment for such assault the wife of the defendant is not a competent witness on his behalf. *McFarlane v. The Queen*, xvi., 393.

2. *Search warrant—Magistrate's jurisdiction—Justification of ministerial officers—Goods in custodia legis—Replevin—Estoppel—Res judicata.*—A search warrant is issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority, and is valid on its face, it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact, and may have been quashed or set aside. *Taschereau, J.*, dissenting.—The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.—A judgment on *certiorari* quashing the warrant will not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside and such judgment was a judgment *inter partes* only. *Taschereau, J.*, dissenting. *Sleeth v. Hurlbert*, xxv., 620.

3. *Criminal Code, s. 575—Persona designata—Officers de facto and de jure—Chief constable—Common gaming house—Confiscation of gambling instruments, money, &c.*—Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gambling implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title

mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. Girouard, J., dissenting.—The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*. *O'Neil v. Attorney-General of Canada*, xxvi., 122.

4. *Principal and agent—Police constable—Negligent performance of duty—Liability of municipal corporation.*—A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. Judgment appealed from (35 N. B. Rep. 296) affirmed. *McCleave v. City of Moncton*, xxxii., 106.

POLICE REGULATIONS.

1. *B. N. A. Act, 1867, ss. 91, 92—Sale of liquor—Brewers' licenses—Local and municipal matters—Powers of Parliament of Canada—Provincial legislative authority—37 Vict. c. 32 (Ont.)*—The Ontario Act, 37 Vict. c. 32, is not a statute in the exercise of police regulations and is *ultra vires* of the Provincial Legislature. *Severn v. The Queen*, ii., 70.

2. *Master and servant—Negligence—"Quebec Factories Act"—R. S. Q. arts. 3019 to 3053—Art. 1053 C. C.—Civil responsibility—Cause of accident—Onus of proof—Statutable duty—Police regulations.*—The provisions of "The Quebec Factories Act," (R. S. Q. arts. 3019 to 3053, inclusively) are intended to operate only as police regulations, and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees, as provided by the Civil Code. *Montreal Rolling Mills Co. v. Corcoran*, xxvi., 595.

POLICY.

See INSURANCE, ACCIDENT, FIRE, GUARANTEE, LIFE AND MARINE.

See also, PUBLIC POLICY.

POSSESSION.

1. *Action on disturbance—Possessory action—"Possession annale"—Arts. 946 and 948 C. C. P.—Nature of possession of unenclosed vacant lands—Boundary marks—Delivery of possession.*—In 1890, G. purchased a lot 25 feet wide, and the vendor pointed it out to him, on the ground, and shewed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25-foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person, who commenced laying foundations for a building, and in doing

so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance. *Held*, that the *possession annale*, required by art. 946 C. C. P., was sufficiently established to entitle the plaintiff to maintain his action. *Gauthier v. Masson*, xxvii., 575.

2. *Title to land—Possession—Statute of Limitations.*—In 1892, M. obtained a grant of land from the Crown and in 1823, permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons who sold it in 1873, and by different conveyances, the title passed to P. in 1884. In 1896, the descendants of the younger children of M. gave a deed of this land to B., who proceeded to cut timber from it. In an action for trespass by P.; *Held*, affirming the judgment appealed from, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870, which had ripened into a title. If not, the deed to his sons, in 1870, gave them exclusive possession and, if they had not a perfect title then, they had twenty years after, in 1890. *Bentley v. Peppard*, xxxiii., 444.

3. *Railways—Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Riparian rights—Possession—Acquisitive prescription—Tenant by sufferance—Arts. 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 C. C.—Art. 77 C. P. Q.—14 & 15 Vict. c. 51—25 Vict. c. 61, s. 15—Findings of fact—Assessment of damages—Emphyteutic lease—Contract incommode—Domaine direct—Domaine utile—Alienation—Right of action—Adding parties.*—A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines and the railway fencing, at the points in dispute, was placed, here and there, above the water line, although the company could not have the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and the bed of the stream *ad medium flum* and, after the registration of the deed to the company, sold the rest of his property including water rights, mills and dams constructed in the stream to the defendant's *auteur*, describing the property sold as "including that part of the river which is not included in the right of way, &c." The plaintiffs never operated their line of railway but, immediately on its completion, under powers conferred by their charter, and the Railway Act, 14 & 15 Vict. c. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas: (1) That the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) that the right of way sold never extended beyond the fencing, such being the interpreta-

tion placed upon the conveyance by permitting P. to retain possession of the strip of land in question and the river *ad medium flum*; (3) that by ten years' possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years, and (4) that, by thirty years' adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question. On appeal the Supreme Court held: 1. That the description in the deed to the railway company included *ex jure nature*, the river *ad medium flum aquæ* as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance. 2. That the possession of the strip of land and the waters and bed of the river *ad medium flum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under art. 2221 of the Civil Code of Lower Canada, but merely an occupation as tenant by sufrance upon which no such prescription could be based. 3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and ambiguous terms or as limiting the area of the lands conveyed. 4. That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years' prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company. 5. That the acquisitive prescription of thirty years under art. 2242 of the Civil Code could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after the sale, his occupation of the part of the property the possession of which he had failed to deliver, was merely on sufrance.—The judgment appealed from was reversed on the questions of law as summarized, Davies, J., *dubitante*, but the findings, on conflicting testimony in respect of damages, made by the trial judge were not disturbed on the appeal.—On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was *Held*, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs' rights in respect of the railway, reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of action *au pétitoire* as the party having the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees, who held the beneficial estate.—*Semble* that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

3a. Prescription—Arts. 1379, 2191 C. C.—Renunciation of community—Estoppel.
See TITLE TO LAND, 75.

4. Ejectment—Injunction—Account—Chancery jurisdiction—Tax title—Evidence—R. S. O. (1877) c. 40, s. 87; 33 Vict. c. 23 (Ont.)
See TITLE TO LAND, 99.

5. Right of way—Trespass—Possessory action.
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6. Purchase of stock in trade — Hiring former owner as clerk—Change of possession—R. S. O. (1877), c. 119, s. 5.
See SALE, 12.

7. Trespass on wild lands—Isolated acts—Statute of Limitations.
See PRESCRIPTION, 15.

8. Long user — Trespass—Title to land — Boundaries — Agreement at trial—Estoppel.
See USER, 1.

9. Evidence — Entry as caretaker—Acts of ownership—Severance of title.
See PRESCRIPTION, 16.

10. Tenants in Common—Will—Remainder—Survival of tenant for life—Statute of Limitations.
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11. Holding under trust—Title to land—Statute of Limitations.
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12. Deed — Construction of — Ambiguous description — Title to lands — Conduct of parties — Presumptions in favour of occupant.
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13. Testamentary succession — Balance due by tutor — Executors — Account, action for — Action for provisional possession — Parties to action.
See EXECUTORS AND ADMINISTRATORS, 8.

14. Title to lands — Boundaries — Old survey—Statute of Limitations.
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15. Statute of Limitations—R. S. N. S. (5 Sch. c. 112)—Partition of lands—Tenants in common.
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18. Title to land—Possession beyond boundary — Bona fides—Notice — Registered title deed.
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POSSESSION, PROVISIONAL.

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1. Contract by correspondence—Acceptance—Mailing—Art. 85 C. C.—Domicile.

See CONTRACT, 134.

2. Contract by correspondence — Post letter — Time limit—Breach of contract—Damages—Counterclaim—Condition precedent—Right of action.

See CONTRACT, 217.

POST OFFICE.

1. Crown — Suretyship — Postmaster's bond — Penal clause — *Lex loci contractus*—Negligence—Laches of the Crown officials—Release of sureties—Arts. 1053, 1054, 1131, 1135, 1927, 1929-1965 C. C.]—In an action by the Crown on the information of the Attorney-General of Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the security to be given by the officers of Canada" (31 Vict. c. 37; 35 Vict. c. 19) and "The Post Office Act" (38 Vict. c. 7), *Held*, Sir Henry Strong, C.J., dissenting, that the right of action under the bond was governed by the law of the Province of Quebec. *Held*, further, that such a bond was not an obligation with a penal clause within the application of articles 1131 and 1135 of the Civil Code of Lower Canada. *Black v. The Queen*, xxix., 693.

2. Appointment of chief inspector—31 Vict. c. 10, s. 14—Privileged communication—Act done in discharge of duty.

See PUBLIC OFFICER, 1.

3. Parol agreement — Carriage of mails—Part performance—Authority to bind Crown.

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4. Contract by correspondence — Acceptance—Mailing—Art. 85 C. C.

See CONTRACT, 134.

POWER OF ATTORNEY.

1. Husband and wife — Prohibitory clause in will.

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2. Assignment in trust for creditors — Power of attorney to assignor—Authority to use principal's name—Sale of goods—Credit.

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2. Stock subscriptions — Surrender — Forfeiture — Duty of directors — Construction of statute — Cancellation of shares — Contributories — Irregular organization — *Ultra vires* — "The Companies Act"—"The Winding-up Act"—Pleading.

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1. ACCOUNT AND INQUIRY.

1. *Testamentary succession — Executors — Balance due by tutor — Practice — Action for account — Provisional possession — Envoies en possession — Parties.*—The Supreme Court affirmed the judgment appealed from (Q. R. 6 Q. B. 34), reversing the trial court and dismissing the action and incidental demand, and which held, that on failure of testamentary executors to render an account, the heirs of the testator have no direct action against them for alleged balances in their hands; that their proper recourse would be by an action for account, which would embrace the whole of the administration of the succession by the executors and could not be restricted to particular or isolated matters; that a demand for provisional possession (*envoies en possession*), of a testamentary succession against an executor who has had the administration thereof should implead all the heirs as plaintiffs, that failure in the joinder of any one of them would be fatal and the defendant could not be compelled to call them in as parties to the action, and further, that, in a case where there were several executors, such actions must be brought against them jointly and could not be validly instituted against one of them even with the extra-judicial consent of the others. *Cream v. Davidson*, xxvii., 362.

2. *Débats de compte — Issues en reddition — Amount in controversy — Jurisdiction.*

See APPEAL, 94, 249.

2. ACTIONS.

3. *Action for negligence — Joint tortfeasors — Joinder of defendants — B. C. Judicature Act — Motion for judgment — Findings of jury — New trial — Judgment by appellate court.*—In a case where a towing company made a contract and afterwards engaged the assistance of another navigation company in carrying out the contract, the ship in tow was damaged through careless and improper navigation by the tugs of both companies employed about the work. *Held*, reversing the judgment appealed from, that an action in which both companies were joined as defendants was maintainable in that form under the B. C. Judicature Act; that the case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English order 40, rule 10, of the orders of 1875, the court could give judgment, finally determining all questions in dispute, although the jury may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of a jury. In case the court consider particular findings to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English order

39, rule 40; and that the Supreme Court of Canada, giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for damages and costs. (See *The "Thrasher" Case*, 1 B. C. Rep. pt. I., 153.) *Sevell v. B. C. Towing Co.*, and *The Moodyville Sawmill Co.*, ix., 527.

[The Privy Council granted leave to appeal, but the case was settled before hearing.]

4. *Parties to suit — Assignment of chose in action — Demurrer — Res judicata — Account.*—C. by instrument under seal assigned to defendant, as security for moneys due, his interest in policies of insurance on which he had actions pending. C. afterwards gave to B. an order on defendant for the balance of the insurance money that would remain after paying his debt to defendant. B. indorsed the order and delivered it to plaintiff by whom it was presented to defendant, who wrote his name across its face. B. afterwards delivered to plaintiff a signed document stating that, having been informed that the indorsed order was not negotiable by indorsement, to perfect plaintiff's title and enable him to obtain the money in defendant's hands, they assigned and transferred their interest therein and appointed plaintiff their attorney, in their name, but for his own use and benefit, to collect the same.—Defendant having received the amounts due C. on the insurance policies informed plaintiff, on his demanding an account, that there were prior claims that would absorb it all. Plaintiff then filed a bill in equity for an account and payment of the amount found due him to which defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that an account between B. and C. being necessary to protect C.'s rights, C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill. *Held*, affirming the judgment appealed from (29 N. B. Rep. 340). Strong and Patterson, JJ., dissenting, that the question of want of parties was *res judicata* by the judgment on the demurrer and could not be raised again by the answer.—Even if it could, the judgment was right as C. was not a necessary party.—As between plaintiff and defendant the order was an absolute transfer of the fund to be received by defendant, and was treated by all the parties as a negotiable instrument.—Defendant had nothing to do with the equities between C. and B., or between B. and plaintiff, but was bound to account to plaintiff in accordance with his undertaking as indicated by the acceptance of the order. *McKean v. Jones*, xix., 489.

5. *Parties to action — Trespass to mortgaged property — Equity of redemption — Transfer before action.*—Under the Judicature Act (N. S.) the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold though after the trespass and before action brought he has parted with his equity.—Judgment appealed from (24 N. S. Rep. 476) affirmed, Gwynne, J., dissenting.—Mortgagees out of possession cannot, after their

interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title.—*Per Gwynne, J.* A mortgagee in possession at the time the trespass and injury is committed is the only person damaged thereby and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed. The tortfeasors could not set up such estoppel even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt. *Brookfield v. Brown*, xxii., 398.

6. *Executors and trustees — Accounts — Jurisdiction of Probate Court — Res judicata.*—A Court of Probate has no jurisdiction over the passing of accounts containing items over accounts of trustees under a will, and relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a Court of Equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court. *Grant v. Maclaren*, xxiii., 310.

7. *Annulment of deed — Prête-nom — Parties in interest—Incidental proceedings.*—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. *Guertin v. Gosselin*, xxvii., 514.

8. *Vacating sheriff's sale — Petition — Exposure to eviction — Refund of price of adjudication paid—Arts. 706, 710, 714, 715 C. C. P.*—Art. 715 C. C. P. does not apply to sheriff's sales which have been perfected by payment of the price of adjudication and execution of the deed, nor does it give a right to have such sale vacated and the amount paid refunded. — The procedure by petition for vacating sheriff's sales can only be invoked in cases where an action would lie. *Trust and Loan Co. v. Quintal* (2 Dor. Q. B. 190) followed.—The joinder of the curator to an unopened substitution is not necessary in an action upon the obligation in a mortgage which has priority over the instrument creating the substitution, and a sheriff's sale in execution of a judgment upon such an obligation against the *grevé de substitution* has the effect of discharging the lands from the unopened substitution, notwithstanding that the curator has not been made a party to the action or proceedings. *Chef dit Vadeboncœur v. City of Montreal* (29 Can. S. C. R. 91) followed. Judgment appealed from, Q. R. 12 S. C. 155, affirmed. *Deschamps v. Bury*, xxix., 274.

9. *Action — Condition precedent — Allegation of performance—Burden of proof.*—Under the Ontario Judicature Act the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff. *Home Life Association v. Randall*, xxx., 97.

10. *Rédemption de compte — Unsworn statement—Contradictory pleadings.*

See ACCOUNT, 1.

11. *Action against Crown — Style of cause.*
See CROWN, 90.

12. *Forfeiture of charter — Scire facias—Form of proceedings—Arts. 997 et seq. C. C. P.—Information by Attorney-General.*

See COMPANY LAW, 21.

13. *Testamentary succession — Executors—Balance due by tutor — Action for account—Provisional possession — Envoie en possession.*

See No. 1, ante.

14. *Mitoyenneté — Demolition of wall—Possessoire—Petitoire—Form of action.*

See APPEAL, 77.

15. *Action against incorporated company—Forfeiture of charter — Estoppel — Compliance with statute—Res judicata—Collection of tolls.*

See COMPANY LAW, 22.

16. *Title to land — Sheriff's sale — Vacating sale, refund of price — Exposure to eviction — Actio conditio indebiti—Substitution—Prior incumbrance—Discharge by sheriff's sale—Petition to vacate sheriff's sale.*

See ACTION, -13.

17. *Adverse mineral claim—Form of plan and affidavit—Right of action—Condition precedent—Necessity of actual survey—Blank in jurat—R. S. R. C. (1897) c. 135, s. 37—R. S. B. C. (1897) c. 3, s. 16—61 Vict. c. 33, s. 9 (B. C.)—B. C. Supreme Court Rule 415 of 1890.*

See ACTION, 28.

3. ADMISSIONS.

18. *Evidence—Judicial admissions — Nullified instruments — Cadastre — Plans and official books of reference — Compromise — "Transaction"—Estoppel.*—A judgment declaring a will *faux* is not evidence of admission of the title of the heir at-law by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not shew any such admission. (*Girouard, J.*, dissented.)—The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties.—Statements entered upon cadastral plans and official books of reference made by public officials, and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made.—Where a deed entered into by the parties to a suit in order to effect a compromise of family disputes, and prevent litigation, failed to attain its end, and was annulled and set aside by order of the court as being in contravention of art. 311 of the Civil Code of Lower Canada, no allegation contained in it could subsist even as an admission. *Durocher v. Durocher*, xxvii., 363.

19. *Evidence — Implied admissions — Arts. 20, 144 C. C. P.*—The provision of art. 144 C. C. P. that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed

shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench. *Guertin v. Gosse-lin*, xxvii., 514.

20. *Statement in declaration—Allegation of possession of land—Amendment after enquête—Art. 1245 C. C.*

See No. 22, *infra*.

21. *Condition of policy of fire insurance—Breach—Further insurance—Interest of insured—Mortgagor as owner—Pleading—Waiver—Estoppel.*

See INSURANCE, FIRE, 28.

4. AMENDMENT.

22. *Judicial admission—Statement of claim—Amendment after enquête—Art. 1245 C. C.*—The declaration alleged that defendant had been in possession of land since 9th May, 1876, and after *enquête* plaintiffs' motion to amend by substituting "1st December, 1886," for "9th May, 1876," was refused on the ground that the admission amounted to a judicial avowal from which they could not recede, and this decision was affirmed. *Held*, reversing the judgment appealed from, *Fournier, J.*, dissenting, that the amendment should have been allowed so as to make the allegation of possession conform with the facts as disclosed by the evidence. *Baker v. Société de Construction Métropolitaine*, xxii., 364.

23. *Suit in equity—Alternative relief—Amendment—Variance from relief claimed by bill.*—At the hearing of a suit by P. to enforce performance of an agreement by the devisee of land under a will to convey it to P. he claimed to be entitled to a decree, in the event of the case made by his bill failing, on the ground that the said will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate. *Held*, that on a bill claiming title under the will P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but antagonistic to, that set out in the bill, especially as such amendment was not asked for until the hearing. *Porter v. Hale*, xxiii., 265.

24. *Amendment—Summoning party in different capacity—New writ.*—Where parties are before the court *quâ* executors and the same parties should also be summoned *quâ* trustees an amendment to that effect is sufficient and a new writ of summons is not necessary. *Ferrier v. Trépannier*, xxiv., 86.

25. *Parties on appeal—Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.*—Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased de-

fendant then made a motion for permission to amend the inscription by substituting their names *ès qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment, and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side), reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from (Q. R. 10 K. B. 511) the Chief Justice and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interfered. *Price v. Fraser*, xxxi., 505.

26. *Findings of fact—Reversal on questions of law—Amendment—Action by lessor—Emphyteutis—Alienation—Right of action—Adding parties.*—The judgment appealed from was reversed on the questions of law, *Davies, J.*, *dubitante*, but the findings on confictory testimony in respect to damages made by the trial judge were not disturbed on the appeal. *Semble*, that where a lessor had the *domaine direct* and the lessees the *domaine utile* in lands and the lessor brought action *au pétitoire* to recover the lands and for damages, if there had been damages proved, an amendment should have been allowed adding the lessees as parties, plaintiffs in the action, in order to recover damages, if any, that might have been sustained. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

27. *Administration of Justice Act (Ont.)—Amendment of pleadings—Order by Court of Appeal.*

See MORTGAGE, 34.

5. APPEALS.

28. *Effect of deed given in evidence—Question not raised at trial nor in term—Entertainment on appeal.*—The Court of Appeal cannot refuse to entertain a question as to the effect of a deed given in evidence on the ground that it was not raised at the trial or in term. *Oakes v. Turquand* (L. R. 2 E. & I. App. 325), referred to by Strong, J. Judgment appealed from (1 Ont. App. R. 112) reversed. *Gray v. Richford*, ii., 431.

29. *Appeal—Order extending time.*—The Court of Appeal for Ontario held that an appeal did not lie to that court from the order of a judge thereof extending the time for appealing to the Supreme Court of Canada. (See 9 Ont. App. R. 54. *Neill v. Travellers' Ins. Co.*, Cass. S. C. Prac. (2 ed.) 63; Cass. Dig. (2 ed.) 373.)

30. *School corporation—Decision of superintendent of public instruction—Appeal—Final judgment—Mandamus—R. S. Q. arts. 2055, 2056—55 & 56 Vict. c. 24, ss. 18 and 19 (Que.)*—Under art. 2055 R. S. Q. as amended by 55 & 56 Vict. c. 24, ss. 18, 19, ratepayers of a school district appealed to the superintendent of public instruction who rendered a decision and gave orders and directions respecting the erection of a school house, which, however, the school commissioners neglected to perform.

Held, affirming the judgment appealed from (Q. R. 3 Q. B. 500), that in such cases, the decision of the superintendent of public instruction was final; that no appeal therefrom would lie to the Superior Court and that the proper remedy to enforce the execution of the orders and directions of the superintendent was by mandamus. *Commissaires d'Ecole de St. Charles v. Cordeau*, 9th December, 1895.

31. *Appeal—Collocation and distribution—Art. 761 C. C. P. — Hypothecary claims—Parties in interest—Incidental proceedings.*—The appeal from judgments of distribution under art. 761 C. C. P. is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution. *Guertin v. Gosselin*, xxvii., 514.

32. *Appeal—Expiration of time limit—Forfeiture of right—Condition precedent—Ouster of jurisdiction—Objection taken by court—Waiver—Arts. 1020, 1209, 1220 C. P. Q.*—The provisions of arts. 1020 & 1209 C. P. Q., limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Vimont v. The Queen* (23 Can. S. C. R. 62) referred to.—Art. 1220 C. P. Q. applies to appeals in cases of petition of right. *Lord v. The Queen*, xxxi., 165.

[Compare *Park Iron Gate Co. v. Coates* (L. R. 5 C. P. 634).]

32a. *Judgments certified to court below—Issue of execution—Special leave.*—Under the provisions of R. S. C. c. 135, s. 67, a judgment of the Supreme Court of Canada certified to the proper officer of the court of original jurisdiction becomes the judgment of the inferior court for all intents and purposes of it is not necessary to make special application for leave to issue execution in order to obtain the costs of the appellant in the Supreme Court of Canada allowed him on taxation in that court. *Ex parte Jones*, 35 N. B. Rep. 108.

33. *Action for negligence—Joint tortfeasors—Joinder of defendants—B. C. Judicature Act—Motion for judgment—Findings of jury—New trial—Judgment by appellate court.*

See No. 3, ante.

34. *Questions of practice—Appeal—Duty of appellate court.*

See APPEAL, 394.

35. *Expiration of time for appealing—Forfeiture of right—Condition precedent—Ouster of jurisdiction—Waiver—Objection taken by appellate court—Arts. 1020, 1209, 1220 C.P.Q.*

See APPEAL, 432.

36. *Parties on appeal—Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.*

See No. 25, ante.

6. DEFAULT PROCEEDINGS.

37. *Service of action—Judgment by default—Opposition to judgment—Arts. 16, 89 et seq., 483, 489 C. C. P.—False return of service.*—No entry of default for non-appear-

ance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.—Arts. 483 et seq. C. C. P. relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment and have it set aside, notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits. *Turcotte v. Dansereau*, xxvii., 583.

38. *Art. 225 C. C. P.—Default to answer faits et articles—Interrogatories takes pro confessis—Irregular procedure.*

See ARBITRATIONS, 42.

39. *Matter of procedure—Removal of default—Leave to defend—Discretionary order.*

See APPEAL, 187.

7. DEPOSIT.

40. *Deposit of moneys in court—Order upon officer obtained by third party—Final order—Appeal—38 Vict. c. 11, s. 11—Interest on deposit—31 Vict. c. 12—37 Vict. c. 13—Summary jurisdiction over court officers.*—Under 31 Vict. c. 12, and 37 Vict. c. 13, the Minister of Public Works of Canada appropriated lands and, in accordance with said Acts, paid into the hands of the prothonotary at Halifax, \$6,180 as compensation and interest, as provided by those Acts to be distributed among the owners. This sum was paid out by order of the Supreme Court of Nova Scotia, to A., as owner, to G., as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of the prothonotary for some time, G. applied to the court for an order upon the prothonotary to pay interest upon his proportion of the moneys, which interest was alleged to have been received by the prothonotary from the bank where he had placed the amount on deposit. The application was resisted on the ground that he was not answerable to the proprietor of the principal, or to the court, for interest, but it was not denied that the interest had been received. A rule absolute was granted, ordering the prothonotary to pay whatever rate of interest he so received. On appeal, *Held*, (Fournier and Henry, JJ., dissenting), that the prothonotary was not entitled to any interest the deposit earned while under the control of the court, and that, in ordering the prothonotary to pay over the interest received, the court was exercising the summary jurisdiction which superior courts have over their immediate officers. *Held* also (Fournier, J., dissenting, and Taschereau, J., *dubitante*), that the order appealed from, being a decision on an application by a third party to the court, was appealable under 38 Vict. c. 11, s. 11. *Wilkins v. Geddes*, iii., 203.

41. *Controverted election—Preliminary objections—Deposit of security—Receipt by deputy prothonotary.*

See No. 43, *infra*.

8. ELECTIONS.

42. *Controverted election—Preliminary objections—Status of petitioner—Onus probandi.*—By preliminary objections to an election petition the respondent claimed the petition should be dismissed because the said petitioner had no right to vote at said election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed: *Held, per Ritchie, C.J., and Taschereau and Patterson, J.J., that the onus probandi was upon the petitioner to establish his status and that the appeal should be allowed and the election petition dismissed.*—*Per Strong J., that the onus probandi was upon the petitioner, but in view of the established jurisprudence the appeal should be allowed without costs.*—*Fourrier and Gwynne, J.J., contra,* were of opinion that the *onus probandi* was on the respondent. *The Meganio Election Case* (8 Can. S. C. R. 169), discussed. *Stanstead Election Case; Rider v. Snow, xx., 12.*

43. *Controverted election—Preliminary objections—Service—Deposit of security—Receipt by deputy prothonotary.*—*R. S. C. c. 9, ss. 8 & 9, s.-ss. (e) & (g) and s. 10.]*—With an election petition against the return of two sitting members for an electoral district, petitioner deposited \$2,000 with the deputy prothonotary, and in the notice of presentation of petition and deposit of security stated that he had given security of \$1,000 for each respondent, "in all, two thousand dollars," duly deposited with the prothonotary, as required by statute. The receipt was signed by the deputy prothonotary appointed by the judges, and acknowledged receipt of \$2,000, without stating that \$1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa. *Held, 1st.* That personal service of the petition at Ottawa without an order of the court is good service under s. 10 of The Controverted Elections Act. *2nd.* That there being at the time of the presentation of the petition security of \$1,000 for the costs of each respondent the security given was sufficient. *3rd.* That payment to the deputy prothonotary was a valid payment. *Queen's County (P.E.I.) Election Case; Davies v. Hennessy, and Prince Edward County (P.E.I.) Election Case, Perry v. Cameron, xx., 26.*

44. *Controverted election—R. S. C. c. 9, s. 62—Preliminary examination—Order postponing until after session of Parliament—Six months' limit—Enlargement of time.]*—On motion for preliminary examination of respondent the court ordered respondent not to appear until after the current session of Parliament. *Held, reversing the judgment appealed from,* that the order was, in effect, an enlargement of the time for the commencement of the trial until after the session, the time occupied by which was not to be computed as part of the six months' limit. *La Prairie Election Case; Gibeault v. Pelletier, xx., 185.*

45. *Controverted election—Enlargement of time for commencement of trial—Notice of trial—Shorthand writer's notes—R. S. C. c. 9, ss. 31, 33, 50 (b).]*—On 10th October, 1891, the judge on the trial of an election petition, within 6 months after filing of the petition,

enlarged the time for the commencement of the trial to 4th November, the 6 months expiring on 18th October. On 19th October another order was made by the judge fixing the trial for 4th November, and 14 clear days' notice of trial was given. Respondent objected to the jurisdiction of the court. *Held,* that the orders made were valid. That the objection to the sufficiency of notice of trial given under R. S. C. c. 9, s. 31, was not an objection which could be relied on in an appeal under s. 50 (b) of that Act.—The evidence taken by a shorthand writer, not an official stenographer of the court, who has been appointed and sworn by the judge, need not be read over to the witnesses when extended. *Pontiac Election Case; Murray v. Lyon, xx., 626.*

46. *Controverted Elections Act—R. S. C. c. 9, s. 30—Judicial discretion.]—R. S. C. c. 9, s. 30,* provides that two or more petitions presented relating to the same election or return shall be bracketed together and tried as one petition, but shall stand in the list where the last presented would have stood if it had been the only one, "unless the court otherwise orders." *Held,* that the words "unless the court otherwise orders," makes it a matter of judicial discretion to try the petitions separately or together. *Vaudreuil Election Case, xxii., 1.*

47. *Election petition—Preliminary objections—Filing of petition—Construction of statute—54 & 55 Vict. c. 20, s. 5 (D.).—R. S. C. c. 1, s. 7, s.-s. 27—Interpretation of words and terms—Legal holiday.]*—When the time limited for presenting a petition against the return of a member of the House of Commons of Canada expires or falls upon a holiday, such petition may be effectively filed upon the day next following which is not a holiday. *Nicolet Election Case, xxix., 178.*

(Leave to appeal to Privy Council refused.)

48. *Controverted election—Trial of petition—Extension of time—Appeal—Jurisdiction.]*—On 25th May, 1901, an order was made by Mr. Justice Belanger for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois thirty days after judgment should be given by the Supreme Court on an appeal then pending from the decision on preliminary objections to the petition. The Supreme Court judgment was given on 29th October, and on 19th November, on application of the petitioner for instructions, another order was made by the same judge (Belanger, J.), which decided that juridical days only should be counted in computing the said thirty days and stating that such was the meaning of the order of 25th May, and that 6th December would be the date of trial. On the petition coming on for trial on 6th December appellant moved for peremption on the ground that the six months' limit for hearing had expired. The motion was refused and, on the merits, the election was declared void. On appeal to the Supreme Court. *Held, Davies, J., dissenting,* that an appeal would not lie from the order of 19th November; that the judge had power to make such order, and its effect was to extend the time for trial to 6th December, and the order for peremption was, therefore, rightly refused. *Beauharnois Election Case, xxxii., 111.*

49. *Controverted election—Stay of proceedings pending appeal on preliminary objections*

—*Trial within six months—Extension of time—Disqualification.*—Preliminary objections to an election petition filed on 22nd February, 1902, were dismissed by Loranger, J., on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May, Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court was given and the Supreme Court judgment was given dismissing the appeal on October 10th, making November 17th the day fixed for the trial under the order of 31st May. On November 14th a motion was made before Loranger, J., on behalf of the member elect to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th November, but the judge held that the trial could not proceed on that day as the order for adjournment had not fixed a certain time and place, and on motion by the petitioner he ordered that it be commenced on December 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial judges was renewed. *Held*, that the effect of the order of May 31st was to fix November 17th as the date of commencement of the trial; that the time between May 31st and October 10th, when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun, and that December 4th, on which it was begun, was therefore within the said six months. *Held*, also, that if the order of 31st May could be considered as fixing a day for the trial it operated as a stay of proceedings and the order of Mr. Justice Lavergue on November 17th was proper.—As to the disqualification of the member elect by the judgment appealed from, the members of the court were equally divided and the judgment stood affirmed. *St. James Election Case*, xxxiii., 137.

50. *Controverted election — Preliminary objections — Status of petitioner — Onus probandi.*

See No. 42, *ante*.

51. *Findings of fact — Inferences — Interference on appeal.*

See ELECTION LAW, 87.

52. *Findings of fact — Interference on appeal.*

See ELECTION LAW, 88.

53. *Controverted election — Enlargement of time for commencement of trial — Notice of trial — R. S. C. c. 9, ss. 31, 33, 50b.*

See No. 45, *ante*.

54. *Election trial — Lapse of time limit — Consent judgments — Reserve of objection.*

See ELECTION LAW, 139.

55. *Appeal — Election petition — Dissolution of parliament — Abatement of proceedings — Return of deposits — Payment out of court below.*

See ELECTION LAW, 63.

56. *Preliminary objections — Service of election petition — Bailiff's return — Cross-examination.*

See ELECTION LAW, 117.

57. *Controverted election — Status of petitioner — Certified copy of voters' list — Imprint of Queen's Printer — Evidence — Form of petition — Jurat on affidavit of verification — Preliminary objections.*

See ELECTION LAW, 108.

9. ELECTION A LA FORME.

58. *Pleas in Exchequer Court — Exception à la forme — Art. 116 C. C. P.*

See PLEADING, 21.

59. *Arts. 14, 116, 119 C. C. P. — Right of action — Married woman — Exception à la forme — Procedure.*

See ACTION, 84.

10. GARNISHMENT.

60. *Husband and wife — Purchase by wife — Re-sale — Garnishment — Procedure — Debts of husband — Statute of Elizabeth — Hindering or delaying creditors — Equitable jurisdiction.*—D. purchased land and had the conveyance made to his wife who paid the price and obtained a certificate of ownership, D. having transferred all his interest to her. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of judgment creditors of D., and judgment having been obtained on their debts the purchase money of said transfer was garnished in the hands of M.. An issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was, by consent, paid into court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the Statute of Elizabeth, and that she therefore held the land and was entitled to the purchase money on the re-sale as trustee for D. *Held*, reversing the decision appealed from, that under the evidence the original transfer to the wife of D. was *bonâ fide*; that she paid for the land with her own money and bought it for her own use; and that, if it was not *bonâ fide*, the Supreme Court of the North-West Territories, though exercising the functions and possessing the powers formerly exercised and possessed by courts of equity, could not, in these statutory proceedings, grant the relief that could have been obtained in a suit in equity.—That even if the proceedings were not *bonâ fide* the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of deed of transfer, and the vendor never undertook to treat him as a debtor; that if there was a debt it was not one in which D., the judgment debtor, as against whom the garnishee proceedings were taken, could maintain an action in his own

right and for his own exclusive benefit; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into court, from claiming that it could not be attached in these proceedings; and that the only relief possible was by an independent suit. *Donohoe v. Hull*, xxiv., 683.

11. INCIDENTAL DEMAND.

61. *Appeal for costs — Action in warranty — Proceedings by warrantee before judgment on principal demand.*—It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby. But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk and, if an unfounded action has been taken against the warrantee and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences. *Archbald v. deLisle*; *Baker v. deLisle*; *Mowat v. deLisle*, xiv., 1.

62. *Opposition to judgment — Cross-demand — Setting off damages — Waiver of exception déclinatoire*—Art. 1164 C. P. Q.

See PLEADING; 43.

12. INFORMATION.

63. *Information of intrusion — Subsequent action — Res judicata — Beneficial interest in land.*—In proceedings on an information of intrusion exhibited against him by the Attorney-General of Canada, it had been adjudged that F., who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of lands situate within the railway belt in that province. *The Queen v. Farwell* (14 Can. S. C. R. 392.) F. having registered his grant and taken steps to procure an indefeasible title from the Registrar of Titles (B. C.), thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct him to execute to the Crown in right of Canada a surrender of conveyance of the lands. *Held*, affirming the judgment appealed from (3 Ex. C. R. 271), that the proceedings on the information of intrusion did not preclude the Crown from the further remedy claimed. *Farwell v. The Queen*, xxii., 553.

13. INTERROGATORIES.

64. *Interrogatories — Faits et articles — Evasive answers — Issues taken pro confessis.*
See EVIDENCE, 159.

65. *Interrogatories — Faits et articles — Taking pro confessis — Motion in trial court*—Art. 229 C. C. P.

See EVIDENCE, 160.

14. JUDGMENT.

66. *Retraxit under reserve of rights — Notice — Judgment granting acte — Subsequent action — Documentary evidence introduced in appeal — Lis pendens — Res judicata*—Art. 451, C. C. P.—The bank, in an action against G., filed a withdrawal of part of the demand in open court reserving the right to institute a subsequent action for the amount so withdrawn. The court granted acte on this *retraxit*, and gave judgment for the balance, which was not appealed from. In a subsequent action for the amount so reserved: *Held*, reversing the judgment appealed from (16 R. L. 663), Fournier, J., dissenting, that art. 451 C. C. P., applied to withdrawals made out of court and cannot affect the validity of a withdrawal made in open court and with its permission.—2. That as to the part of the claim so withdrawn, there was no *lis pendens* at the time of the second action, and it was then too late to question the validity of the *retraxit* upon which the court had acted and rendered a judgment in the first action, which was final and conclusive.—Neither was there *chose jugée* as to the amount reserved as no adjudication was made thereon.—A document not proved at the trial but introduced for the first time on appeal cannot be invoked or made part of the case in appeal to the Supreme Court. *Montreal L. & M. Co. v. Fauteux* (3 Can. S. C. R. 433), and *Lionais v. Molsons Bank* (10 Can. S. C. R. 527) followed. *Exchange Bank of Canada v. Gilman*, xvii., 108.

67. *Appeal — Practice — Judgment of court — Withdrawal of opinion — Equal division of judges in appeal — Final judgment.*—The Court of Appeal for Ontario, composed of four judges, pronounced judgment, two being in favour of dismissing an appeal, the other two pronouncing no judgment. In the Supreme Court it was objected that in the judgment appealed from no decision had been arrived at. *Held*, that the appellate court could not go behind the formal judgment which stated that the appeal had been dismissed; further, that the proposition was the same as if the four judges had been equally divided in opinion, in which case the appeal would have been properly dismissed.—(Compare, 11 O. R. 491; 14 Ont. App. R. 419; 15 App. Cas. 188.) *Booth v. Ratté*, xxi., 637.

68. *Encroachment on street — Building "upon" or "close to" the line — Petition to remove obstruction — Judgment — Ultra petita.*—By s. 454 of the charter of the City of Halifax any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the city engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a judge thereof, may, on petition of the recorder, cause it to be removed. A petition was presented under this section, asking for the removal of a porch built by R. to his house, which the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1884; while it stood the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved, but the judge held that it was close to the line so used by the public, and

ordered its removal. The Supreme Court (N. S.) reversed his decision. *Held*, affirming the judgment appealed from (26 N. S. Rep. 130), that the evidence would have justified the judge in holding that the porch was upon the line, but having held that it was close to the line while the petition only called for its removal as upon it, his order was properly reversed. *City of Halifax v. Reeves*, xxiii., 340.

69. *Set-off — Judgment against stranger to cause—Prête-nom.*—A defendant cannot set up by way of compensation to a claim due to plaintiff a judgment (purchased subsequent to the date of the action), against one who is not a party to the cause, and for whom the plaintiff is alleged to be a *prête-nom*. *Bury v. Murray*, xxiv., 77.

69a. *Judgments certified to court below — Issue of execution—Special leave.*—Under the provisions of R. S. C. c. 135, s. 67, a judgment of the Supreme Court of Canada certified to the proper officer of the court of original jurisdiction becomes the judgment of the inferior court for all intents and purposes and it is not necessary to make special application for leave to issue execution in order to obtain the costs of the appellant in the Supreme Court of Canada allowed him on taxation in that court. *Ex parte Jones*, 35 N. B. Rep. 108.

70. *Appeal — Question of local practice — Inscription for proof and hearing — Preliminary list — Notice — Surprise—Artifice—Requête civile.*

See PRACTICE OF SUPREME COURT, 239.

71. *Opposition to judgment — Revocation—Arts. 85, 94, 120, 1164, 1173, 1175, 1176 C. P. Q.—Cross-demand — Waiver of declinatory exception.*

See PLEADING, 43.

15. JURY TRIAL.

72. *Jury trial — Questions — Findings as to contract in writing—Ratification of irregular agreement.*

See CONTRACT, 117.

73. *Change of venue — Order for habeas corpus—Presence of prisoner—Increased expenses — Pleading to indictment—Conviction.*

See HABEAS CORPUS, 2.

74. *Marine insurance — Partial loss on cargo — Stranding — Evidence — Jury trial.*

See EVIDENCE, 176.

16. NEW TRIALS.

75. *Quashing appeal — Death of party — Suggestion — Judgment nunc pro tunc.*—Where the unsuccessful party died after verdict and before judgment on a rule for a new trial and judgment *nunc pro tunc* was entered, by order of a judge, as of a day prior to his death and a suggestion of the death entered on the record, the court refused to quash an appeal by his executors. Judgment appealed from (25 N. B. Rep. 196) affirmed. *Muirhead v. Shirreff*, xiv., 735.

76. *Misdirection — Disagreement of jury—Motion for judgment — Amendment of pleadings —New trial — Judicature Act, rule 799 —Jurisdiction — Final judgment.*—In an action for damages for the loss of glass delivered to defendants for carriage the judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. Defendant then moved in the Divisional Court for judgment, but pending such motion, plaintiffs applied for and obtained an order amending the statement of claim, and charging other grounds of negligence. Defendants submitted to the order, pleaded to the amendments, and new material issues were thereby raised. The action as amended was entered for trial but was not tried before the Divisional Court pronounced judgment on the motion, dismissing plaintiff's action. The Court of Appeal reversed this judgment and ordered a new trial. *Held*, affirming the judgment appealed from, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had been passed upon or considered by the trial judge or jury, a new trial should be ordered, and that this was not a case for invoking the power of the court, under rule 799, to finally put an end to the action. *Held*, also, that the judgment ordering a new trial was not a final judgment nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final. *Canadian Pacific Ry. Co. v. Cobban Mfg. Co.*, xxii., 132.

77. *Practice — Equity suit — New trial — Construction of statute as to—Persona designata — 53 Vict. c. 4, s. 85 (N. B.)*—53 Vict. c. 4, s. 85 (N. B.), provides that in an equity suit "either party may apply for a new trial to the judge before whom the trial was held." *Held*, reversing the decision appealed from, Taschereau, J., dissenting, that such application need not be made before the identical judge before whom the trial was had, but could be made to any judge exercising the same jurisdiction. Therefore, where the judge in equity who had tried a case resigned his office, an application for a new trial could be made to his successor. *Footner v. Figez* (2 Sim. 319) followed. *Bradshaw v. Baptist Foreign Mission Board*, xxiv., 351.

78. *New trial — Verdict — Finding of jury —Question of fact — Misapprehension.*—Where a case has been properly submitted to the jury and their finding upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict. *Fraser v. Drew*, xxx., 241.

79. *Cross-examination of prosecutrix—New trial — Discharge of prisoner.*

See EVIDENCE, 1.

80. *Negligence — Joint tortfeasors—Joinder of defendants — B. C. Judicature Acts—Motion for judgment — Findings of jury — Judgment of appellate court.*

See No. 3, ante.

81. *Direction to jury — Wilful misrepresentation — Fair and truthful answers.*

See INSURANCE, LIFE, 24.

82. Trial with jury — Evidence — Giving credit — Direction to jury.

See SALE, 38.

83. Disposing of case on motion for new trial — Rule 476 N. S. Jud. Act.—Directions to jury — Issue not pleaded — Equity case—Dispensing with jury.

See NEW TRIAL, 73.

84. New trial — Misdirection — Proceedings at trial — Reserved questions.

See NEGLIGENCE, 189.

85. New trial — Condition of refusal — Remittitur damna.

See DAMAGES, 7; AND LIBEL, 5.

86. Jury trial — Admitting testimony *de bene esse* — Withdrawal by judge's charge — Improper admission of evidence.

See NEW TRIAL, 35.

87. New trial — Judgment on verdict — Court of Review—34 Vict. c. 4, s. 10 (Que.)—35 Vict. c. 6, s. 13 (Que.)

See RAILWAYS, 108.

88. New trial — Improper reception and rejection of evidence—Nominal damages.

See NEW TRIAL, 37.

89. Jury trial — Assignment of facts — Arts. 353, 414 C. C. P.—Art. 427 C. P. Q.—Inconsistent findings — Misdirection — New trial—Pleadings.

See NEW TRIAL 79, 93.

17. NOTICE.

90. Notice of action — Public officer — Question not directly before court — Unwarranted declaration.

See NOTICE, 30.

91. Money counts — Notice of claim — Special pleas — “Never indebted.”

See ACTION, 21.

92. Appeal — Question of local practice — Inscription for proof and hearing—Peremptory list — Notice — Surprise — Artifice — *Requête civile*.

See PRACTICE OF SUPREME COURT, 239.

18. OPPOSITIONS.

93. Form of proceeding — Opposition to judgment — “*Rescisoire*” joined with “*Rescindant*.”]—An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescisoire* has thus been improperly joined with the *rescindant*. *Turcotte v. Dansereau*, xxvii., 583.

94. *Fi. fa. de terris*—Insolvency of execution debtor — Opposition to seizure — Art. 772 C. O. P.

See EXECUTION, 5.

s. c. d.—35

19. ORDERS.

95. Award to be entered as a verdict — Motion to set aside — Judge's order — Special paper Superior Court (N. B.)—Affidavits in reply — New matter — Discretion of court below—Con. Stats. (N. B.) c. 37, s. 173.]—The cause was referred by the Supreme Court of New Brunswick at *nisi prius* to arbitration, the award to be entered on the *postea* as a verdict of a jury. After the award the appellants obtained a judge's order for a stay of proceedings, and for the cause to be entered on the motion paper of the court below, to enable the appellants to move to set aside the award and obtain a new trial, on the ground that the arbitrators had improperly taken evidence after the case before them was closed. Before the term in which the motion was to be heard, appellants abandoned that portion of the order directing the cause to be placed on the motion paper, and gave the usual notice of motion to set aside the award and *postea*, and for a new trial, which motion, by the practice of the court, would be entered on the special paper. Defendant, in opposing such motion, took the preliminary objection that the judge's order should be rescinded before plaintiffs could proceed on their notice, and presented affidavits on the merits, and plaintiffs requested leave to read affidavits in reply, claiming that defendant's affidavits disclosed new matter. This the court refused, and dismissed the motion, the majority of the judges holding that plaintiffs were bound by the order of the judge, and could not proceed on the special paper until that order was rescinded, the remainder of the court refusing the application on the merits. *Held*, reversing the judgment appealed from (23 N. B. Rep. 447), that the cause was rightly on the special paper, and should have been heard on the merits, and the court should have exercised its discretion as to the reception or rejection of affidavits in reply. Strong, J., dissented, on the ground that such an appeal should not be heard, and also because on the merits the appeal should fail.—*Per* Ritchie, C.J. A court of appeal ought not to differ from a court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. Con. Stats. N. B. c. 37, s. 173 applies as well to motions for new trials, where the grounds upon which the motion is based are supported by affidavits, as in other cases. It makes no distinction, but applies to all “motions founded on affidavits.” *Jones v. Tuck*, xi., 197.

96. Report of referee — Appeal — Notice—*Extending time* — *Discretionary order*.]—Refusal to extend time for appealing to a court below is an exercise of judicial discretion with which the Supreme Court will not interfere. *Township of Colchester South v. Valad*, xxiv., 622.

97. Parties on appeal—Proceeding in name of deceased party — Amendment — Jurisdiction — Interference with discretion on appeal.

See No. 25, ante.

20. PARTIES.

98. Negligence — Joint tortfeasors—Joiner of defendants—B. C. Judicature Act—Motion for judgment — Findings of jury — New trial — Practice — Judgment by ap-

pellate court.]—In a case where a towing company made a contract and afterwards engaged the assistance of another transportation company in carrying out the contract, the ship in tow was damaged through careless and improper navigation by the tugs of both companies employed upon the work. *Held*, reversing the judgment appealed from, that the action in which both companies were joined as defendants was maintainable in that form under the B. C. Judicature Act; that the case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with the English order 40, rule 10 of the orders of 1875, the court could give judgment finally determining all matters in dispute, although the jury may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of the jury. In case the court considers particular findings to be against evidence, all that can be done is to order a new trial, either generally or partially, under the powers conferred by the rule similar to the English order 39, rule 40; and that the Supreme Court of Canada giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their doing so, and therefore, a judgment should be entered against both defendants for damages and costs. — See *The "Thrasher" Case* (1 B. C. Rep. pt. I., 153). *Sewell v. B. C. Towing Co. and the Moodyville Saw-mill Co.*, ix., 527.

[The Privy Council granted leave to appeal, but the case was settled before hearing.]

99. *Will—Action to annul—Testamentary capacity—Evidence of capacity—Onus—Parties—Mis en causes.*]—An action for annulment of a will, the execution of which was procured when, as alleged, the testator was not capable of making it, was dismissed because all necessary parties had not been summoned. The Court of Queen's Bench (Q. R. 3 Q. B. 552), reversing this decision, held that the execution of the will had been procured by undue influence, and annulled it. — The Supreme Court affirmed the decision appealed from as to parties, holding that the Superior Court should itself have summoned the parties deemed necessary. It also affirmed the judgment as to the will on the ground that the onus was on the party procuring the execution to prove capacity, and that he had not only failed to do so, but the evidence was overwhelming against him. *Currie v. Currie*, 6th May, 1895, xxiv., 712.

100. *Devolution of Estates Act, 49 Vict. (O.) c. 22—Added parties—Orders 46 & 48, Ontario Judicature Act—R. S. O. (1887) c. 109, s. 30.*]—A testator divided his real estate among his three sons, the portion of A. C., the eldest, being charged with the payment of \$1,000 to each of his brothers, and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of \$50 per annum out of the estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said \$50 on her marriage." A. C. died after the testator, leaving a widow, but no issue. *Held*, that the mortgagee of the reversionary interest of one of his brothers in the lands devised to A. C. was

improperly added, in the master's office, as a party to an administration action, and could take objection at any time to the proceeding either by way of appeal from the report or on further directions, and was not limited to the time mentioned in order 48 of the Supreme Court of Judicature which refers only to a motion to discharge or vary the decree. *Cowan v. Allen*, xxvi., 292.

101. *Winding-up Act—Moneys paid out of court—Order made by inadvertence—Jurisdiction to compel re-payment—R. S. C. c. 129, ss. 40, 41, 94—Locus standi of Receiver-General—55 & 56 Vict. c. 28, s. 2—Statute, construction of.*]—The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General of Canada, as trustee of the residue, intervened and applied for an order to have the money re-paid in order to be disposed of under the provisions of the Winding-up Act. *Held*, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had not expired. *Held*, also, that even if he was not so entitled to intervene the provincial courts had jurisdiction to compel re-payment into court of the moneys improperly paid out. *Hogaboom v. Receiver-General of Canada; In re Central Bank of Canada*, xxviii., 192.

102. *Supreme Court of Nova Scotia—Parties—Husband and wife—Striking out name of wife joined as co-plaintiff.*

See INSURANCE, FIRE, 82.

103. *Intervention—Tutor ad hoc—Matter of procedure.*

See SUBSTITUTION, 2.

104. *Service of judgment—Party absent from jurisdiction—Defendant in hypothecary action—Condemnation in default of surrender.*

See No. 131, *infra*.

105. *Restitution de deniers—Right of action—Prête-nom.*

See ACTION, 134.

106. *Vice-Admiralty—Rescue of vessel stranded—Salvage—Special contract—Parties.*

See SHIPPING, 5.

107. *Action for use and occupation—Trespass—Mesne profits—Parties—Tenants in common—Non-joinder.*

See EJECTMENT, 2.

108. *Trespass—Mortgage—Equity of redemption—Transfer before action—Parties.*

See No. 5, *ante*.

109. *Foreclosure—Order for possession—Immoral contract—Pleading—Parties.*

See PLEADING, 31.

110. *Defense en fait—Status of plaintiff—Special denial—Art. 144 C. C. P.*

See PLEADING, 33.

111. *Adding parties—Orders 46 and 48, Ontario Judicature Act.*

See WILL, 15.

112. *Testamentary succession—Executors—Balance due by tutor—Action for account—Provisional possession—Envoies en possession.*

See No. 1, ante.

113. *Annulment of deed—Prête-nom—Parties in interest—Incidental proceedings—Collation—Hypothecary claim.*

See No. 7, ante.

114. *Winding-up Act—Insolvent bank—Repayment of moneys paid through inadvertence—Locus standi of Receiver-General.*

See WINDING-UP ACT, 14.

115. *Title to land—Entail—Life estate—Fiduciary substitution—Privileges and hypothecs—Mortgage by institute—Preferred claim—Prior incumbrancer—Vis major—Registry laws—Sheriff's sale—Sheriff's deed—Chose jugée—Parties—Estoppel—Art. 2172 C. C.—29 Vict. c. 26 (Can.)*

See MORTGAGE, 16.

116. *Trustee—Misappropriation—Surety—Knowledge by cestui que trust—Estoppel—Parties.*

See TRUSTS, 21.

117. *Vacating sheriff's sale—Petition—Exposure to eviction—Refund of price of adjudication.*

See No. 8, ante.

118. *Legal warranty—Issues on appeal—Parties.*

See APPEAL, 397.

119. *Findings of fact—Reversal on questions of fact—Amendment—Action by lessor—Emphyteusis—Alienation—Right of action—Adding parties.*

See RAILWAYS, 153.

21. PEREMPTION D'INSTANCE.

120. *Péremption d'instance—Limitation of action—Abatement—Retrospective legislation.*

See PEREMPTION D'INSTANCE.

22. PROCEDURE IN SPECIAL CASES.

121. *Special case—Adduction of further evidence.]—Where a special case has, by consent of parties, been submitted, and the judge's minutes of evidence taken at the trial agreed to be considered as part of the special case, the court has no power to order further evidence to be taken, except with the like consent. Smyth v. McDougall, i., 114.*

122. *Judgments certified to court below—Issue of execution—Special leave.]—Under the provisions of R. S. C. c. 135, s. 67, a judgment of the Supreme Court of Canada certified to the proper officer of the court of original jurisdiction becomes the judgment of*

the inferior court for all intents and purposes, and it is not necessary to make special application for leave to issue execution in order to obtain the costs of the appellant in the Supreme Court of Canada allowed him on taxation in that court. *Ex parte Jones*, 35 N. B. Rep. 108.

122a. *Civil procedure—B. N. A. Act, 1867, s. 92, s.-s. 14—Jurisdiction of provincial legislatures.*

See CONSTITUTIONAL LAW, 12.

23. REFERENCES.

123. *Winding-up Act—Procedure—Use of ordinary machinery of court—Security—Reference to master.]—In assigning to provincial courts or judges certain functions under the Winding-up Act, Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master. Judgment appealed from (16 Ont. App. R. 161) affirmed. *Shoobred v. Clarke*, xvii., 265.*

124. *Master's report—Reasons for decision—Apportionment of damages—Credibility of witnesses—Irrelevant evidence.]—In an action against several mill-owners for obstructing the Ottawa River by throwing sawdust and refuse into it from their mills a reference was made to the master to ascertain the amount of damages. *Held*, affirming the judgment appealed from, that the master rightly treated the defendants as joint tortfeasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant, and that he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff. *Held*, further, that the master was the final judge of the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.—On a reference to a master, the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons or enter into a detailed explanation of his report to the court. (Compare 11 O. R. 491; 14 Ont. App. R. 419; 15 App. Cas. 188.) *Booth v. Ratté*, xxi., 637.*

125. *Appeal—Trial by jury—Withdrawal from jury—Reference to court—Consent of parties—Railway company—Negligence.]—On the trial of an action for injuries alleged to have been caused by negligence of the servants of the railway company in not giving proper notice of the approach of a train at a crossing, whereby plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court with power to draw inferences of fact and on the law and facts either to assess damages to the plaintiff or enter a judgment of nonsuit. On appeal from the decision of the full court (31 N. B. Rep. 318), assessing damages to plaintiff: *Held*, Gwynne and Patterson, JJ., dissenting, that as by the practice in the Supreme Court*

of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitrator, and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the court. *Canadian Pacific Ry. Co. v. Fleming*, xxii., 33.

126. *Municipal corporation—Drainage—Action for damages—Reference—Drainage Trials Act, 54 Vict. c. 51—Powers of referee.*—A referee under The Drainage Trials Act of Ontario (54 Vict. c. 51), whether under s. 11, or s. 19, has full power to deal with the case as he thinks fit, and to make of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said s. 11 into a claim for damages arising under s. 591 of the Municipal Act.—One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed, and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act, that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.—The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law. *Township of Ellice v. Hiles; Township of Ellice v. Crooks*, xxiii., 429.

127. *Report of referee — Time for moving against—Notice of appeal—Cons. rules 848, 849—Extension of time—Confirmation of report by lapse of time.*—In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to s. 101, Judicature Act, and rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to \$600 damages. The Divisional Court held that an appeal was too late, no notice having been given within the time required by cons. rule 848, and refused to extend the time for appealing. On motion for judgment on the report by V. it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do. *Held*, affirming the decision appealed from, that the appeal not having been brought within one month from the date of the report, as required by cons. rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which an appellate court would not interfere. *Held*, also, Gwynne, J., dissenting, that the report having been confirmed by lapse of time and not appealed against, the court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for. *Freeborn v. Vandusen* (15 Ont. P. R. 264) approved of and followed. *Township of Colchester South v. Valad*, xxiv., 622.

24. RULES OF PRACTICE.

128. *Disposing of case on appeal — Nova Scotia Judicature Act—Order 57, rule 5.*—Order 57, Rule 5, of the Nova Scotia Judicature Act, applies only to cases tried by a judge without a jury, and order 38, Rule 10, to cases tried with a jury. *Green v. Miller*, xxxiii. at p. 227.

AND see NEW TRIALS, No. 89a.; PRACTICE OF SUPREME COURT, No. 181a.

128a. *Negligence—Joint tortfeasors—Joinder of defendants—B. C. Judicature Acts—Motion for judgment — Findings of jury — Judgment of appellate court.*

See No. 3, ante.

129. *Adding parties—Orders 46 and 48 Ontario Judicature Act.*

See WILL, 15.

130. *Adverse mineral claim—Form of affidavit—Right of action—Condition precedent—Necessity of actual survey—B. C. Supreme Court rules.*

See ACTION, 28.

25. SERVICE OF PROCESS.

131. *Hypothecary action — Absentee—Art. 2075 C. C.—Service of judgment—Art. 476 C. C. P. and C. S. L. C. c. 49, s. 15—Waiver—Surrender—Personal condemnation.*—By a judgment *en déclaration d'hypothèque* land in the possession and ownership of respondents was declared hypothecated to D. for \$5,200, interest and costs; they were condemned to surrender the same for judicial sale to satisfy the judgment, or pay the amount to D.; the option to be made within 40 days of service on them of the judgment, and in default of option within that time, the respondents were condemned to pay appellant the amount of the judgment. The respondents residing in Scotland and having no domicile in Canada the judgment was served at the prothonotary's office and on their attorneys. After 40 days, no option having been made, D. issued *fi. fa. de terris* against respondents for the amount of the judgment. The sheriff first seized the property hypothecated, sold it and handed over the proceeds to a prior mortgagee. Another writ of *fi. fa. de terris* issued, other lands of respondents were seized, and they filed an opposition *afin d'annuler*, claiming that the judgment had not been served on them and that they were not personally liable for the debt. *Held*, 1. Reversing the judgment appealed from, that it was not necessary to serve a judgment *en déclaration d'hypothèque* on a defendant who is absent from the jurisdiction and has no domicile therein. 2. That respondents, by not opposing the first seizure of their property, had waived any irregularity (if any) as to the service of the judgment. 3. That in an action *en déclaration d'hypothèque* the defendant may, in default of his surrendering the property within the period fixed by the court, be personally condemned to pay the full amount of the plaintiff's claim. *Dubuc v. Kidston*, xvi., 357.

132. *Parties to hypothecary action—Service of judgment—Absence from jurisdiction—Condemnation in default of surrender.*—In an action *en déclaration d'hypothèque*, on default of

surrendering the property charged, a defendant may be personally condemned to pay the amount of the claim.—It is not necessary to serve a judgment *en déclaration d'hypothèque* upon a defendant absent from the jurisdiction and who has no domicile therein. *Dubuc v. Kidson*, xvi., 357.

AND see No. 131, ante.

133. *Service of action — Judgment by default—False return of service.*

See No. 37, ante.

134. *Service of petitions and process in controverted elections.*

See ELECTION LAW and No. 43, ante.

26. STAY OF PROCEEDINGS.

135. *Adding parties—Foreclosure—Stay of proceedings — Conditions of sale—Lessee of mortgaged premises.*

See MORTGAGE, 27.

136. *Controverted elections — Stay of proceedings pending appeal on preliminary objections—Extension of time—Disqualification.*

See No. 49, ante.

27. TRIALS.

137. *Cross-examination—Defendants jointly impleaded—Joint defence—Rights of separate counsel at trial.*

See PLEADING, 22.

138. *Absence of material witness—Bill for account — Order refusing postponement of hearing.*

See VENDOR AND PURCHASER, 18.

139. *Trial—Omission of evidence — Misdirection—Undue influence on jury.*

See NEW TRIAL, 80.

140. *Mining law—Location of mining claim—Certificate of work — Vacant location—Reception of evidence.*

See MINES AND MINERALS, 11.

141. *Libel—Question of privilege—Proof of malice—Admission of evidence.*

See LABEL, 8.

142. *Criminal law — Procedure at trial—Canada Evidence Act, 1893 — Husband and wife as competent witnesses — “Communications” — Privilege—Construction of statute—Directions given by legal adviser.*

See CRIMINAL LAW, 25.

28. WRITS.

143. *Renewal of writ—Setting aside order for—Master setting aside his own order.]—A writ issued from the High Court of Justice (Ont.), in June, 1887, was renewed by order of a master in chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the master to have the service and last renewal set aside, which application*

was granted and the order setting aside said service and renewal was affirmed on appeal by a judge in chambers and by the Divisional Court. Special leave to appeal from this decision was granted by the Court of Appeal, which also affirmed the order of the master, Osler, J., who delivered the principal judgment, holding that the master had jurisdiction to review his own order; that plaintiffs had not shewn good reasons, under rule 238 (a), for extending the time for service; and the ruling of the master having been approved by a judge in chambers and a Divisional Court, the Court of Appeal could not say that all the tribunals below were wrong in so holding. *Held*, that for the reasons given by Osler, J. (15 Ont. P. R. 56), the appeal to the Supreme Court should be dismissed with costs. *Howland v. Dominion Bank*, xxii., 130.

144. *Venditioni exponas—Order of court or judge — Vacating sheriff's sale — Execution against lands.]—A petition en nullité de décret has the same effect as an opposition to a seizure and under arts. 662 and 663 C. C. P. the sheriff cannot proceed to the sale of property under a writ of venditioni exponas unless such writ is issued by an order of the court of a judge. Bissonette v. Laurent (15 R. L. 44) approved. Taschereau and Gwynne, JJ., dissenting. Lefeuntun v. Veronneau, xxii., 203.*

145. *Execution for costs — Supreme Court judgments—Special leave for issue of writ.]—As a judgment of the Supreme Court of Canada, certified to the proper officer of the court of original jurisdiction, becomes a judgment of the inferior court under the provisions of R. S. C. c. 135, s. 67, for all intents and purposes, it is unnecessary to obtain special leave to issue execution for costs awarded on the appeal. *Ex parte Jones*, 35 N. B. Rep. 108.*

PRACTICE OF THE SUPREME COURT OF CANADA.

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AND see APPEALS — FINDINGS IN COURT BELOW—NEW TRIALS.

1. AMENDMENTS.

1. *Appeal case—Amendment—Application after judgment.*—The Supreme Court in determining an appeal is bound by the case as transmitted as forming the material upon which the hearing was based; steps to amend should be taken before the decision on the appeal, and an application to amend the case after a judgment ordering a new trial comes too late. *Providence Washington Ins. Co. v. Gerow*, xiv., 731.

2. *Amendment of case—Action against Provincial Government—Style of cause.*—In this case the action was instituted against the Government of Quebec, but when the case came up for hearing on the appeal to the Supreme Court the court ordered that the name of "Her Majesty the Queen" be substituted for that of the "Province of Quebec." *Grant v. The Queen*, xx., 297.

3. *Amending case—Evidence of plaintiff—Chamber application.*—Respondent (plaintiff) moved the full court to have the case amended by adding his evidence when examined as a witness on behalf of appellant (defendant). For appellant it was contended that under art. 251 of the Code of Civil Procedure the evidence could not be considered, a declaration having been filed excluding it from the record. *Held*, that the application should have been made in chambers, and not to the court, and that, in any event, the evidence could not properly be made part of the case. *Atna Ins. Co. v. Brodie*, Cass. Dig. (2 ed.) 673; Cass. S. C. Prac. (2 ed.) 66, 86, 131.

4. *Case—Amendment—Remitted to court below.*—A judge of the court below having certified that the examination of one D. was made part of the case *quantum valeat*, *Held*, that the case must be remitted to the court below to be settled in accordance with the statute and practice of the court. It should appear clearly, whether the examination did or did not properly form a part of the case. *McCall v. Wolff*, Cass. Dig. (2 ed.) 673; Cass. S. C. Prac. (2 ed.) 86, 131.

5. *Municipal corporation—Construction of sidewalks—Trespass—Action en bornage—Petitory action—Amendment of pleadings—Practice—R. S. C. c. 135, s. 65.*—The plaintiff brought his action to recover the value of a strip of land of which the defendant was illegally in possession. The courts below dismissed the action on the ground that the proper remedy was by action *en bornage* or *au pétitoire*. In order to cease litigation, the Supreme Court of Canada, without directing any amendment of the pleadings, reversed the judgment of the courts below, directed that the record should be remitted to the trial court for the purpose of ascertaining the extent of the property affected by the trespass and ordered the restoration thereof to the plaintiff. *Burland v. City of Montreal*, xxxiii., 373.

6. *Adding alternative claims—Amendment—Discretionary orders—Duty of appellate court.*—Where the courts below have in the exercise of judicial discretion ordered or refused leave to amend the pleadings, there ought not to be any interference with this exercise of their discretion on an appeal. *Porter v. Pelton*, xxxiii., 449.

7. *Exercise of discretion on appeal—Entering new verdict—Amending pleadings.*

See APPEAL, 130.

8. *Amendment—Case in appeal—Adding affidavit to printed case.*

See No. 14, *infra*.

9. *Replevin—Pleading—Justification by sheriff—Amendment in Supreme Court.*

See SHERIFF, 9.

10. *Correction of printed case—Remitting record for amendment.*

See Nos. 22, 23, *infra*.

11. *Matter in controversy—Amendment of pleadings—New grounds raised on appeal.*

See No. 218, *infra*.

12. *Defective awards—Objections taken on appeal—Amending answers—Costs.*

See ARBITRATIONS, 54.

2. CASE AND FACTS.

13. *Special case—Consent as to material to be used—Order for taking further evidence.*—In a special case submitted by consent of the parties upon the trial judge's notes, the court cannot make an order for the taking of further evidence without a like consent. *Smyth v. McDougall*, i., 114.

14. *Case in appeal—Amendment—Adding affidavit to printed case.*—On the hearing application on behalf of the appellant was made to have an affidavit added to the case filed.—*Per Ritchie, C.J.* "The case has been settled and you cannot now amend it by adding what would be equivalent to new evidence." *Confederation Life Association v. O'Donnell*, x., at p. 93.

15. *Factum—Scandalous and impertinent matter—Costs.*—The appellant's factum containing reflections on the conduct of the judges of the court below, was ordered to be taken off the files as scandalous and impertinent, and appeal allowed without costs. *Vernon v. Oliver*, xi., 156.

16. *Printed case—Reasons for judgment appealed from.*—The printed case filed should contain the reasons for judgments of courts below.—*Per Ritchie, C.J.*, in *Attorney-General v. City of Montreal*, xiii., at p. 359.

17. *Verdict for solatium—Death of parent—Pecuniary loss—Art. 1056 C. C.—Lord Campbell's Act—Cross-appeal.*—Where a verdict for damages could not be upheld on the ground of solatium, but the respondent neglected to file a cross-appeal to sustain it on the ground that there was evidence of a pecuniary loss for which compensation might have been recovered, the appeal was allowed and action dismissed with costs. *City of Montreal v. Labelle*, xiv., 741.

18. *Case on appeal—Evidence—Document not proved in trial court.*—The case in appeal should not contain matter that was not before the trial court. *Exchange Bank of Canada v. Gilman*, xvii., 108.

19. *Factum—Unnecessary matter.*—Objections to a factum as containing unnecessary matter may be urged at the hearing. *Coleman v. Miller*, Cass. Dig. (2 ed.) 683; Cass. S. C. Dig. (2 ed.) 144.

20. *Demurrer—Defective case—Formal judgment.*—A case cannot be filed or appeal entertained where it does not appear by the printed record that judgment has been formally entered. *Reid v. Ramsay*, Cass. Dig. (2 ed.) 420; Cass. Prac. (2 ed.) 64.

21. *Filing case—Record incomplete—Postponement of hearing.*—An incomplete case cannot be received by the registrar, but where such a case was filed, the hearing of appeal was allowed to stand over till the case was perfected by the addition of the formal judgment of the court below. *Kearney v. Kean*, Cass. Dig. (2 ed.) 672; Cass. S. C. Prac. (2 ed.) 64.

22. *Irregularity in case filed—Printing—Italics—Substantial compliance with rules.*—Certain portions of the case had been italicized in the printing. The prothonotary certified that the printed case was the case agreed upon and settled by the parties. No affidavit was produced to contradict this certificate or to shew that the italics had been improperly used.—Objection to case overruled.—The case is to be printed so as to procure a certain degree of uniformity and all that is required is a substantial compliance with rule 8.—*Ritchie, O.J.*, in chambers. *May v. McArthur*, Cass. Dig. (2 ed.) 674; Cass. S. C. Prac. (2 ed.) 135.

23. *Correction of printed case—Remitting to court below.*—*Per Fournier, J.*, in chambers. Where it appeared that certain papers which a judge of the court below had directed should form part of the case had been incorrectly printed, especially the factum of the respondent in said court, which had been translated and in which interpolations had been made, the registrar was directed to remit the case to the court below to be corrected. *Parker v. Montreal City Pass. Ry. Co.*, Cass. Dig. (2 ed.) 674; Cass. S. C. Prac. (2 ed.) 132.

24. *Settling case—Application as to printing.*—*Per Gwynne, J.*, in chambers. No application should be made with respect to the contents of the "case," or to dispense with printing any part of it, until it has been settled by agreement between the parties, or by a judge of the court below, pursuant to the statute. *Carrier v. Bender*, Cass. Dig. (2 ed.) 674; Cass. S. C. Prac. (2 ed.) 65, 66, 134.

25. *Incomplete record—Order to add matter omitted.*—*Per Ritchie, C.J.*, in chambers. In a British Columbia appeal from a judgment overruling demurrers an original case did not contain the formal order or judgment of the court. Upon application, the agent of the respondents' solicitors consenting, it was ordered that the registrar be at liberty to file the case as received without the formal order, and that the appellants might attach the formal order to the case and copies within six weeks from that date. *Bank of B. N. A. v. Walker*, Cass. Dig. (2 ed.) 673; Cass. S. C. Prac. (2 ed.) 65, 85.

26. *Case on appeal—Incomplete record—Undertaking to have decree added.*—During

the hearing of the appeal, the attention of appellant's counsel was called to the fact that the case was defective on account of the omission from the record of the decree of the Court of Chancery. The argument was allowed to proceed on counsel undertaking to have the decree added to the case before judgment should be rendered. *Wright v. Synod of Huron*, Cass. Dig. (2 ed.) 673; Cass. S. C. Prac. (203) 65, 86.

27. *Late filing of case—Inscription—Cross appeal—Hearing refused.*—Respondents, who had given notice of cross-appeal, moved for leave to proceed with cross-appeal, notwithstanding that the original case had not been filed until that day by appellants and that the appeal had not been inscribed.—Appellants also moved to have principal appeal heard, the delay in inscribing and in filing factums having been an oversight. Held, that if the cross-appellant desired to proceed with his cross-appeal he should have himself filed the original case. Both principal appeal and cross-appeal were ordered to stand over. *Mayor of Montreal v. Hall*, Cass. Dig. (2 ed.) 680.

28. *Filing case—Formal judgment of court below—Postponement—Factum—Irrelevant matter—Sup. and Bw. Courts Act, s. 44—S. C. Rule 30.*—A case cannot be filed unless it contains the formal judgment of the court appealed from. The appeal may, by consent, be placed at the foot of the roll to permit the adding of the rule of the court below.—Improper reflections upon the conduct of the judges in the court below will be ordered to be struck out of the factum and subject the solicitor to the censure of the court and loss of his costs. *Wallace v. Souther*, Cass. S. C. Prac. (2 ed.) pp. 64, 85; Cass. Dig. (2 ed.) pp. 672, 682.

29. *Deposit of factum—Rule of court—No waiver—Consent of parties—Inscription.*—Motion for leave to inscribe case which had not been put on inscription list because factum of appellant not filed in time. The appellant had been directed to bring appeal on for hearing at the session then being held, otherwise appeal to stand dismissed. Counsel stated that delay in filing factum had occurred because both parties had consented to an extension of time for so doing. Counsel for respondent consented. Held, that the rule requiring factums to be deposited within a limited time had been passed for the convenience of the court and judges and could not be waived by consent of parties, but under the peculiar circumstances, and in view of the consequences of refusing the motion, liberty to inscribe might be given. *Côté v. Stadacona Assur. Co.*, Cass. Dig. (2 ed.) 682, 683; Cass. S. C. Prac. (2 ed.) 133, 143.

30. *Factum—Leave to deposit—Inscription ex parte.*—When an appeal inscribed for hearing *ex parte* was called, counsel for respondents asked leave to be heard and to be allowed to deposit factum. Counsel for appellant consented. The application was granted. *Parker v. Montreal City Passenger Ry. Co.*, Cass. Dig. (2 ed.) 683.

31. *Time for filing factum—Leave to deposit—Inscription ex parte.*—When an appeal inscribed for hearing *ex parte* was called, counsel for respondent asked leave to be heard, although his factum had not been deposited within the time provided by the rules. Counsel for appellant consented. Held, that the

rules respecting factums must be strictly complied with and the registrar should not receive factums tendered after the time fixed in the rule. Counsel for respondent was heard but this case was not to be considered a precedent. *Lord v. Davidson*, Cass. Dig. (2 ed.) 683; Cass. S. C. Prac. (2 ed.) 143.

32. *Factums—Filing—Delivery to parties—Rules 23-30.*—The rules respecting factums must be strictly complied with, and the registrar should not receive factums tendered after the delay specified in the rule. Default by the respondent to file a factum does not justify a similar default on the part of the appellant or relieve him from the consequences of a motion to dismiss under S. C. Rule 26. *Whitfield v. Merchants Bank of Canada*, Cass. Dig. (2 ed.) 681; S. C. Prac. (2 ed.) 144.

33. *Extension of time for appealing—Obstacles placed in the way of appellant—Delays caused by other persons—Costs.*—A defendant seeking appeal had numerous obstacles placed in the way of having the "case" settled, certified and transmitted from the court below through the action of the Chief Justice, and the registrar thereof, and of the plaintiff's solicitor. On a special application in chambers for relief, the Chief Justice of Canada enlarged the motion and stayed proceedings to allow of the application being made in the Supreme Court of Canada at the opening of its next session. After hearing the parties by their counsel.—The Supreme Court of Canada was of opinion that whether the "case" had been settled or not by the Chief Justice, it certainly was not through the fault or laches of the defendants that it had not been settled, but from the delays and laches of the plaintiff, and it ought to have been settled, and the court ordered that notwithstanding the order of the 22nd June, 1882, the time for filing the "case" and depositing the factum of the appellants should be extended to 1st January, 1883, and the appellants should be at liberty to bring the appeal on for hearing at the next sessions thereafter; that the appellants should be at liberty to apply to a judge of the Supreme Court of Canada in chambers, to extend any time thereby limited until the first day of the next sessions of the court, or until an order upon any such application could be heard and disposed of by the court; that the appellants might then apply to the court for any further or other relief as might seem just; and that the respondent (plaintiff) should pay to the appellants the sum of \$20 as the costs of the motion before the Chief Justice, and the further sum of \$50 as the costs of the motion before the full court.—The court intimated that if any further obstacles were placed in the way of the appellants the court would take the necessary means to have a speedy hearing of the appeal. *Bank of B. N. A. v. Walker*, Cass. Dig. (2 ed.) 701.

34. *Filing case—Extension of time—Vacation.*—Motion on behalf of respondent to dismiss appeal for want of prosecution. The judgment of the Court of Appeal was pronounced 30th June, 1885. On 3rd July following appellant put in his bond for security for costs, which was allowed, but being under the impression that the time of vacation did not count, he took no steps to further prosecute his appeal. Notice of motion to dismiss was given 17th September, 1885, and was shortly afterwards heard before Henry, J., in chambers, who held, that under the circum-

stances, the time for filing the case should be extended to 10th October, then instant. Motion dismissed without costs. *Herbert v. Donovan*, Cass. Dig. (2 ed.) 706; Cass. S. C. Prac. (2 ed.) 170.

35. *Appeal—Special case—Judgment appealed from—R. S. C. c. 135, s. 44—Practice.*—The Supreme Court of Canada will not hear an appeal when the judgment appealed from does not appear in the case filed. *Town of St. Stephen v. County of Charlotte*, 8th November, 1894.

[NOTE.—Before the hearing, attention was drawn to the fact that the formal judgment or order of the court below was not in the printed "case." Upon counsel undertaking to have it taken out, printed and added to the "case" the court consented to hear the appeal, but the Chief Justice intimated that, in future, no appeal would be heard if the "case" did not contain the formal judgment of the court below.]

36. *Appeal—Incomplete record—Remitting case to trial court—Costs.*—The respondent had recovered damages for the death of his son, alleged to have been caused by the appellant's fault, and, in the course of the argument of an appeal to the Supreme Court of Canada, the attention of the court was directed to the absence of proof of record as to the relationship between the deceased and the plaintiff, and it was contended on behalf of the appellant that he had no *locus standi*. The hearing was enlarged for a day, and, upon the re-assembling of the court, application was made on behalf of the respondent to have the cause remitted to the trial court for the purpose of completing the proofs of relationship and completing the record so as to include the judgments on motions in the courts below to reject the evidence put in on that point.—The court, after hearing counsel for both parties, ordered that the case should be remitted to the trial court for the purpose of receiving evidence as to the relationship of the plaintiff and the identity of the deceased, and no other evidence, but as a condition precedent to such indulgence, that the plaintiff should pay to the defendants, appellants, the costs incurred by them in the Court of Queen's Bench, appeal side, and in the Superior Court for Lower Canada, such costs to be paid within a time limited and in default, the appeal to stand allowed, and the action to be dismissed with costs to the defendants in all the courts without further order, said costs to be taxed at the diligence of said respondents, the record being retained in the Supreme Court office for the time mentioned, when, if it appeared that the costs had been taxed and paid, then that the record should be remitted to the trial court for the purposes above mentioned.—Gwynne, J., dissented, and King, J., while concurring as to remitting the record, did not feel disposed to make the plaintiff pay the costs of the Court of Queen's Bench. *Davidson v. Tremblay*, 10th May, 1895.

37. *Case in appeal—Additions made to judgments after institution of appeal.*—Per Taschereau, J. Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly allowed to form part of the case on appeal and could not be

considered by the appellate court. *Mayhew & Stone*, xxvi., 58.

38. *Printed case—Use of italics—Factums.*—The court drew attention to the impropriety of printing parts of the case on appeal in italics merely for the purpose of emphasizing particular phrases or paragraphs. Such a practice may be permitted in factums, but never in the printed case. *Barnard v. Riendeau*, 11th March, 1901.

39. *Printed case—Translation of judge's notes.*—The court drew attention to the uselessness of translations of the notes of reasons for judgment in the courts below which were stated to be quite irregular. The judgments and reasons for judgment as printed in the case are the proper material to be read by the court on an appeal. *Fairman v. City of Montreal*, 13th March, 1901.

(NOTE.—The translations of factums and the judgments and opinions of the judges of the courts below may be ordered by any Supreme Court Judge under Supreme Court rules 64 and 65, when deemed necessary.)

40. *Case on appeal—Judge's notes—Production at hearing of reasons for judgment.*—When the appeal was called for hearing counsel for the appellant applied for leave to file, as part of the case on appeal, the notes of reasons for a dissenting judgment in the court below which had not been delivered in time for printing as part of the record. A certificate by the clerk of appeals was annexed to a printed copy of the notes stating that they were a correct copy and that, owing to the judge's absence from Canada, they had been unable to obtain the notes from him at an earlier date. The application was opposed by counsel for the respondents. The court allowed the notes to be filed and it was stated, by his Lordship the Chief Justice, that, the court was always disposed to permit the filing of notes of the reasons for judgment of judges in the court below when they could be obtained. *Canadian Fire Insurance Co. v. Robinson*, 9th Oct., 1901.

41. *Mandamus—Refusal to commit for trial—Printing factums and case—Striking out appeal.*—On 21st May, 1901, a motion for a rule was refused and on 14th November following, the case being inscribed for hearing on an appeal from a judgment refusing mandamus to compel a magistrate to commit a person accused of forgery for trial after the accused had been tried summarily and discharged by him. As no printed case or factums were filed, the court refused to hear the appeal and ordered that it should be struck off the roll. *Rea v. Love*, 14th November, 1901.

42. "Agent's book"—S. C. R. rule 16.]—Incomplete—Record remitted for expertise.

See SALE, 103.

43. *Printing case—Unnecessary matter—Deduction of costs.*

See No. 64, *infra*.

44. *Irregular appeal—Factum filed late—Hearing ex parte refused.*

See No. 152, *infra*.

3. COUNSEL, SOLICITORS AND AGENTS.

45. "Agent's book"—S. C. rule 16.]—Under authority of a decision by Ritchie, C.J.,

in chambers, that established the practice, written authority should be filed in the office of the registrar of the court authorizing either the registrar or a solicitor to enter the name of the agent in the agent's book, when the principal does not enter the name himself. *Wallace v. Burkner*, 2nd May, 1883; Cass. Dig. (2 ed.) 669; Cass. S. C. Prac. (2 ed.) 138, 139.

46. *Constitutional questions—Counsel for Provincial Government.*—In an appeal between private suitors in which the validity of an Act of a Provincial Legislature is questioned, the Attorney General of the province will be heard on the question of provincial legislative jurisdiction. *Citizens Ins. Co. v. Johnston*, Cass. Dig. (2 ed.) 678.

47. *Hearing counsel from different provinces—Rule 32—Third counsel heard.*—The court heard a third counsel for appellants, notwithstanding rule 32, as the laws of two provinces were in question, and there was a cross-appeal. It was stated that the practice permitted under the special circumstances should not be considered a precedent. *Coleman v. Miller*, Cass. Dig. (2 ed.) 678.

48. *Hearing counsel—Third counsel citing authorities.*—When one counsel from Quebec and one from Ontario had been heard for respondent, a third counsel (from Quebec) was heard on French authorities applicable. *Russell v. Lefrançois*, Cass. Dig. (2 ed.) 679; See S. C. R. at p. 338.

49. *Transaction of office work—Correspondence—Appointment of agents.*—Conducting business with the registrar's office by correspondence is an irregular practice. A solicitor should appoint an agent as required by the Supreme and Exchequer Court rules. *Wallace v. Burkner*, Cass. Dig. (2 ed.) 669; Cass. S. C. Prac. (2 ed.) 138, 139.

50. *Counsel—President of railway company, appellants, not entitled to be heard.*—The appellants did not appear by counsel at the hearing, but a Mr. O'B. appeared and stated that he was the president and proprietor of the railway company, appellants, and wished to be heard on their behalf. The application was refused and the hearing of the appeal was ordered to stand over till next session. *Halifax City Ry. Co. v. The Queen*, Cass. Dig. (2 ed.) 679.

51. *Constitutional questions—Hearing of counsel—Right to begin—Reply—R. of P. 32.*—Where a question of legislative jurisdiction is raised, the party attacking the validity of an Act should begin. In the case in question, counsel for the provinces were first heard. Only one counsel was heard in reply for all the provinces. *In re "Liquor License Act, 1883"*, Cass. Dig. (2 ed.) 679; Cass. S. C. Prac. (2 ed.) 147.

52. *Referred question—Hearing counsel—Right to begin.*—Question whether or not on a reference upon the Canada Temperance Act, 1878, s. 6, had been complied with, and whether proclamation should issue under s. 7, the court directed that the parties seeking to sustain the affirmative, and wishing to shew that the proclamation should issue should begin. *In re "Canada Temperance Act, 1878"* (*County of Perth*), Cass. Dig. (2 ed.) 679.

53. *Postponement of hearing — Illness of counsel.*—Motion to postpone hearing till the following session on the ground of unexpected illness of counsel retained. Granted. *Adamson v. Adamson*, Cass. Dig. (2 ed.) 686; *Quebec Ins. Co. v. Eaton*, May, 1900; *Consumers' Cordage Co. v. Connolly*, 11th Oct., 1900.

54. *Extra counsel — Special circumstances — Intricate questions — Cross-appeal — Rule relaxed.*— On special application, third counsel was heard, intricate questions of law having to be argued, there being a cross-appeal, and counsel stating that the Court of Queen's Bench for Lower Canada had also relaxed its rule which forbids the hearing of more than two counsel on each side.—The court stated that the fact of there being a cross appeal was not of itself sufficient ground to cause the court to depart from its rule. *Jones v. Fraser*, Cass. Dig. (2 ed.) 678.

55. *Non-appearance — Absence of counsel when appeal called for hearing.*— When the case was called for hearing in the order in which it appeared upon the roll no person appeared on behalf of the appellant.—On motion by counsel on behalf of respondent the appeal was dismissed for want of prosecution and a motion subsequently made to reinstate the case was refused. *Hall Mines v. Moore*, 20th May, 1898.

56. *Postponement of hearing—Alteration of roll—Illness of counsel.*—An application was made on behalf of respondent to have an appeal postponed to a lower position on the list of cases inscribed for hearing, a consent in writing signed by the solicitors for both parties was filed and it was shown that respondent's counsel was seriously ill and unable to attend at the time when the hearing on the appeal would be likely to come on in its position upon the roll. It was accordingly directed by the Chief Justice that the case should be placed in a lower position upon the roll than that in which it had been inscribed. *Provident Savings and Assurance Society v. Mowat*, 11th Oct., 1901.

57. *Default in appearance—Prosecution of appeal—Dismissal.*— On default of counsel appearing when the case was called for hearing, the appeal was dismissed with costs. *Burnham v. Watson, &c.*, Cass. Dig. (2 ed.) 681.

See No. 91, *infra*.

58. *Counsel for party attacking legislative jurisdiction—Hearing—Right to begin.*—The counsel for the Dominion of Canada were ordered to begin at the hearing of a reference to test the validity of a provincial statute. *The "Thrasher" Case*, 16th May, 1883, Cass. Dig. (2 ed.) 679.

See No. 145, *infra*; and CONSTITUTIONAL LAW, 1.

59. *Counsel of party attacking statute as ultra vires—Hearing—Right to begin.*—On the reference to test the validity of the "Liquor License Act, 1883," counsel for the provinces were first heard. *In re "Liquor License Act, 1883,"* 23rd Sept., 1884, Cass. Dig. (2 ed.) 679.

See No. 145, *infra*; and LIQUOR LAWS, 7.

60. *Foreign counsel—Refusal to hear.*

See No. 146, *infra*.

61. *Default of appearance—Application to reinstate—Absence of counsel.*

See No. 95, *infra*.

62. *Default of appearance—Counsel absent—Application to reinstate—Notice—Costs.*

See No. 97, *infra*.

4. COSTS.

63. *Discretion in awarding—Costs—Court equally divided—38 Vict. c. 11, s. 38.*—The judges of the Supreme Court being equally divided in opinion, and the decision of the court below standing affirmed, the successful party was refused the costs of the appeal. But (*per Richards. C.J.*, at pp. 693-696), by 38th Vict. c. 11, s. 38 (R. S. C. c. 135, s. 62), the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case does not necessarily prevent the majority of the court from ordering payment of costs of appeal in other cases where there is an equal division of opinion amongst the judges. *The Liverpool and London and Globe Ins Co. v. Wyld*, i., 605.

NOTE.—Up to 1893, the practice in cases of equal division of opinion was to dismiss appeals without costs (*see COSTS*, No. 36, and Cass. Dig (2 ed.) p. 676, No. 39). It has, however, been the practice since then to give the respondent costs in such cases, the appellant having been unsuccessful on the assertion of the appeal.

64. *Printing of case—Unnecessary matter—Cost deducted.*—The cost of printing unnecessary and useless matter in case not allowed on taxation. *L'Heureux v. Lamarche*, xii. at p. 465.

65. *Costs — Application in chambers — Increased counsel fee—Quashing appeal.*—An application for increased counsel fee is not one for the full court, but should be made to a judge in chambers.—When an appeal is quashed for want of jurisdiction, the court may order the taxation and payment of costs. *Beamish v. Kaulbach*, Cass. Dig. (2 ed.) 677; Cass. S. C. Prac. (2 ed.) 81.

66. *Appeal for costs — Habeas corpus — Prisoner at large.*—Where an appeal in a *habeas corpus* matter had been proceeded with after the discharge of the prisoner and for the mere purpose of deciding the question of costs, the appeal was dismissed with costs. *Fraser v. Tupper*, 21st June, 1880, Cass. Dig. (2 ed.) 421, 677; Cass. S. C. Prac. (2 ed.) 54, 83.

67. *Costs — Re-payment of — Reversal of Supreme Court judgment — Practice.*—A judgment of the Supreme Court of Canada allowing an appeal with costs (20 Can. S. C. R. 481), was carried, in further appeal, by the respondents to Her Majesty's Privy Council, where the decision was reversed ([1893] A. C. 506; 63 L. J. 14). The respondents had, however, in the meantime paid the costs under the order of the Supreme Court.—On motion in the Supreme Court of Canada, on behalf of the said respondents, it was held that they were entitled to an order directing the re-payment to them of the costs so paid, the amount of such costs to be settled upon an inquiry before the Registrar of the Sur-

preme Court of Canada. — (Motion granted with costs). *Duggan v. London and Canadian Loan & Agency Co.*, 23rd March, 1893.

68. *Appeal — Acquiescence — Estoppel — Question of costs — Practice — Motion to quash.* — In order to avoid expense the Supreme Court of Canada will, when possible, quash an appeal involving a question of costs only, though there may be jurisdiction to entertain it. *Schlomann v. Dowker*, xxx., 323.

69. *Appeal — Motion to quash — Objection to jurisdiction taken in factum — General costs — Counsel fee.*

See COSTS, 10.

70. *Cross-appeal — Motion to quash — Taxing costs.*

See COSTS, 8.

71. *Refusal of costs — Scandalous matter in factum.*

See No. 15, *ante*.

72. *Question of jurisdiction — Failure to take exception — Court acting proprio motu — Costs divided.*

See COSTS, 37.

73. *Supreme Court Act, s. 24 — Appeal for costs — Hearing refused.*

See APPEAL, 36.

74. *Habeas corpus — Application refused by court below — Appeal dismissed without costs.* See COSTS, 46. See also note to No. 63, *ante*.

75. *Habeas corpus — Release of prisoner — Appeal for costs.*

See APPEAL, 275.

76. *Motion to quash appeal — Want of jurisdiction — Delay in application — Refusal of costs.*

See COSTS, 43.

77. *Quashing appeal — Want of jurisdiction — Objection taken in factum — Costs.*

See COSTS, 12.

78. *Amendment of pleading — Application for distraction of costs.*

See COSTS, 72.

79. *Objection taken on appeal — Prescription — Costs withheld.*

See LIMITATIONS OF ACTIONS, 22.

80. *Default of appearance — Dismissal of appeal — Application to reinstate — Notice — Costs.*

See No. 97, *infra*.

81. *Cross-appeal to Privy Council — Inscription pending such appeal — Stay of proceedings — Costs.*

See No. 192, *infra*.

82. *Misconduct of appellant — Costs.*

See No. 218, *infra*.

83. *Appeal per saltum — Divisional Court judgment — Order as to costs.*

See No. 195, *infra*.

5. CROSS-APPEALS.

84. *Cross-appeal — Appellate court awarding substantial damages in lieu of solatium — Appropriate relief.* — A respondent whose verdict must be set aside on the ground that it was awarded by way of solatium cannot be given substantial damages where he has failed to give notice of his intention to ask appropriate relief by way of cross-appeal. *City of Montreal v. Labelle*, xiv., 741.

85. *Cross-appeal — Interference by appellate court — Landlord and tenant — Assessment of damages.* — Plaintiff recovered \$5,000 damages in an action for negligence, but the verdict was reduced to \$3,000 on appeal to the Queen's Bench on the ground that the assessment made by the trial court included vindictive damages for which the defendant was not liable. The Supreme Court was of opinion that the amount awarded by the Superior Court at the trial was not unreasonable and could not be said to include vindictive damages, but, as there was no cross-appeal by the plaintiff, the court would not interfere to restore the original judgment. *Stephens v. Chausse*, xv., 379.

86. *Appeal — Judgment refusing nonsuit and ordering new trial — Failure to cross-appeal.* — A rule was discharged so far as it asked a nonsuit but was made absolute for a new trial. *Held*, on an appeal by defendant, that although the plaintiff was entitled to recover, yet, as he had not appealed from the order for a new trial, the rule should be affirmed and the appeal dismissed with costs. *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2 ed.) 729.

87. *Special circumstances — Cross-appeal — Relaxation of rule as to counsel at hearing.*

See Nos. 46, 47, 48, *ante*, and see APPEAL, 121, 122, 123.

6. DISMISSING APPEALS SUMMARILY.

88. *Dismissal for want of prosecution — Order of judge in chambers — Motion to rescind order.* — Appellant obtained an extension of time for filing case but failed to take advantage of the indulgence, whereupon, on application of respondent, appeal was dismissed by the judge in chambers. On motion to rescind the order dismissing the appeal. *Held*, Strong and Gwynne, J.J., dissenting, that under the circumstances of the case the court would not interfere by rescinding the judge's order and restoring the appeal. *City of Winnipeg v. Wright*, xiii. 441.

89. *Factum, further time required to file — Motion to dismiss appeal — Costs.* — Motion to dismiss appeal refused, but appellant requiring further indulgence to file factum, his application was granted and he was ordered to pay costs of motion. *Dawson v. McDonald*, Cass. Dig. (2 ed.) 683.

90. *Discretion of judge in chambers — Dismissal for want of prosecution — Undue delay in filing factum — Inscription.* — Case filed 22nd Oct. 1884; respondent's factum, 18th Nov., 1884. Last day for filing factums 30th Jan., and for inscribing, 2nd Feb., 1885. Appeal not being inscribed, respondent gave

notice of motion on 9th Feb. to dismiss appeal for want of prosecution; on 14th motion heard. Appellant's agent stated that on 2nd Feb. he had searched for the respondent's factum, and had been informed it had not been filed; and claimed respondent could not take advantage of the delay of appellant. *Held, per Fournier, J., in chambers, 16th Feb., 1885*, that the undue delay in filing appellant's factum and inscribing appeal had not been satisfactorily accounted for, and the appeal should be dismissed.—On application to the court to rescind or vary the order of Fournier, J., and to allow the appellant to file his factum and inscribe appeal, affidavits were filed to the effect: 1. That appellant's counsel thought that while respondent was in default with regard to his factum, it could not be considered there was any undue delay in prosecution of appeal; and 2. That appeal was *bona fide* and serious. *Held*, that the court would not interfere with the order of the judge in chambers. *Whitfield v. Merchants Bank of Canada*, Cass. Dig. (2 ed.) 681; Cass. S. C. Prac. (2 ed.) 75, 133, 144.

91. *Prosecution of appeal — Appellant making default—Dismissing appeal—Costs.*—Where no one appears on behalf of the appellant when an appeal is called for hearing, and counsel for respondent asks for the dismissal of the appeal, it will be dismissed with costs. *Burnham v. Watson*; *Scott v. The Queen*; *Western Ass. Co. v. Scanlan*, Cass. Dig. (2 ed.) 681.

92. *Dismissing appeal—Controverted election — Discontinuance.*—Counsel for appellant moves to dismiss appeal, not wishing to proceed with it, and having filed a discontinuance.—Counsel for respondent consents, on payment of costs. Appeal dismissed with costs. *Soulanges Election Case*; *Fikatrault v. De Beaufeu*, Cass. Dig. (2 ed.) 682; Cass. S. C. Prac. 120.

See Nos. 95 and 97, *infra*.

93. *Prosecution of appeal — Diligence required — Dismissal—Costs.*—Neglect to inscribe for hearing or in depositing factums or any carelessness in compliance with rules exposes the appeal to dismissal on motion of respondent or at least to such discipline as may be enforced by the court in ordering payment of costs. *Côté v. Stadacona Ass. Co.*, Cass. Dig. (2 ed.) 682; Cass. S. C. Prac. (2 ed.) 133.

94. *Dismissing appeal — Motion in chambers.*—Motions to dismiss appeals ought not to be brought before the court, but in the first instance, should be made to a judge in chambers. *Martin v. Roy*, Cass. Dig. (2 ed.) 682; S. C. Prac. (2 ed.) 75, 132; *Halton Election Case*, xix., 557; *Chicoutimi & Saguenay Election Case*, 16th May, 1892.

95. *Appeal—Dismissal for want of appearance—Application to reinstate.*—On motion to reinstate an appeal which had been dismissed because no counsel had appeared for appellant when the case was called, the only ground stated for asking the indulgence of the court was that counsel had been present not long before the case was called and had felt satisfied that it would not be reached that day, but that the cases before it had been unexpectedly disposed of.—The court declined to reinstate the appeal and refused the motion with costs. *Foran v. Handley*, xxiv., 706.

See No. 92, *ante*, and No. 97, *infra*.

96. *Delay in proceedings—Motion to dismiss for want of prosecution—Interlocutory application—Jurisdiction of judge in chambers—S. C. rules 26, 39, 53.*—In a case which had not been inscribed on the roll for hearing, a motion was made on behalf of the respondent, before the full court, to dismiss the appeal for want of prosecution, under the 53rd rule of practice of the Supreme Court of Canada.—The court refused to hear the motion, as it was an interlocutory proceeding within the jurisdiction of a judge in chambers, and directed that the motion should be made in chambers. *Fournier v. Barsalou*, 3rd May, 1898.

97. *Appeal—Dismissal for want of appearance — Application to reinstate — Notice — Practice—Costs.*—The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs.—On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice.—The court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but under the circumstances the motion was dismissed without costs. *Hall Mines v. Moore*, 20th May, 1898.

See Nos. 92 and 95, *ante*.

98. *Decision of domestic tribunal — Interference on appeal — Church discipline.*—Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court, without calling upon counsel for the respondent, refused to interfere, the matter complained of being within the jurisdiction of the Conference. *Ash v. The Methodist Church*, xxxi., 497.

99. *Equal division in opinion—Dismissal of appeal—Effect inter partes—Res judicata.*

See No. 172, *infra*.

100. *Controverted election—Discontinuance — Dismissal on motion by appellant.*

See Nos. 104-107, *infra*.

101. *Motion to quash appeal — Summary application ordered to stand, the court refusing to make such an order till hearing on the merits.*

See ELECTION LAW, 14.

102. *Habeas corpus—Change in relation of parties pending appeal.*

See No. 135, *infra*.

7. ELECTION CASES.

103. *Controverted election—Appeal—Dissolution of Parliament—Petition lapsing—Return of deposit.*—Pending an appeal from a decision on 8th Nov., 1890, in a controverted election case and the sittings of the court, Parliament was dissolved, and by effect of dissolution the petition dropped. Respondent in order to have costs out of the deposit in the court below moved before a judge of the Supreme Court in chambers (on reference from the full court) to dismiss the appeal for want of prosecution, or to have the record remitted to the court below. The petitioner claimed his deposit.—Patterson, J., held, that the final determination of the right to costs being kept in suspense by the appeal the motion should be refused, but inasmuch as the deposit in the court below ought to be disposed of by an order of that court the Registrar of the Supreme Court should certify to the court below that the appeal was not heard, and that the petition dropped by reason of dissolution of Parliament on 2nd February, 1891. [NOTE.—The petitioner subsequently moved the Supreme Court of Canada for an order directing the re-payment to him of the deposit in the court below. shewed that a similar application in the High Court of Justice for Ontario had been dismissed and that the order by Patterson, J., had not been appealed from. On 15th March, 1893, the Supreme Court ordered that a certificate should issue reciting the proceedings that had taken place and declaring that the petitioner was entitled to have his deposit returned.] *Halton Election Case; Lush v. Waldie*, xix., 557.

104. *Dismissing appeal—Motion in chambers.*—A motion to dismiss appeal should not be brought before the court but, in the first instance, should be made to a judge in chambers. *Martin v. Roy*, Cass. Dig. (2 ed.) 682; S. C. Prac. (2 ed.) 75, 132. *Halton Election Case*, xix., 557. *Chicoutimi and Saguenay Election Case*, 16th May, 1892.

105. *Dismissing appeal—Controverted election case—Order in chambers by consent—Application to full court.*—Counsel for respondent moves for an order dismissing appeal in a controverted election case. An order had been obtained in chambers, on consent, but doubts had been raised as to whether the order should not have been an order of the court. Granted. *North York Election Case*, Cass. Dig. (2 ed.) 682; S. C. Prac. (2 ed.) 75.

106. *Election case—Expediting proceedings.*—When an election appeal is properly in court and in a position to be set down for hearing, an application may be made under the provisions of the Supreme Court Act, to expedite the proceedings. *Bothwell Election Case; Smith v. Hawkins*, Cass. Dig. (2 ed.) 686.

107. *Controverted election—Discontinuance—Appeal dismissed.*—The appellant filed a discontinuance and moved to dismiss his appeal, counsel for respondent consenting, on payment of costs. The appeal was dismissed with costs. *Soulanges Election Case; Filiatrault v. DeBeaujeu*, Cass. Dig. (2 ed.) 682.

108. *Appeal—Supreme Court Act, 1879, s. 10—38 Vict. c. 11, s. 48—Decision on preliminary objections—Trial on merits.*

See ELECTION LAW, 6.

109. *Controverted elections—Appeal—Setting down for hearing—Notice—Extension of time—Discretion of trial judge—Jurisdiction.*
See ELECTION LAW, 7.

110. *Service of election petition—Extension of time—Discretion—Preliminary objections.*
See ELECTION LAW, 65.

111. *Taxation of witnesses in cases not appealed—Motion to vary minutes.*
See No. 177, *infra*.

112. *Irregular inscription—Factum filed too late—Hearing ex parte refused.*
See No. 152, *infra*.

8. EXCHEQUER COURT APPEALS.

113. *Setting down appeals for hearing—Appeal not promptly prosecuted—Re-inscription.*—Where the registrar has set down an appeal and it is not brought on for hearing, the registrar should not set it down a second time without an order. (*Per Fournier, J.*) *McQueen v. The Queen*, Cass. S. C. Prac. (2 ed.) p. 108.

114. *Hearing—Setting down exchequer appeal—Lapse of time—Exchequer Court rules 138, 231, 263—Supreme Court rule 44—Sup. & Ex. Courts Act, 1875, s. 68—Ex post facto rule—Costs.*—Application for a direction to the registrar to set down for hearing an appeal from the Exchequer Court. The judgment had been pronounced at Quebec, 17th October, 1877. The contract on which petition of right was brought was signed at Quebec, and the work was done on the I. C. Ry. in New Brunswick. On 9th November, 1877, the deposit of \$50 as security for costs, was made. Exchequer Court rule 231 had been previously made applicable to cases in which the cause of action had arisen in Quebec, but rule 138 had not been expressly declared applicable to such cases. On 12th February, 1878, rules 138 to 142, both inclusive, were declared applicable to actions in which the cause of action had arisen in Quebec.—On the 7th January, 1878, an application for a rule *nisi* to set aside the judgment was made to Taschereau, J.; on 7th February, he refused it. Subsequently proceedings were taken in the Exchequer Court, and an order was obtained directing all the papers to be transmitted to the acting registrar at Quebec for the purposes of a taxation. The registrar did not set the appeal down for hearing, and no steps were taken relating to the appeal, nor to have judgment entered, nor had application been made to the registrar to set the appeal down for hearing until shortly before the date of application, 22nd February, 1883. Held, that the order declaring rules 138 to 142 applicable in Quebec cases did not apply retroactively to proceedings in pending causes, and that the registrar not having set the appeal down for hearing as required by s. 68, and not having entered the judgment, the appeal was not out of court by the operation of Supreme Court rule 44. Motion granted, (*Ritchie, C. J.*, dissenting), but without costs, the point of practice involved being a new one. *Berlinquet v. The Queen*, xiii., 26.

115. *Exchequer appeal—Assessment of damages—Interference with findings of Exchequer Court judge.*—The Exchequer Court judge

heard witnesses and upon his appreciation of contradictory testimony awarded damages to the respondents. The Crown appealed on the ground that the damages were excessive. *Held*, Gwynne and Girouard, JJ., dissenting, that as it did not appear from the evidence, that there was error in the judgment appealed from, the Supreme Court would not interfere with the decision of the Exchequer Court Judge. *The Queen v. Armour*, xxxi., 499.

116. *Appeals from Exchequer Court—Final judgments—Decisions—Supreme and Exchequer Courts Act*, s. 68.

See APPEAL, 159.

117. *Exchequer Court—Petition of right—Time for application—Discretionary order.*

See COSTS, 69.

118. *Appeal from Exchequer Court—Extension of time—Questions at issue on the appeal—Final judgment.*

See APPEAL, 183.

119. *Appeal by the Crown—Expiration of time limit—Special grounds—Extension of time.*

See No. 123, *infra*.

9. EXTENSION OF TIME FOR APPEAL.

120. *Extension of time—Notice of appeal—R. S. C. v. 135, s. 41.*—The time for giving notice of appeal under s. 41 Sup. & Ex. Courts Act (R. S. C. c. 135), can be extended as well after as before the twenty days have elapsed. *Vaughan v. Richardson*, xvii., 703.

121. *Bringing appeal—Filing case—Jurisdiction of judge in chambers—Extending time.*—Under s. 79 of the Supreme and Exchequer Courts Act and rules 42 & 70 S. C., a judge of the Supreme Court in chambers has power to extend the time for printing and filing case.—*Per Ritchie, C.J.*, in chambers.—*Per Fournier, J.*, in chambers. *Bickford v. Lloyd; Canada Southern Ry. Co. v. Norvell*, Cass. Dig. (2 ed.) 673.

122. *Filing case and factums—Application for further time—Appeal from B.C.*—On 12th October, 1881, the agent for defendants' solicitor applied for three months' further time to file the case and factums, shewing by affidavit that the day the order had been made by a judge of Supreme Court, allowing \$500 to be paid into the Supreme Court of Canada, as security for the costs of appeal, 13th September, 1882, the \$500 had been paid in; that the next day the papers had been mailed to the defendants' solicitor at Victoria, B.C., to enable him to prosecute his appeal; that a letter took about three weeks to reach Victoria from Ottawa; that he had on 7th October received a telegram (produced) from defendants' solicitor, saying: "Papers just received; get time extended," and that he verily believed unless three months' further time was granted to prepare and print case and factums and transmit them, grave injustice would be done.—An order was thereupon made giving until 1st December, then next to have case printed and filed with the registrar of the Supreme Court of Canada.—*Per Ritchie, C.J.*, in chambers. *Bank of B. N. A. v. Walker*, Cass. Dig. (2 ed.) 701.

123. *Appeal by the Crown—Special grounds—Extension of time.*—Where an application was made by the Crown for an extension of time for leave to appeal after the time prescribed by 50 & 51 Vict. c. 16, s. 51, as amended by 53 Vict. c. 35, and special grounds were not disclosed in the material read on the application as reasons for such extension, the application was refused. *MacLean v. The Queen*, 4 Ex. C. R. 257.

124. *Notice of appeal—Extension of time—Application after time expired.*—The time for giving notice under s. 41 of R. S. C. c. 135, can be extended as well after as before the twenty days have elapsed. *Vaughan v. Richardson*, xvii., 703.

125. *Controverted election—Appeal—Settling down for hearing—Notice—Discretionary order.*

See ELECTION LAW, 136, 137, 138.

126. *Time for appealing—Vacation—Leave to appeal when entry of judgment is delayed—Special rule for Quebec cases.*

See APPEAL, 425.

127. *Time for appealing—Varying minutes—Settlement of substantial questions—Delay in entry of judgment.*

See APPEAL, 427.

128. *Appeal from Exchequer Court—Extension of time—Questions at issue on the appeal—Final judgment.*

See APPEAL, 183.

129. *Extending time for appeal—Order by court—Delays by respondent—Settling case in appeal.*

See No. 33, *ante*.

130. *Obstacles placed in the way of appeal—Delays caused through no fault of appellant—Time extended by order of court.*

See No. 33, *ante*.

131. *Appeal—Time limit—Commencement of—Pronouncing or entry of judgment—Security—Delay in filing—Extension of time—Order of judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46—Pronouncing judgment—Report of referee—Order of judge—Waiver—Forfeiture—Special grounds.*

See APPEAL, 425, 436.

10. HABEAS CORPUS APPEALS.

132. *Supreme and Ea. Courts Acts—R. S. O. (1877) c. 70—Jurisdiction.*—The only appellate power conferred on the court in criminal cases, is by s. 49 of the Supreme and Exchequer Courts Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose upon the court the duty of revision in matters of fact of summary convictions by magistrates.—Section 34 of the Supreme Court Amendment Act, 1876, does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus*, granted by a judge of the Supreme Court in chambers; and, as the proceedings before the full court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of

such judge in chambers, that section does not authorize the court to issue a writ of *certiorari* in such proceedings; to do so, would be to assume appellate jurisdiction over the inferior court.—*Semble, per Ritchie, C.J.*, that R. S. O. (1877) c. 70, relating to *habeas corpus*, does not apply to the Supreme Court of Canada. *In re Trepanier*, xii., 111.

AND see HABEAS CORPUS, 1.

133. *Habeas corpus—Appeal—Proceedings to appeal—Time for filing case.*—In a *habeas corpus* appeal the first proceeding is the filing of the case with the registrar—this must be done within 60 days after the pronouncing of judgment appealed from. *In re Smart*, xvi., 396.

134. *Habeas corpus—Notice—Hearing.*—An application to be allowed to bring a *habeas corpus* appeal on for hearing after short notice, must not be *ex parte*. *Re Boucher*, Cass. Dig. (2 ed.) 687.

AND see HABEAS CORPUS, 4.

135. *Habeas corpus—Change in relation of parties pending appeal.*—Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of *habeas corpus*, for the possession of Quai Sing, a Chinese female, under age), counsel for the respondent produced to the court an order of the Supreme Court of British Columbia, dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in question, whereupon the Chief Justice intimated that, under the circumstances it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant.—The appeal was consequently dismissed with costs. *Seid Sing Kaw v. Bowes*, 17th May, 1898.

136. *Appeal—Habeas corpus—Extradition—Necessity to quash.*—By s. 31 of the Supreme and Exchequer Courts Act (R. S. C. c. 135) "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal; *Held*, that the matter was *coram non iudice* and there was no necessity for a motion to quash. *In re Lazier*, xxix., 630.

137. *Practice—Habeas corpus—Binding effect of judgment in provincial court.*—An application for a writ of *habeas corpus* was referred by the judge to the Supreme Court of the province and, after hearing, the application was refused. On application subsequently made to Mr. Justice Sedgewick, in chambers, *Held*, that under the circumstances, it would be improper to interfere with the decision of the provincial court. *In re White*, xxxi., 383.

138. *Criminal matters—Writs of habeas corpus—Notice—Delays—Exercise of discretion—Appellate jurisdiction.*

See APPEAL, 274.

139. *Criminal cases—Crimes at common law—Standing offences—Issue of writ of habeas corpus.*

See HABEAS CORPUS, 2.

140. *Costs not allowed in habeas corpus matters.*

See COSTS, 46.

141. *Habeas corpus—Release of prisoner—Appeal for costs.*

See APPEAL, 275.

142. *Appeal for costs—Prisoner at large—Habeas corpus.*

See No. 66, ante.

143. *Territorial divisions—Judicial notice—Jurisdiction of Supreme Court judge.*

See HABEAS CORPUS, 7.

144. *Quashing appeal—Extradition case.*

See HABEAS CORPUS, 9.

11. HEARING.

145. *Counsel—Right to begin—Case referred Supreme Court of British Columbia.*—Inasmuch as all statutes should *primò facie* be considered within the jurisdiction of the Legislature passing them, any one attacking a statute should begin. Therefore counsel for Dominion Government was first heard. *The "Thrasher" Case*, Cass. Dig. (2 ed.) 481, 679.

AND see No. 52, ante.

146. *Foreign counsel—Not heard.*—Counsel residing in the State of New York wishing to be heard on behalf of appellants in an appeal pending before the Supreme Court of Canada was refused. *Halifax City Ry. Co. v. The Queen*, Cass. Dig. (2 ed.) 679.

147. *Case filed too late for session—Record incomplete—Hearing—Factum not filed.*—A motion to have appeal heard, notwithstanding that the case and factum of appellant had not been filed 30 days before the first day of the session, and that no factum was yet filed on behalf of the Crown, (counsel for Crown consenting), was refused. *O'Brien v. The Queen*, ~~v. Sullivan~~, Cass. Dig. (2 ed.) 686.

148. *Submitting appeal on factum.*—By consent of both parties an appeal may be submitted on *factums* and reporters' notes of a former argument before the court. *Lawless v. Sullivan*, Cass. Dig. (2 ed.) 684.

149. *Ex parte hearing—Notice of inscription—Proof of service.*—On an appeal being heard *ex parte*, the court requires an affidavit proving service of notice of inscription for hearing. *Kearney v. Kean*; *Domville v. Cameron*, Cass. Dig. (2 ed.) 684.

150. *Argument of appeal—Submitting appeal on factums.*—Court refuses to allow appeal to be submitted on the *factums*, but decides it must be orally argued. *Charlevoix Election Case*; *Valin v. Langlois*, Cass. Dig. (2 ed.) 684.

151. *Re-hearing—Case submitted on factums.*—Where a re-hearing became necessary owing to a change in the *personnel* of the court, the judge who had not heard the appeal consenting, and counsel for all parties desiring it, the court assented to the appeal being submitted on the *factums*. *McKenzie v. Kittridge*, Cass. Dig. (2 ed.) 165.

152. *Irregular appeal—Default by both parties—Factum not filed in time—Hearing ex parte refused.*—When the appeal was called, for hearing, counsel for the appellant appeared, no one appearing on behalf of the respondent. It appeared that the appellant's *factum* had not been filed until the morning of the day on which the appeal was so called, instead of three clear days before the first day of the session, as required by rule 54.—The court refused to hear the appellant *ex parte* as the case was thus irregularly inscribed. *Levis Election Case; Belleau v. Dus-sault*, Cass. Dig. (2 ed.) 686.

153. *Inscription—Appeal—Consent by counsel—Application to expedite hearing.*—In an appeal perfected after the day for inscribing, an application was made by counsel for appellant, counsel for respondent consenting, to have appeal heard at the session of the court then proceeding. *Held*, that the appeal must come on in the regular way the following session, there being no circumstances shewn to induce the court to interfere to expedite the hearing. *Bank of Toronto v. Les Curé, &c., de la Ste. Vierge*, Cass. Dig. (2 ed.) 687.

154. *Re-hearing—Motion to re-open appeal—Reconsideration of question as to writ of prohibition—Costs.*—The Supreme Court had refused a writ of prohibition to prevent the taxation of respondent's costs by the county judge, such taxation having been made before the judgment of the Supreme Court was given; but the court stated that the respondent was not entitled to costs.—Counsel for appellants moved to re-open argument of that part of the appeal as to the right to the prohibition, and for a re-consideration thereof, on the ground that the amount taxed to respondent had been paid into the County Court, and that the county judge might make an order directing the money so paid into his court to be paid out to respondent unless prohibited. *Held*, that the application which was really for a re-hearing of the appeal, which had been duly considered and adjudicated upon by the court, could not be entertained; that the court could not assume that the County Court judge would act illegally, and in defiance of the judgment of the court to the effect that the respondent was not entitled to costs; but that if the County Court judge should propose so to act, the appellants would have their remedy against him, and might apply to one of the superior courts for a writ of prohibition.—Counsel for appellants not called upon.—Motion refused with \$25 costs. *Ontario & Quebec Ry. Co. v. Philbrick*, Cass. Dig. (2 ed.) 687.

155. *Appeal—Hearing—Submitting on factums by consent.*—On application of counsel for appellants, counsel for respondent assenting, the court consented to have appeal submitted on *factums* without oral argument. *Muirhead v. Sheriff*, Cass. Dig. (2 ed.) 684.

156. *Appeal—Resignation of judge—Disqualification—Re-hearing—Practice.*—Where one of the judges who sat during the hearing of an appeal in which judgment had been reserved, resigned his commission before the judgment was rendered, and thereby became disqualified from adjudicating upon the appeal, the practice of the Supreme Court of Canada is to order that the case should be re-heard at the next following session of the court. *Wright v. The Queen*, 15th March, 1895.

157. *Illness of counsel—Postponement of hearing.*—On the calling of the case in its order as inscribed on the roll for hearing, it was shewn that leading counsel for the appellant had been taken suddenly ill and was unable to be present in court. The hearing was consequently postponed till a subsequent day during the session, in accordance with the usual practice of the court in such cases. *Consumers' Cordage Co. v. Connolly*, 11th October, 1900.

AND see Nos. 47, 48, 51, 53, 54 and 56, *ante*.

12. INSCRIPTION.

158. *Inscription—Case filed after time.*—Counsel for appellant moves for leave to inscribe appeal for hearing, though the case had been filed after the time limited for inscribing, all parties being desirous of having appeal heard and consenting. Motion refused. *Grip Print. & Pub. Co. v. Butterfield*, Cass. Dig. (2 ed.) 687.

159. *Hearing—Motion to strike out inscription—Notice.*—A motion to strike an appeal off the list of appeals inscribed for hearing must be on notice. *Parker v. Montreal City Pass. Ry. Co.*, Cass. Dig. (2 ed.) 686.

160. *Controverted election—Setting down appeal for hearing—Notice.*

See ELECTION LAW, 7.

161. *Filing case too late—Cross-appeal—Inscription—Hearing refused.*

See No. 27, *ante*.

162. *Notice of inscription—Ex parte hearing—Proof of service of notice.*

See No. 149, *ante*.

163. *Late filing of case—Factums not filed—Irregular inscription—Hearing ex parte refused.*

See No. 152, *ante*.

164. *Cross-appeal to Privy Council—Inscription pending such appeal—Stay of proceedings—Costs.*

See No. 232, *infra*.

13. INTEREST.

165. *Settlement of minutes—Appeal from N. B.—Interest on amount of verdict.*—In an appeal from New Brunswick in 1880, on a special application to the court, it was held that interest should be allowed on the principal sum from the last day of the term after verdict. *Clark v. Scottish Imp. Ins. Co.*, Cass. Dig. (2 ed.) 688; Cass. S. C. Prac. (2 ed.) 87.

166. *Stay of judgment—Allowing interest—Question for court ex mero motu.*—The question of allowing interest for time judgment has been stayed, pursuant to s. 36, Sup. & Ex. Courts Act, is a matter which the court will dispose of on its own motion. *McQueen v. Phoenix Fire Ins. Co.*, Cass. Dig. (2 ed.) 688; Cass. S. C. Prac. (2 ed.) 87.

167. *Notice of application to vary minutes—Addition of interest.*

See No. 173, *infra*.

168. *Interest against the Crown—Consent to reversal.*

See INTEREST, 6.

AND see also INTEREST, 1-28.

14. JUDGMENTS.

169. *Minutes of judgment—Question arising on settlement—Intimation by court—Supplementary opinion after delivery of judgment.*—By memorandum at the end of the reported case (5 Can. S. C. R. 90), it appears that, a dispute having arisen as to whether the court had held the action prematurely brought, on a reference, the court intimated that such had, in fact, been the opinion of the court, although it did not appear as one of the reasons for the judgment delivered. *Mutual Fire Ins. Co. v. Frey*, v., 82.

170. *Negligence—Joint tortfeasors—Joinder of defendants—B. C. Judicature Act—Motion for judgment—Findings of jury—New trial—Practice—Judgment by appellate court.*—In a case where a towing company made a contract and afterwards engaged the assistance of another transportation company in carrying out the contract, the ship in tow was damaged through careless and improper navigation by the tugs of both companies employed about the work. *Held*, reversing the judgment appealed from, that an action in which both companies were joined as defendants was maintainable in that form under the B. C. Judicature Act; that the case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with the English order 40, rule 10 of the orders of 1875, the court could give judgment finally determining all matters in dispute, although the jury may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of the jury. In case the court considers particular findings to be against evidence, all that can be done is to order a new trial, either generally or partially, under the powers conferred by the rule similar to the English order 39, rule 40; and that the Supreme Court of Canada, giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their doing so, and therefore, a judgment should be entered against both defendants for damages and costs. (See *The "Thrasher" Case*, 1 B. C. Rep. pt. I, 153.) *Sewell v. B. C. Towing Co. and The Moodyville Sawmill Co.*, ix., 527.

[The Privy Council granted leave to appeal, but the case was settled before hearing.]

AND see No. 181a, *infra*.

171. *Appeal direct—R. S. C. c. 135, s. 26—Special circumstances—Judgment of Privy Council—Rule—Costs.*—An appeal came before the Supreme Court, by consent, from the decision of the Judge in Equity (N.B.), without an intermediate appeal to the Supreme Court of the province, and, after argument, was dismissed (9 Can. S. C. R. 617). The judgment of the Supreme Court was subsequently reversed by the Privy Council, and the case sent back to the Judge in Equity to s. C. D.—36

make a decree. The plaintiffs being dissatisfied with the decree pronounced by the Judge in Equity applied for leave to appeal direct under R. S. C. c. 135, s. 26. *Held*, Taschereau and Gwynne, J.J., dissenting, that under the circumstances of the case such leave should be granted.—Where a judgment of the Supreme Court of Canada has been reversed by the Privy Council the proper manner of enforcing the judgment of the Privy Council is to obtain an order making it a rule of the Supreme Court of Canada.—Where such judgment of the Privy Council was made a rule of court, the court ordered the re-payment by one of the parties of costs received pursuant to the judgment so reversed. *Lewin v. Howe*, xiv., 722.

172. *Equal division of court—Effect of dismissal of appeal—Precedent—Res judicata.*—When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the actual parties to the litigation only and the court, when a similar case is brought before it, is not bound by the result of the previous case. *Stanstead Election Case; Rider v. Snow*, xx., 12.

173. *Notice—Interest—Application to vary minutes of judgment.*—An application to vary minutes of judgment by inserting a direction that interest be allowed for the period during which the appeal has been pending, must be on notice. *Trust & Loan v. Ruttan*, Cass. Dig. (2 ed.) 688.

174. *Minutes of judgment—Application to vary—Reference to judge in chambers.*—A motion to vary minutes was referred to Strong, J., in chambers, to be subsequently heard *pro forma* before the court. *Bickford v. Grand Junction Railway Co.*, Cass. Dig. (2 ed.) 689.

175. *Error in minutes of judgment—Amendment in chamber application.*—The judgment of the Supreme Court, as settled and entered, having directed that the costs should be paid by the appellant to the respondent on application of respondent, the order was amended by directing that the costs should be paid by the appellant's "next friend" to the respondent, the appellant having sued and prosecuted the appeal by his next friend.—*Per Ritchie, C.J.*, in chambers. *Penrose v. Knight*, Cass. Dig. (2 ed.) 689; Cass. S. C. Prac. (2 ed.) 86, 149.

176. *Application to vary terms of judgment—Questions disposed of—Reference to judge in chambers.*—Counsel for respondent moves for leave to address court on question of appointment of valuers and question of costs, disposed of by final judgment of court. Referred to Taschereau, J., in chambers, who stating to the court that the respondent seeks to practically reverse the judgment of the court, the motion is dismissed with costs. *Reeves v. Gerriken*, Cass. Dig. (2 ed.) 689.

177. *Controverted election—Taxation of witnesses in cases not appealed—Costs—Election appeal—Motion to amend judgment.*—Counsel for appellant moved to amend final order of Supreme Court as to costs, such order declaring that the respondent should pay the costs in the court below, but the trial judge having refused to tax to appellant the costs of certain witnesses examined in cases not appealed to

the Supreme Court. *Held*, that the judge was right. Motion refused with \$25 costs. *Soulanges Election Case*, Cass. Dig. (2 ed.) 676.

178. *Application in court—Mistake in setting minutes—Petition to vary judgment as entered—Amended judgment ordered to be read nunc pro tunc.*—On a petition presented in court, (five judges being present of the six who had heard the appeal), it was shewn that an error had occurred in drawing up the minutes. The court ordered the judgment as entered to be amended and so varied as to make it conform to the intention of the court, and the principles upon which it was based, and that the judgment so amended should be read *nunc pro tunc*. (Mr. Justice Strong was absent when this order was made.) *Smith v. Goldie*, Cass. Dig. (2 ed.) 689; Cass. S. C. Prac. (2 ed.) 86, 149.

[NOTE.—For form of the order as amended see Cass. Dig. (2 ed.) 689-691.]

179. *Mistake in calculation—Application in court—Error in judgment—Amending—Power of court over its own judgments—Order upon court below—Transmission of record for correction.*—Present: The Chief Justice and Fournier, Henry, Taschereau, and Gwynne, JJ.—Motion to amend final judgment in appeal. The court when delivering judgment during the last session, stated that a sum of \$2,399 should be awarded to plaintiff. The order in appeal providing for the payment of that sum was settled and sent to the court below. Counsel for appellant contended that it clearly appeared there had been an error in the calculation, and that in arriving at the sum awarded certain sums had been twice deducted, depriving the plaintiff of a sum of \$3,218.98. Counsel for respondent contended that it did not appear upon the face of the reasons for judgment that an error had been made, and therefore the application was in the nature of a re-hearing. Under the practice of the Privy Council this could not be allowed. *Held*, that it being clear that by oversight or mistake an error had occurred, the court had power of its own motion to amend its judgment to make it conform to the intention of the court and the principles upon which its judgment was based. Order to be made directing the registrar to call upon the proper officer of the court below to have the judgment of the court returned to be amended. (See *Montreal Ass. Co. v. McGillivray*, 11 L. C. R. 325.) *Rattray v. Young*, Cass. Dig. (2 ed.) 692; Cass. S. C. Prac. (2 ed.) 86, 149.

180. *Jurisprudence of Supreme Court of Canada—Binding effect of decisions.*—The Supreme Court is competent to overrule a judgment of the court differently constituted, if it clearly appears to be erroneous. *Per Gwynne, J.*, in *Burrard Election Case*; *Duval v. Maxwell*, xxxi., 459.

181. *Varying minutes—Saving clauses added—Costs.*—The judgment on appeal (31 Can. S. C. R. 196) ordered a variation of the decree appealed from so that appellant should be entitled to immediate specific performance, but that respondent should have his costs in the original action. On motion before the full court (Present: Sir Henry Strong, C.J., and Taschereau, Gwynne, Sedgewick and Girouard, JJ.), to vary the minutes of judgment as settled by the registrar it was ordered that a clause should be inserted as follows:—"That the appellant should not be obliged to pay the costs of the original action unless and until

the respondent delivers to him a good and sufficient conveyance in fee simple of the property mentioned." No costs were allowed on the motion. *Millard v. Karrow*, 14th May, 1901.

181a. *Setting aside judgment for misdirection—Motion for new trial only—Entering judgment on motion or on appeal—Nova Scotia Judicature Act, O. 28, r. 10; O. 40, r. 10; O. 57, r. 5—Evidence for jury.*—On motion for new trial it appeared that there was no evidence to go to the jury. The majority of the court (on appeal from 35 N. S. Rep. 117), *Held*, that, as the defendant had asked only for a new trial, judgment could not be entered for defendant and, in allowing the appeal a new trial merely was granted. Girouard and Davies, JJ., *contra*, considered that, under the Nova Scotia Judicature Act rules, the court below could, *ex proprio motu*, have entered judgment for the defendant, under the circumstances of the case. *Per Armour, J.*—"The only course open to us is to allow the appeal, for we cannot, as I had hoped, make a final disposition of the case, for order 57, rule 5, of the Nova Scotia Judicature Act, applies only to cases tried by a judge without a jury, and order 38, rule 10, to cases tried with a jury." The Chief Justice and Mills, J., concurred with Armour, J. *Green v. Müller*, xxxiii., pp. 196, 198, 212, 213, 227.

See No. 170, ante.

181b. *Judgments certified to court below—Issue of execution—Special leave.*—Under the provisions of R. S. C. c. 135, s. 67, a judgment of the Supreme Court of Canada, certified to the proper officer of the court of original jurisdiction, becomes a judgment of the inferior court for all intents and purposes, and it is not necessary to obtain special leave to issue execution in order to levy the costs of the party awarded costs on the appeal to the Supreme Court of Canada. *Ex parte Jones*, 35 N. B. Rep. 108.

182. *Division of opinion—New trial.*

See INSURANCE, LIFE, 8.

183. *Varying minutes—Special recitals—Certificate of proceedings—Appeal to Privy Council.*

See PRIVY COUNCIL, 4.

15. LEAVE TO APPEAL.

184. *Special circumstances—No quorum in provincial Court of Appeal—Appeal direct from trial court—Supreme Court Act, 1879, s. 6.*—On application of the defendant against whom a decree had been made at the hearing, an order was made by the Chief Justice under s. 6 of the Supreme Court Amendment Act, 1879, granting leave to appeal direct to the Supreme Court of Canada, it being shewn that there were then only two judges on the bench in Manitoba, the Chief Justice, who was plaintiff in the cause, and Dubuc, J., from whose decree the appeal was sought. *Schultz v. Wood*, vi., 585.

185. *Appeal—Certificate of deposit—Security for costs—Rule 6—38 Vict. c. 2, s. 31—Court of Review (Que.)*—The certificate filed with the printed case, as complying with Rule 6, shewed that the defendant had deposited \$500 in the court below as security in appeal before the Supreme Court.—On motion to quash, *Held*, *per Ritchie, C.J.*, and Strong,

Fournier and Henry, JJ.—The deposit of the \$500, in the court below, without a certificate that it was made to the satisfaction of the court appealed from, or one of its judges, was nugatory and ineffectual as security for the costs of the appeal.—*Per* Henry, J. Although not within the functions of the Supreme Court to decide upon the sufficiency of the security, the court might have allowed appellant reasonable time to obtain the necessary certificate, had it been asked to do so within a reasonable time after the appeal was first inscribed, but no such request having been made and so long a time having elapsed, the court should not now permit such a course to be taken.—*Per* Taschereau, J. The case should be sent back to the court below in order that a proper certificate might be obtained.—*Per* Strong and Taschereau, JJ. An appeal does not lie from the Court of Review (*Que.*) to the Supreme Court of Canada. (*Henry, J. contra*). See *Danjou v. Marquis* (3 Can. S. C. R. 251). *Macdonald v. Abbott*, iii., 278.

[Appeals now lie from the Court of Review, 54 & 55 Vict. c. 25, s. 3, s.-s. 3; 56 Vict. c. 29, s. 2.]

186. *Prosecution of appeal—Form of appeal bond—Objection—Application in chambers to dismiss—Waiver.*—A bond for security of costs of appeal to Supreme Court should provide for the prosecution of the appeal.—If an objection is made to the form of a bond for security for costs on appeal to the Supreme Court it should be by application in chambers to dismiss, and if not so made the objection will be held to be waived. *Whitman v. Union Bank of Halifax*, xvi., 410.

187. *Appeal from interlocutory judgment—Application for leave to appeal—Refusal by court below—Renewal of application to Supreme Court.*—An appellant may apply to a judge of the Supreme Court to settle the case and approve security on appeal notwithstanding that he may have already applied to a judge of the court below who has refused the application. *Ontario & Quebec Ry. Co. v. Marcheterre*, xvii., 141.

See No. 198, *infra*.

188. *Leave to appeal—Winding-up Act—Time extended after argument—Order nunc pro tunc.*—A case under the "Winding-up Act" having been set down for hearing without leave obtained under s. 76 of that Act, after it had been argued, appellant, with the consent of respondent, obtained from a judge of the court below an order to extend the time for bringing the appeal, and subsequently before the time expired he got an order from the Registrar of the Supreme Court, *nunc pro tunc*, giving leave to appeal in accordance with s. 76, and the order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal. *Ontario Bank v. Chaplin*, xx., 152.

189. *Appeal direct—Court of original jurisdiction—Supreme Court Act, (1879), s. 6.*—Appeal allowed without any intermediate appeal to any court in the Province of British Columbia. *Bank of B. N. A. v. Walker*, Cass. Dig. (2 ed.) 671; Cass. S. C. Prac. (2 ed.) 35.

190. *Leave to appeal—Application in vacation—Notice.*—On 23rd Aug., 1881 (in vacation) the agent of the defendants' solicitor applied to a judge of the Supreme Court (Strong, J.), for leave to give security under

s. 31, Supreme and Exchequer Courts Act as amended by sec. 14, Supreme Court Amendment Act, 1879.—The judge refused to make any order on two grounds:—1. Because it did not appear to him a proper application for vacation, not being urgent; and 2. Because the application ought to be made on notice and not *ex parte*. *Bank of B. N. A. v. Walker*, Cass. Dig. (2 ed.) 706.

191. *Leave to appeal—Approval of security—Application in chambers.*—Motion on behalf of defendant for approval of security and allowance of appeal. *Held*, that a similar application having been made to Gwynne, J., in chambers, and refused, and the application being in any event one which should be made in chambers, the application could not be entertained. *MacNab v. Wagler*, Cass. Dig. (2 ed.) 699; Cass. S. C. Prac. (2 ed.) 70.

192. *Appeal—Jurisdiction—Special leave—R. S. C. c. 135, ss. 40, 42—Form of application and order.*—In an order granting special leave to appeal to the Supreme Court of Canada under the provisions of s. 42, Supreme Court Act, after the expiration of the time limited by s. 40, it is not necessary to set out the special circumstances under which such leave to appeal has been granted, nor to state that such leave was granted under special circumstances. *Bank of Montreal v. Demers*, xxix., 435.

193. *Appeal—Jurisdiction—Case originating in County Court—Transfer to High Court.*—There is no appeal to the Supreme Court of Canada in a case in which the action was commenced in the County Court and transferred by order to the High Court of Justice in which all subsequent proceedings were carried on.—*Per* Gwynne, J., *contra*. Where the cause is transferred because the pleas ousted the County Court of jurisdiction an appeal lies.—Leave to appeal cannot be granted under 60 & 61 Vict. c. 34, s. 1 (e), in a case not appealable under the general provisions of R. S. C. c. 135. *Tucker v. Young*, xxx., 185.

194. *Appeal—Divisional Court judgment—Appeal direct—R. S. C. c. 135, s. 26, s.-s. 3—Appeal from order in chambers.*—*Held, per* Strong, C.J., and Gwynne, J. (Taschereau and Sedgewick, JJ., *contra*) that under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is no right of appeal to the Court of Appeal. *Farquharson v. Imperial Oil Co.*, xxx., 188.

See Nos. 196, 197 and 198, *infra*.

195. *Appeal per saltum—Divisional Court judgment—62 Vict. (2) c. 11, s. 27 (Ont.)—Constitutional question—Indian lands—Legislative jurisdiction—Costs.*—*Per* Girouard, J., (in chambers). Under the provisions of s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave. (It was ordered that the costs of the motion for leave to appeal *per saltum* should be costs in the cause to the

successful party.) *Ontario Mining Co. v. Seybold*, xxxi., 125.

196. *Ontario appeals—Special leave—60 & 61 Vict. c. 34, s. 1 (e).*—Special leave to appeal from a judgment of the Court of Appeal for Ontario under 60 & 61 Vict. c. 34, s. 1 (e), will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded. *Royal Templars of Temperance v. Hargrove*, xxxi., 385.

See No. 194, *ante*.

197. *Appeal per saltum — Jurisdiction—R. S. C. c. 135, s. 26 (3).*—Leave to appeal direct to the Supreme Court from a judgment of a Divisional Court of the High Court of Justice under s. 26, s.s. 3 of the Supreme and Exchequer Courts Act, cannot be granted unless it is clear that there is a right of appeal from such judgment to the Court of Appeal for Ontario. *Ottawa Electric Co. v. Brennan*, xxxi., 311.

See No. 194, *ante*.

198. *Special leave to appeal — Application refused in provincial court—Subsequent application—60 & 61 Vict. c. 34 (D.).*—The Supreme Court of Canada will not entertain an application for special leave to appeal under 60 & 61 Vict. c. 34 (D.), after a similar application has been made to the Court of Appeal and leave has been refused. *Town of Aurora v. Village of Markham*, xxxii., 457.

See Nos. 187 and 194, *ante*; also No. 200, *infra*.

198a. *Appeal per saltum — Extension of time for appealing — Jurisdiction — Supreme and Exchequer Courts Act, ss. 40, 42—Yukon Territory Act, 62 & 63 Vict., c. 11—North-west Territories Act, R. S. C. c. 50.*—A judge of the court appealed from has no jurisdiction to extend the time for appealing *per saltum* to the Supreme Court of Canada.—After the expiration of sixty days from the signing, entry or pronouncing of judgment, leave to appeal *per saltum* to the Supreme Court of Canada cannot be granted.—*Quere*, Whether under the provisions of section six of the Yukon Territory Act, 62 & 63 Vict. c. 11, and of the North-West Territories Act, R. S. C. c. 50, s. 42, thereby made applicable to the Territorial Court of Yukon Territory, three judges of that court are necessary to constitute a quorum for the hearing of appeals from judgments upon the trial of cases therein? *Barrett v. Syndicat Lyonnais du Klondyke*, xxxiii., 677.

See Amending Act of 1903.

199. *Appeals from Exchequer Court — Amount involved less than \$500—Discretion of judge in chambers.*—Where the amount involved in a suit in the Exchequer Court is under \$500, leave to appeal should not be granted unless it appears to the judge hearing the application that the judgment is clearly erroneous or that it might be reversed on a point of law or because the conclusions are not justified by the evidence. *Per Gwynne, J.* (in chambers), 6th May, 1899. *Schultze v. The Queen*, 6 Ex. C. R. (note), 273.

200. *Leave to appeal—Extension of time—Appeal from order — Practice of Ontario courts—Discretion.*—An appeal does not lie in the Ontario courts from a judge in the Court of Appeal for Ontario extending the time for appealing under the Supreme and Ex-

chequer Courts Act, s. 26. *Neill v. Travellers' Ins. Co.* (9 Ont. P. R. 54); *Re Central Bank of Canada* (17 Ont. P. R. 395).

Compare Nos. 187, 194, 196, 197 and 198, *ante*.

201. *Security for costs—Appeal to Supreme Court—Amount of bond.*—*Per Osler, J.* The court has no discretion to increase the amount of security on an appeal to the Supreme Court of Canada, fixed by R. S. C. c. 135, s. 46, at \$500, because of the number of respondents. *Archer v. Severn*, xii., Ont. P. R. 472.

See No. 202, *infra*.

202. *Bond on appeal — Separate issues — Number of respondents.*—Upon application to file bond of security for costs of an appeal to the Supreme Court of Canada, several respondents who had appeared separately in the Superior Court and in the Court of Appeal, urged that they were respectively entitled to separate security bonds from each of four appellants, *i. e.*, four bonds of \$500 each. *Held, per Hall, J.*, that leave for the appeal should be granted upon the furnishing of a single bond for the amount of \$500. *Archer v. Severn* (12 Ont. P. R. 472) followed. *Bonsack Machine Co. v. Falk*, Q. R. 9 Q. B. 355.

See No. 201, *ante*.

203. *Granting leave to appeal—Approval of security—Ouster of jurisdiction.*

See APPEAL, 309.

204. *Appeal per saltum—Question of law—Binding provincial decision.*

See APPEAL, 310.

205. *Appeal per saltum—Opinion expressed on merits by court below.*

See APPEAL, 311.

206. *Reversal of judgment by Privy Council—Decree of judge in equity — Appeal direct under special circumstances.*

See No. 171, *ante*.

207. *Appeal after time limit — Vacation—Quashing for want of jurisdiction—Appeal per saltum on terms—Stay of execution.*

See APPEAL, 186, 315, 317, 318.

208. *Appeal direct from trial court—Time limit.*

See APPEAL, 317.

209. *Leave to appeal—Jurisdiction to allow—Privy Council rule—Appeal in forma pauperis—Mode of granting leave.*

See APPEAL, 314.

210. *Allowance for security — Leave to appeal—Stay of proceedings in court below.*

See APPEAL, 323.

211. *Appeal per saltum—Expiration of time for application.*

See APPEAL, 317.

212. *Leave to appeal—Expiration of time limit—Effect of approving security — Evocation of cause—Discretion of court below—Rescinding order of refusal.*

See APPEAL, 322.

213. *Appeal per saltum*—Leave granted by registrar—Special circumstances.
See APPEAL, 313.

16. NEW GROUNDS TAKEN ON APPEAL.

214. *Effect of deed given in evidence*—Question not raised at trial nor in court below—Right to argue point on appeal.—An appellate court cannot refuse to entertain a question as to the effect of a deed given in evidence, on the ground that it was not raised at the trial nor in term. *Oakes v. Turquand* (L. R. 2 E. & I. App. 325), referred to by Strong, J.—Judgment appealed from (1 Ont. App. R. 112) reversed. *Gray v. Richford*, ii., 431.

215. *Want of parties*—Objection taken on appeal.—It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to an action on a policy of life insurance. *Venner v. Sun Life Ins. Co.*, xvii., 394.

216. *Point not raised by factum*—Postponement of hearing.—Where a point was raised at the hearing which was not taken in the factum, and counsel objects that he is not prepared to argue it, the court adjourned the hearing for a week. *Western Counties Ry. Co. v. Windsor & Annapolis Ry. Co.*, Cass. Dig. (2 ed.) 683.

217. *Landlord and tenant*—Conditions of lease—Construction of deed—Practice—Objections first taken on appeal.—Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained. *The Queen v. Poirier*, xxx., 36.

218. *Practice on appeal*—Supplementary evidence—Objections not taken at trial—Amendment of pleadings—Costs.—On hearing of appeal, objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question.—*Held*, following *Exchange Bank of Canada v. Gilman* (17 Can. S. C. R. 108), that the court must refuse to receive the document as fresh evidence can not be admitted upon appeal.—*Held*, also, that defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time, on appeal.—The allegations and conclusions of the declaration were deficient and the court, under s. 63 of the Sup. and Ex. Courts Act, ordered all necessary amendments to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. *Piché v. City of Quebec*, Cass. Dig. (2 ed.) 497; *Gorman v. Dixon* (26 Can. S. C. R. 87), followed.—(Under the special circumstances of the case and improper actions of the defendant, the plaintiff was awarded costs in all the courts. The judgment appealed from, Q. R. 8 Q. B. 534, was varied.) *City of Montreal v. Hogan*, xxxi., 1.

219. *New points raised on hearing of appeal*—Counsel allowed to proceed—Supplementary

factums.]—On the hearing of the appeal, counsel for appellant suggested a question for argument which was pertinent to the issues but had not been taken in the factum nor raised in the courts below. He was permitted to argue the question on the understanding that both parties would be permitted to file supplementary factums on the points raised after the hearing closed. Counsel for respondent made no objections to arguing the new points on the terms settled. *Hosking v. Le Roi*, No. 2 (Limited), 27th October, 1903.

220. *New grounds of objection raised on appeal*.

See APPEAL, 348.

221. *Filing new evidence on appeal*.

See APPEAL, 345.

222. *Form of bail bond*—Technical objection first taken on appeal.

See APPEAL, 349.

223. *Technical objection first taken on appeal*—Rule of Privy Council—Improper reception of evidence.

See APPEAL, 352, AND see CONTRACT, 11.

224. *Improvement of watercourses*—Art. 5535 R. S. Q.—Arbitration—Condition precedent—New grounds on appeal—Assessment of damages—Interference by appellate court.

See APPEAL, 242.

17. PARTIES.

225. *Death of party after hearing*—Entry of judgment—*Nunc pro tunc*.—The respondent, assignee of an insolvent estate, died between the day of hearing of the appeal and the day of rendering judgment. On motion of counsel for appellant the court ordered the judgment in appeal to be entered *nunc pro tunc* as of the date of hearing. *Merchants Bank v. Smith*, Cass. Dig. (2 ed.) 688; Cass. S. C. Prac. (2 ed.) 78.

226. *Assignment of plaintiff's interest*—Diligence in making application—Adding parties—Art. 154 C. C. P.—S. C. rules 36, 38—Costs—Hearing on case.—Motion under S. C. rule 36 to add B. as a co-respondent, on the ground that he had obtained a notarial assignment from respondents of all their interest in the suit. The suit had been instituted by plaintiff in *forma pauperis*, and the Superior Court condemned appellants to pay \$1,200, judgment being affirmed by the Queen's Bench. The alleged assignment had been made after the judgment by the Superior Court and before appeal to the Queen's Bench, but no application had been made to the latter court to make B. a party. The appellant claimed that under art. 154 C. C. P. an intervention could be had or forced at any time before final judgment; and if any question as to liability of the person sought to be added should arise, the court could remit the case under S. C. rule 38, to the Superior Court to have such question decided.—It was admitted that the object of the application was to have a party who would be answerable for the costs of the appeal. *Held*, that the application should have been made at the earliest opportunity to the Court of Queen's Bench,

the assignment to B. having been made before the appeal to that court. The question as to the liability of B. to be forced into the cause as a party was not one which, under the circumstances, the Supreme Court should be called upon to decide. The appeal should be heard on the case as settled in and transmitted by the court below. (Henry, J., dissenting.) Motion dismissed with costs fixed at \$25. *Dorion v. Crowley*, Cass. Dig. (2 ed.) 694, 78.

227. Judgment reserved—Death of party—Judgment, *nunc pro tunc*.]—On motion of counsel for respondent, supported by affidavit shewing that one of the parties had died between the date of hearing and the date upon which judgment delivered, the court directed judgment to be entered *nunc pro tunc* as of the day of hearing. *Merchants Bank v. Smith; Merchants Bank v. Keefer; Ontario and Quebec Ry. Co. v. Philbrick*, Cass. Dig. (2 ed.) 688; Cass. S. C. Prac. (2 ed.) 78.

228. Special bail — Exoneretur — Parties — Discretion of court below—Jurisdiction.]—S. brought an action against J. and issued a writ of *captas*. Bail was given and special bail entered in due course, but the bail piece was not filed nor judgment entered against J., for some months after. On application to a judge in chambers an order was made for the discharge of the bail on account of delay in entering up judgment, and the full court refused to set aside the order. An appeal was brought to the Supreme Court of Canada entitled in the suit against J., from the judgment of the full court, and the bond for security for costs was given to J. *Held*, that as the bail, the only parties really interested in the appeal, were not before the court and not entitled to the benefit of the bond, the appeal must be quashed for want of proper security. *Held*, also, that the appeal would not lie as the matter was simply one of practice, in the discretion of the court below. *Scammell v. James*, xvi., 593.

228a. Parties on appeal — Practice — Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.]—Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *és qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side), reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on its merits, and that, consequently, all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from (Q. R. 10 K. B. 511), the Chief Justice and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's

Bench should not have interfered. *Price v. Fraser*, xxxi., 505.

18. PRIVY COUNCIL APPEALS.

229. Record of appeal — Application for rule—Privy Council judgment.]—A judgment of the Privy Council reversing the judgment of the Supreme Court should be made a rule of the Supreme Court. The application should be made in chambers. *Lewin v. Howe*, xiv., 722.

230. Notice of appeal to Privy Council.]—Notice of intention to apply to the Supreme Court of Canada for leave to appeal to the Privy Council should not be put on the motion paper. *Nasmith v. Manning*, Cass. Dig. (2 ed.) 695.

231. Appeal — Privy Council — Cross-appeal — Practice — Costs.]—Where the respondent has taken an appeal from the same judgment as is complained of in the appeal to the Supreme Court of Canada, to the Judicial Committee of Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him.—In the case in question the costs were ordered to be costs in the cause. *Eddy v. Eddy*, 4th October, 1898.

232. Cross-appeal to Privy Council — Inscription pending such appeal — Stay of proceedings — Costs.]—Where the appellant had inscribed an appeal for hearing in the Supreme Court of Canada after he had received notice of an appeal taken in the same matter by the respondent to the Privy Council, upon motion on behalf of the respondent the proceedings on the Supreme Court appeal were stayed with costs against the appellant pending the decision of the Privy Council upon the respondent's appeal. (*Eddy v. Eddy* [No. 231, ante] followed.) *Bank of Montreal v. Demers*, xxix., 435.

233. Appeal to Privy Council — Stay of execution.]—A judge in chambers of the Supreme Court of Canada will not entertain an appeal to stay proceedings pending an appeal from the judgment of the court to the Judicial Committee of the Privy Council. *Adams & Burns v. Bank of Montreal*, xxxi., 223.

234. Appeal in *forma pauperis* — Leave to appeal to Privy Council — Transmission of record — Payment of Supreme Court fees.]—On 7th October, 1902, present, Sir Henry Strong, C.J., and Taschereau, Sedgewick, Girouard, Davies and Mills, JJ. A motion was made for an order directing the Registrar of the Supreme Court of Canada to transmit the record to the Registrar of His Majesty's Privy Council, on an appeal by the respondent, without the payment of the fees in stamps as required by the statute and rules of practice of the court. After hearing counsel for the parties, the motion was allowed and the order made as applied for, the Chief Justice stating that, as this was an extraordinary case in which the Judicial Committee of the Privy Council had granted special leave to appeal in *forma pauperis*, the ordinary rules could not apply. *Dominion Cart-ridge Co. v. McArthur*, 7th October, 1902.

235. *Reversal by Privy Council—Repayment of costs.*

See No. 67, *ante*.

236. *Appeals to Privy Council—Jurisdiction of Superior Court of Canada—Motion paper.*

See PRIVY COUNCIL, 2.

237. *Cross-appeal pending in Privy Council—Stay of proceedings.*

See APPEAL, 121, 422.

19. PROCEDURE IN COURTS BELOW.

238. *Amending pleadings—Order of court below—Procedure.*—The Supreme Court of Canada will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the court below. *Williams v. E. Leonard & Sons*, xxvi., 406.

239. *Appeal—Question of local practice—Inscription for proof and hearing—Peremptory list—Notice—Surprise—Artifice—Requête civile—Arts. 234, 235, 505, C. C. P. (old text)—R. of P. (S.C.) L.V.*—Where a grave injustice has been inflicted upon a party to a suit, the Supreme Court of Canada will interfere for the purpose of granting appropriate relief although the question involved upon the appeal may be one of local practice only. *Lambe v. Armstrong* (27 Can. S. C. R. 390) followed.—Under a local practice prevailing in the Supreme Court, in the District of Montreal, the plaintiffs obtained an order from a judge fixing a day peremptorily for the adduction of evidence and hearing on the merits of a case by precedence over other cases previously inscribed on the roll and without notice to the defendants. The defendants did not appear when the case was taken up for proof and hearing and judgment by default was entered in favour of the plaintiffs. The defendant filed a *requête civile* asking for the revocation of the judgment to which the plaintiffs demurred. On appeal to the Supreme Court of Canada against the judgment maintaining the demurrer and dismissing the *requête* with costs:—*Held*, reversing the decision of the Court of Queen's Bench, that the order was improperly made for want of notice to the adverse party as required by the rules of practice of the Superior Court, and the defendant was entitled to have the judgment revoked upon *requête civile*. *Eastern Townships Bank v. Swan*, xxix., 193.

240. *Appeal—Order on matter of procedure in court below.*—The Supreme Court of Canada will not entertain an appeal from an order made upon a motion in a practice matter in the appellate court below. *Dueber Watch Case Co. v. Taggart*, 24th April, 1900.

241. *Partnership—Account—Action pro socio—Procedure—Art. 1898 C. C.*—The judgment appealed from held that in an action *pro socio*, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify inquiry into all the affairs of the partnership and for the liquidation of the same, without producing full and regular accounts of the partnership affairs. *Held*, that the appeal involved merely a question of pro-

cedure in a matter where the appellant had suffered no wrong and, therefore, that the appeal should be dismissed. *Higgins v. Stephens*, xxxii., 132.

242. *Appeal—Question of procedure—Verdict—Weight of evidence.*—The Supreme Court of Canada refused to interfere with a decision of the Court of Appeal for Ontario in a manner of procedure, namely, whether a verdict of a jury was a general or special verdict.—The court also refused to disturb the verdict on the ground that it was against the weight of evidence after it had been affirmed by the trial judge and the Court of Appeal. *Toronto Ry. Co. v. Balfour*, xxxii., 239.

243. *Issues irregularly joined—Procedure in trial court—Interference on appeal.*—The Supreme Court of Canada will not, on appeal, interfere with the action of the courts below in matters of mere procedure where no injustice appears to have been suffered in consequence although there might be irregularities in the issues as joined which brought before the trial court a *demande* almost different for the matter actually in controversy. *Finnie v. City of Montreal*, xxxii., 335.

244. *Appeal—Concurrent findings of courts below—Reversal on questions of facts—Improper rulings—Reversal on a matter of procedure.*—Where the findings of the trial courts are manifestly erroneous and the trial appears to have been irregularly conducted, the Supreme Court of Canada reversed the concurrent findings of the courts below, and also reversed the concurrent rulings of the courts below refusing leave to amend the statement of claim by alleging an account stated. *Belcher v. McDonald*, xxxiii., 321.

[Leave to appeal to Privy Council granted, Aug., 1903.]

245. *Non-interference in matters of procedure—Adding pleas—Discretion of court below—Insufficient cause shown—Stay of proceedings pending appeal—Interlocutory judgment—Notice of appeal—Entry of final judgment.*—Defendant applied by motion for permission to file new pleas, which was refused by the Superior Court on account of insufficiency of the affidavit in support thereof, and, therefore, defendant served notice of intention to appeal from this interlocutory judgment to the Court of Queen's Bench. Notwithstanding this notice, plaintiff moved for and obtained judgment in the Superior Court, and this judgment was affirmed by the Court of Queen's Bench.—On appeal to the Supreme Court of Canada, *Held*, per Ritchie, C.J., and Strong and Taschereau, JJ., that on a question of procedure an appellate court should not interfere.—*Per* Fournier and Henry, JJ., that the affidavit filed by the appellant in support of his amended plea was insufficient, not being sufficiently positive and precise.—*Per* Taschereau, J. Only a rule for leave to appeal would have the effect of staying proceedings, not a mere service of a motion for leave to appeal. Appeal dismissed with costs. *Dawson v. Union Bank*, Cass. Dig. (2 ed.) 428; Cass. S. C. Prac. (2 ed.) 31, 85.

245a. *Judgments certified to court below—Issue of execution—Special leave.*—Under the provisions of R. S. C. c. 135, s. 67, a judgment of the Supreme Court of Canada,

certified to the proper officer of the court of original jurisdiction, becomes a judgment of the inferior court for all intents and purposes and it is not necessary to obtain special leave to issue execution in order to levy the costs of the party awarded costs on the appeal to the Supreme Court of Canada. *Ex parte Jones*, 35 N. B. Rep. 108.

246. Action confessoire — Intervenant — Joint condemnation — Procedure — Interference with on appeal.

See **SERVITUDE**, 3.

247. Opposition — Contestation — Removal from Superior Court — Venditioni ex-ponas—Appeal.

See **APPEAL**, 393.

20. STAY OF PROCEEDINGS.

248. Stay of proceedings — Execution for costs — Amount in dispute — Jurisdiction.]—While the proceedings were pending on an opposition filed 30th December, 1880 (see **RES JUDICATA**), another writ of execution issued in the original cause for costs awarded to respondents by the Supreme Court on the 10th June, 1880. See **OPPOSITION**, 3.) To this writ appellant filed a second opposition on 18th January, 1881, which was dismissed by the Superior Court, the judgment being affirmed by the Queen's Bench, refusing an appeal on the ground that the amount in dispute was not sufficient.—On motion for an order to suspend proceedings under the execution opposed, on 18th January, 1881, and for leave to appeal from the judgment on said opposition, the Supreme Court *Held*, that there was no ground for staying the execution. The court had properly dismissed the appeal on the case presented, and that was a final decision in itself and it was no ground for staying the execution, that there were other proceedings in the court below which might possibly shew that the defendant should have succeeded in the original action.—Motion refused with costs. *Dawson v. Macdonald*, Cass. Dig. (2 ed.) 588.

249. Judgment — Stay of execution of—Requête civile.]—The judgment of the Supreme Court must, under s. 46, Sup. and Ex. Courts Act, be entered and sent to the court below before defendant can have recourse to a proceeding by *requête civile*. A *requête civile* does not stay execution as a matter of course. The defendant would have to apply to a judge of the Superior Court or a judge thereof for an order. A judge in chambers should not grant an order staying execution of a judgment, especially when defendant has had ample time to apply to the full court.—(*Per Taschereau, J.*) *Dawson v. Macdonald*, Cass. Dig. (2 ed.) 688.

250. Appeal per saltum — Stay of execution.

See **APPEAL**, 315.

251. Matter of procedure in court below — Stay of proceedings pending appeal.

See **APPEAL**, 391.

252. Cross-appeal to Privy Council — Order to stay proceedings in Supreme Court.

See No. 231, ante.

253. Cross-appeal to Privy Council — Inscription pending such appeal — Stay of proceedings—Costs.

See No. 232, ante.

254. Appeal to Privy Council — Stay of execution.

See No. 233, ante.

21. VACATION.

255. Time for appealing — Vacation — Delayed entry of judgment — Special rule in Quebec.

See **APPEAL**, 425.

256. Time for appealing — Jurisdiction — Appeal per saltum — Stay of execution.

See **APPEAL**, 315.

257. Filing case — Computation of time in vacation — Extension of time.

See No. 34, ante.

PRECEDENT.

Dismissal of appeal on equal division of court—Binding effect of judgment.]—A judgment appealed from standing unreversed on an equal division of opinion among the judges is not a binding precedent when a similar case comes before the court. *Stanstead Election Case*, xx., 12.

PREFERENCES.

See **ASSIGNMENT — CHATTEL MORTGAGE — DEBTOR AND CREDITOR — FRAUDULENT CONVEYANCES — FRAUDULENT PREFERENCES — INSOLVENCY — MORTGAGE.**

PREMIUM NOTE.

1. Accident insurance — Renewal of policy — Payment of premium — Promissory note — Instructions to agent — Agent's authority — Finding of jury.

See **INSURANCE, ACCIDENT**, 3.

2. Non-payment — Forfeiture — Conditions — Collateral agreement.

See **INSURANCE, LIFE**, 29.

PREROGATIVE.

Of Crown — Pardoning power — Representative of Crown — Legislative authority to confer.

See **CONSTITUTIONAL LAW**, 44.

And see **CROWN**, 73, 76.

AND see ALSO **PRIVY COUNCIL**, 7.

PRESBYTERIAN CHURCH.

"Union Act"—38 Vict. c. 72 (Q.)—Recovery of church property—Trustees—Petitory

action—38 Vict. c. 72 (Q.)—By deed on 23rd November, 1871, duly registered, plaintiff, defendant, and two others as trustees of the Presbyterian Church of Côte St. George, in connection with the Church of Scotland, became purchasers of the ground upon which a church was subsequently erected. At the time of action the trustees with the exception of the plaintiff and defendant, were dead. A union of the Presbyterian Churches of Canada took place in June, 1875. To further this union and remove any obstructions which might arise out of the trusts by which the property of any of the churches was held, the "Union Act," (38 Vict. c. 72 (Q.)) was passed, which by s. 2, provided "that if any congregation in connection or communion with any of the said churches decide, at any meeting of the said congregation regularly convened, according to the rules of the said congregation, or the custom of the church with which it is in connection, and held in the two years after such union, by the majority of the votes of those who, according to the rules of the said congregation, or the custom of the church with which it is in connection, are entitled to vote at such meeting, not to form part of the said union, but on the contrary to separate itself therefrom, then and in such case, the property of the said congregation shall not be affected by this Act, nor by any of the provisions thereof." Plaintiff claimed that no meeting of the congregation had been regularly convened, or conducted according to its rules or the custom of the church, and that consequently the property was affected by the statute, and should be held and administered for the benefit of the congregation in connection with the united church, i.e., "The Presbyterian Church in Canada." Plaintiff also alleged that defendant had ceased to be a trustee, and, acting with a minority of the congregation who refused to enter into the united church, had taken forcible possession of the church property and excluded therefrom the plaintiff and the congregation, for which he was trustee. Plaintiff as sole surviving and acting trustee, suing for himself in his said quality, and for the congregation, claimed the property and that defendant be ordered to quit and abandon the same, and be declared not to be a trustee of said property. Defendant admitted that he was not a trustee, but, while saying that he had no quality to defend the action, alleged that three regularly convened meetings had been held, within the two years, the effect of which was to take the church and property out of the union and that, at these meetings, trustees were legally appointed to replace those deceased. The Superior Court dismissed the action on the sole ground that because the trust deed said nothing about survivors, but provided for a succession, there could be no action unless the succession was first filled up. The Court of Queen's Bench affirmed this judgment, the majority presumably on the ground stated. Cross, J. alone giving as his reason that the meetings referred to were sufficient compliance with the law to take the property out of the union. *Held*, affirming the judgment appealed from, that the action being petitory, and defendant having pleaded and proved that he was not and had never pretended to be in possession of the property, plaintiff must fail; and that he was not entitled to a judgment declaring one not a trustee who did not pretend to be and admitted that he was not a trustee, Henry, J., dissenting. *Morrison v. McCuaig*, 19th June, 1883; Cass. Dig. (2 ed.) 642.

PRESCRIPTION.

1. CRIMINAL CONVERSATION, 1.
2. CROWN CASES, 2, 3.
3. IMPRESCRIPTIBLE RIGHTS, 4, 5.
4. INTERRUPTION OF PRESCRIPTION, 6-12.
5. PLEA OF PRESCRIPTION, 13, 14.
6. POSSESSION, 15-25.
7. TIME REQUIRED FOR PRESCRIPTION, 26-30.

AND see "LIMITATIONS OF ACTIONS."

1. CRIMINAL CONVERSATION.

1. *Statute of Limitations—Criminal conversation.*

See CRIMINAL CONVERSATION.

2. CROWN CASES.

2. *Damages arising from public work — Negligence of Crown officials — Limitation of action — Art. 2261 C. C.*—The prescription established by art. 2261 of the Civil Code of Lower Canada applies to damages for injuries to property caused by the negligence of Crown officials to keep a public work in proper order. *Letourneau v. The King*, xxxiii., 335.

3. *Petition of right — Demurrer — Crown pleading prescription — Good faith — Translatory title — Judgment of confirmation — Inscription en faux — Improvements — Incidental demand.*

See TITLE TO LAND, 76.

3. IMPRESCRIPTIBLE RIGHTS.

4. *Water lots — Easement — Interference with navigation.*—Public navigable waters, while open for navigation, are not subject to prescription by which any private easement may be acquired in respect thereto. (12 Ont. App. R. 327, affirmed.) *London & Canadian Loan & Agency Co. v. Warin*, xiv., 232.

5. *Right of succession — Sale by co-heir — Retrait successoral*—Art. 710 C. C.

See RETRAIT SUCCESSORAL.

4. INTERRUPTION OF PRESCRIPTION.

6. *Accounts — Action — Promissory note — Acknowledgment and security by notarial deed — Novation* — Arts. 1169 and 1171 C. C.—*Onus probandi*—Art. 1213 C. C.—*Prescription*—Arts. 2227, 2260 C. C.—A prescription of 30 years is substituted for that of five years only where the admission of the debt from the debtor results from a new title which changes the commercial obligations to a civil one.—In an action of account instituted in 1887, plaintiff claimed *inter alia* the sum of \$2,361.10, being the amount due under a deed of obligation and *constitution d'hypothèque*, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that

the amount was payable on the terms and conditions and the manner mentioned in the said promissory note. The defendants pleaded that the deed did not effect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial. *Held*, reversing the judgment appealed from (Q. R. 2 Q. B. 489), that the deed did not effect a novation. Arts. 1169 and 1171 C. C. At most, it operated as an interruption of the prescription and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue. Art. 2264 C. C. And as the onus was on the plaintiff to produce the note, and he had not shewn that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years. Art. 2260 C. C. *Paré v. Paré*, xxiii, 243.

7. *Rendering account — Acknowledgment in writing — Interruption of prescription.*

See No. 26, *infra*.

8. *Possession — Married woman — Renunciation of community — Estoppel by deed.*

See TITLE TO LAND, 75.

9. *Interruption of prescription — Letter by party charged.*

See CONTRACT, 11.

10. *Purchase of land — Registered hypothec — Knowledge of circumstance — Presumption of good faith — Art. 2251 C. C.*

See No. 17, *infra*.

11. *Interruption of prescription — Necessary way — Implied grant — User — Obstruction of way — Acquiescence — R. S. N. S. (5 ser.) c. 112.*

See LIMITATION OF ACTIONS, 4.

12. *Title to land — Description — Possession beyond boundaries — Sale to married woman — Metes and bounds — Construction of deed.*

See No. 18, *infra*.

5. PLEA OF PRESCRIPTION.

13. *Petition of right — Demurrer — Crown pleading prescription — Good faith — Translatory title — Judgment of confirmation — Inscription en faux — Improvements — Incident al demand.*

See TITLE TO LAND, 76.

14. *Appeal — Pleading prescription — Judgment dismissing plea — Final judgment — Art. 2267 C. C. R. S. C. c. 135, s. 24.*

See PLEADING, 40.

6. POSSESSION.

15. *Title to land — Statute of Limitations — Trespass on wild lands — Isolated acts — Misdirection — Verdict against evidence.* — Isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the Statute of Limitations, and there was no misdirection in the

judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute. — To acquire such a title there must be open, visible and continuous possession known or which might have been known to the owner, not a possession equivocal, occasional, or for a special or temporary purpose. *Doe d. Des-Barres v. White* (1 Kerr. N. B. 595) approved. — Judgment appealed from affirmed. Gwynne, J., dissented on the ground that the finding of the jury on the question submitted to them was against evidence, and further that the acts done by the defendant were not mere isolated acts of trespass, but acts done in assertion of ownership during a period exceeding thirty-five years, and the evidence of such acts should have been submitted to the jury and the jury told that if they believed this evidence they should find for the defendant. *Sherren v. Pearson*, xiv, 581.

16. *Occupation as caretaker — Acts of ownership — Title to land — Possession — Statute of Limitations — Severance of title.* — In an action against O. to recover possession of land it was shewn that he had been in possession for over 20 years; that he was originally in as caretaker for one of the owners; that afterwards the property was severed by judicial decree and such owner ordered to convey portions to the others, that after severance O. performed acts shewing that he was still acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways. *Held*, reversing the judgment appealed from (18 Ont. App. R. 529), that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker and he had acquired no title by possession. *Ryan v. Ryan* (5 Can. S. C. R. 487) followed. *Heward v. O'Donohoe*, xix., 341.

17. *Possession by subsequent purchaser — Bona fides — Knowledge of incumbrance — Art. 2251 C. C.* — Actual knowledge of a registered hypothec or *bailleur de fonds* claim is sufficient to rebut the presumption of good faith in the possession of a subsequent purchaser. — Judgment appealed from reversed. *Baker v. Société de Construction Métropolitaine*, xxii, 364.

18. *Title to land — Description — Metes and bounds — Sale en bloc — Possession beyond boundaries — Acquisitive prescription — Registration — Constructive notice — Interruption of prescription — Construction of deed — Sale to married woman — Propre de communauté — Cadastral plan and description — Arts. 1503, 2168, 2174, 2185, 2210, 2227, 2242, 2251, 2254 C. C.* — In June, 1868, by deed of gift, P. granted to his son F., an emplacement, described by metes and bounds and stated to have 30 feet frontage, "tel que le tout est actuellement . . . et que l'acquéreur dit bien connaître" declaring in the deed, that the donation had actually been made in 1860, although no deed had been executed, and that since then F. had been in possession as owner and erected buildings. Under this donation the donee and his vendees claimed 36 feet frontage as having been actually occupied by him and them since F. took possession as owner in 1860, and also that plaintiff had acquired a prescriptive title by

10 years' possession under the deed, at the time of the action in 1897 to recover possession of the 6 feet then in occupation of defendant, whom plaintiff alleged to be a trespasser. *Held*, that the deed in 1868 operated as an interruption of prescription and limited the title to 30 feet frontage as therein described.—Plaintiff's wife purchased from F. in 1885 by deed describing the emplacement in a manner similar to the description in the donation, but also making reference to its number on the cadastral plan of the parish which described it as of greater width. *Held*, that the description in the deed of 1885 left the true limits of the emplacement subject to determination according to the title held by the plaintiff's *auteur* which granted only 30 feet frontage; that by the registered title, plaintiff was charged with either actual or implied notice of this fact and that, consequently, he had not, in good faith, possessed more than 30 feet frontage under this deed and could not invoke an acquisitive prescription of title to the disputed 6 feet by ten years' possession thereunder, and further, that no augmentation of the lands originally granted could take place in consequence of the cadastral description of the emplacement.—The words "Tel que le tout est actuellement et que l'acquéreur dit bien connaître" used in the deed of gift, cannot be interpreted in contradiction of the special description that precedes them and can only be construed as extending "dans les limites ci-dessus décrites."—A prescriptive title to lands beyond the boundaries limited by the description in the deed of conveyance can only be acquired by 30 years' possession.—*Quere*, Is a deed of sale of lands in Quebec to a married woman without the authorization of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under art. 2254 C. C., to serve as the ground for a prescription of the title by 10 years' possession? *Chalifour v. Parent*, xxxi., 224.

19. *Railways—Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Registry laws—Notice of prior title—Riparian rights—Possession animo domini—Acquisitive prescription—Arts. 1487, 2193, 2196, 2242, 2251 C. C.—Art. 77 C. P. Q.*—A railway company purchased land from P., bounded by an unnavigable river, as "selected and laid out" for the permanent way. Stakes were planted to shew the side lines, but the railway fencing was placed inside the stakes above the water line, although the company could not have the quantity of land conveyed unless they took possession *ad flum aquæ*. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream and, subsequently to the registration of the deed to the company, sold the rest of his property including water rights, mills and dams constructed in the stream to defendant's *auteur*, described as "including that part of the river which is not included in the right of way, &c." Plaintiffs never operated the railway but, immediately on its completion, under powers by their charter and The Railway Act, 14 & 15 Vict. c. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under such lease. The action *pétitoire*, including a claim for damages, was met, amongst other defences, by pleas; that the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by P. and the

company in permitting him to retain possession of the strip of land in question and the river *ad medium flum*; that by ten years' possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years, and that, by thirty years' adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question.—On appeal the Supreme Court, *Held*, 1. That the description in the deed to the railway company included, *ex jure naturæ*, the river *ad medium flum aquæ* as an incident of the lands thereby granted and their title could not be defeated under the subsequent conveyance by their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance. 2. That the possession of the strip of land and the waters and bed of the river *ad medium flum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for acquisitive prescription of ten years under art. 2251 C. C., but merely an occupation as tenant by sufferance upon which no such prescription could be based. 3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed. 4. That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years' prescription, more especially as he was charged with notice of that prior conveyance through the registration of the deed to the company. 5. That the acquisitive prescription of thirty years under art. 2242 C. C., could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property he had failed to deliver *animo domini* nor in good faith. *Massawippi Valley Ry. Co. v. Keed*, xxxiii., 457.

20. *Construction on public property—Suffrance—Long user—Possession—Trespass—Nuisance.*

See ESTOPPEL, 1.

21. *Arts. 2211, 2251, 2206 C. C.—Plea by the Crown—Bona fides—Translatory title—Impenses et ameliorations.*

See TITLE TO LAND, 76.

22. *Easement—User in common—Title to land.*

See USER, 1.

23. *Right of way—Way of necessity—License—User—Adjoining lands.*

See EASEMENT, 11.

24. *Light and air—Long user—Measure of damages—Misdirection.*

See EASEMENT, 4.

25. *Farm crossing—Right of way.*
See RAILWAY, 44.

7. TIME REQUIRED FOR PRESCRIPTION.

26. *Prescription commenced before Civil Code came into force—Limitation of action for debt—Claims of a commercial nature—Loan by a non-trader to a trader—Arrears of interest—Acknowledgment in writing—Entries in merchant's books—Interruption of prescription—Evidence—Arts. 2250, 2260—C. S. L. C. c. 67.]—In 1858, W. D., sr., opened a credit of \$584, in favour of his daughter I. D., with W. D. & Co. (a firm consisting of appellant and T. D.), W. D. & Co. charging W. D., sr., and crediting I. D. with that amount. In 1860, W. D., a sole executor of the will of D. D., credited I. D. in the books of W. D. & Co. (appellant at that time being the only member of the firm), with a further sum of \$800, amount of a legacy bequeathed by such will. These entries in the books of W. D. & Co., with entries of interest in connection with said items, were continued from year to year. An account current was rendered to I. D. exhibiting details of the indebtedness up to the 31st December, 1861. After 31st December, 1864, the firm of W. D. & Co. consisted of appellant and T. D. In December, 1865, another account was rendered to I. D., which shewed a balance due her at that time of \$1,912.08. The accounts rendered were unsigned, but the second account current was accompanied by a letter, referring to it, written and signed by the appellant. I. D. died, and in a suit brought by G. T., her husband and universal legatee, to recover the \$1,912.08, with interest from 31st December, 1865; *Held*, affirming the judgment appealed from (21 L. C. Jur. 92), 1. That a loan of moneys, as in this case, by a non-trader to a commercial firm is not a "commercial matter" or a debt of a "commercial nature;" that, therefore, the debt could not be prescribed, either by 6 years under C. S. L. C. c. 67, or by 5 years under the Civil Code, but only by the prescription of 30 years. *Whishaw v. Gilmour* (15 L. C. R. 177) approved.—2. That, even if the debt were of a commercial nature, the sending of the account current accompanied by the letter referring to it signed by the appellant would take the case out of the statute.—3. That the prescription of 5 years against arrears of interest, under art. 2250 C. C., does not apply to a debt, the prescription of which was commenced before the Civil Code came into force.—4. That entries in a merchant's books make complete proof against him. *Darling v. Brown*, i., 360.*

27. *Débats de compte—Taking of accounts of joint executors—Liability for moneys collected—Limitation of action—Art. 2242 C. C.]—The action against executors for an account of their administration of moneys received or which or ought to have been collected by them in their capacity as such executors is prescribed only by the lapse of 30 years. *Darling v. Brown*, ii., 26.*

28. *Use and occupation of land—Quasi-délit—Prescription—Arts. 1608, 1288, 2150, 2261, 2267 C. C.—Judicial notice of bar to action although not pleaded.]—Action by appellant, W. B., to recover compensation for the use of lands on the River Chaudière, occupied by H. K. & Co., for storing logs, attaching booms in summer and storing booms in*

winter, and which were submerged by means of a dam erected for that purpose, and made use of for about five years as a booming-ground for sawlogs coming down the river to their mills.—The declaration contained counts for damages, and for value of use and occupation.—Respondent pleaded by demurrer a prescription of two years as for a *quasi-délit* under arts. 2261 and 2267, C. C.; that the alleged works were for the efficient working of the mill, and that arbitration proceedings should have been taken under C. S. L. C. c. 51, by which the remedy by action had been taken away. By perpetual exception respondent repeated the plea of prescription and set up that on 5th December, 1877, at a sale of the land by licitation it was purchased by J. B.; that from that date, respondent had no interest in the mills; and that no proceedings under C. S. L. C. c. 51, had been adopted by appellant; respondent further pleaded the general issue.—The demurrer was dismissed. The trial judge found that appellant was entitled to \$1,600, compensation for the use of the premises for four years, at \$400 per annum.—The Court of Queen's Bench, on an appeal, reduced the amount to \$200, value of the land for agricultural purposes. *Held*, reversing the judgment appealed from (7 Q. L. R. 286; 15 R. L. 514), that the prescription of two years under art. 2261 C. C., did not apply, because C. S. L. C. c. 51, recognizing the right of a proprietor, in the case of improvement of watercourses, to erect works which may have the effect of damming back the water on a neighbouring property, the construction of a dam having that effect, as in this case, could not be considered a *quasi-délit*, but rather as a right of servitude which gave to him who was injured by it a legal recourse for indemnity for the damage. *Held*, further, that the owner's claim should be considered as being one for rent or value of the use and occupation of the lands and subject to the prescription of 5 years under art. 2250 C. C., such prescription being one which is to be judicially noticed although not pleaded under art. 2188 C. C., by an appellate court. *Breakey v. Carter*, Cass. Dig. (2 ed.) 463.

OTHER CASES.

29. *Commencement of prescription—Continuing damage—Tortious act.]—The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act, and could have been foreseen and claimed for at the time. *Kerr v. Atlantic and North-West Ry. Co.*, xxv., 197.*

30. *Acknowledgment of debt—Novation—New title—Substituted prescription.*

See No. 6, *ante*.

AND see LIMITATIONS OF ACTIONS.

PRESSURE.

Assignment for benefit of creditors—Preference—Intent—Criminal liability.

See FRAUDULENT CONVEYANCES, 1.

AND see DURESS.

PRESUMPTION.

Sale — Donation in form of — Gifts in contemplation of death — Mortal illness of donor—Presumption of nullity—Validating circumstances — Dation en paiement — Arts. 762, 989 C. C.

See NULLITY, 2.

AND see EVIDENCE, 123-145. See also, PRESCRIPTION, 17.

PRETE NOM.

1. *Suit by trustee — Art. 19 C. C. P.—Estoppel.*

See TRUSTS, 5.

2. *Transfer of chose in action — Judicial admission—Action.*

See SALE, 107.

3. *Assignment — Action to annul — Parties in interest.*

See NULLITY, 1.

4. *Building societies — Participating borrowers — Shareholders — C. S. L. C. c. 68—42 & 43 Vict. (Q.) c. 32—Liquidation — Expiration of classes — Assessments on loans — Notice of—Interest and bonus—Usury laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and trustees—Sales to—Art. 1484 C. C.*

See BUILDING SOCIETY, 3.

PRINCE EDWARD ISLAND.

1. *Constitutional law—B. N. A. Act, 1867—Representation of P. E. I. in House of Commons.]—The representation of the Province of Prince Edward Island in the House of Commons of Canada is liable to be reduced below the original number of six members, under s. 51, s.-s. 4, B. N. A. Act, 1867, after a decennial census. In re Representation of P. E. Island in House of Commons, xxxiii, 594.*

2. *Statutes of Dominion—Interpretation of acts applicable to the province.]—The Interpretation Act (31 Vict. c. 1) applies to statutes of the Dominion of Canada relating to the Province of Prince Edward Island whether such statutes were passed before or after the admission of that province into the Dominion. Fitzgerald v. McKinlay, Cass. Dig. (2 ed.) 107.*

See CANADA TEMPERANCE ACT, 4.

PRINCIPAL AND AGENT.

1. ACTION ON CONTRACT BY AGENT, 1.
2. LIABILITY FOR CONTRACT BY AGENT, 2-18.
3. LIABILITY FOR ACTS OF AGENT, 19-47.
4. LIABILITY OF AGENT TO THIRD PARTIES, 48.
5. RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT, 49-55.

1. ACTION ON CONTRACT BY AGENT.

1. *Undisclosed principal — Sale of goods—Deficient delivery—Acceptance of bill of lading—Re-weighing — Estoppel — Pleading — Tender and payment into court—Acknowledgment of liability.]—Action for \$3,038.44, price of 810 tons, 5 cwt. of coal sold by their agents T., M. & Co. through a broker, as per following note. "Messrs. T. M. & Co.:—I have this day sold for your account, to arrive, to the V. Hudon Cotton Mills Co., the 810 tons, 5 cwt. . . . coal per bill of lading, per 'Lake Ontario,' at \$3.75 per ton of 2,240 lbs., duty paid, ex ship; ship to have prompt dispatch. Terms, net cash on delivery, or 30 days adding interest, buyers' option. Brokerage payable by you, buyer to have privilege of taking bill of lading, or re-weighing at sellers' expense." Defendants pleaded that the contract was with T., M. & Co. personally, that plaintiffs had no action; that the cargo contained only 755 tons, 580 lbs. = \$2,868.72, which they had offered T., M. & Co., together with the price of 10 tons more to avoid litigation, in all \$2,890.72, which they brought into court, without acknowledging their liability to plaintiffs, and prayed dismissal of action as to any greater sum. Held, per Ritchie, C.J., and Taschereau and Gwynne, J.J., (Fournier and Henry, J.J., dissenting,) that it was unnecessary to decide the question as to whether the action could be brought by the undisclosed principal, for by their plea of tender and payment into court the defendants had acknowledged their liability to the plaintiffs, although such tender and deposit had been made "without acknowledging their liability."—Per Strong, J. That the action by respondents (undisclosed principals) was maintainable.—Per Fournier and Henry, J.J., (dissenting,) that the action by respondents (undisclosed principals) was not maintainable, and that the appellants were not precluded from setting up this defence by their plea of tender and payment into court.—It was proved that defendants agreed to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons, 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency. Held, Fournier and Henry, J.J., dissenting, that defendants had no right to refuse payment for the cargo on the grounds of deficiency in delivery, considering that the weighing was done by them in the absence of plaintiffs without notice to them, and at a time when defendants were bound by the option they had previously made of taking the coal in bulk. Judgment appealed from (2 Dor. Q. B. 356) affirmed. V. Hudon Cotton Co. v. Canada Shipping Co., xiii., 401.*

2. LIABILITY FOR CONTRACT BY AGENT.

2. *False bill of lading—No goods shipped—Accepted drafts with bill attached—Advance on consignment—Fraud of agent—Liability of company.]—C., freight agent of the railway company, and a partner in the firm of B. & Co., issued bills of lading in the form commonly used by the company signed by him as the company's agent to B. & Co., for flour which had never in fact been delivered to the company, which acknowledged that the com-*

pany had received from B. & Co. the flour addressed to E. The bills of lading were attached to drafts drawn by B. & Co., and accepted by E. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts, *Held*, affirming the judgment appealed from (3 Ont. App. R. 446), Fournier and Henry, JJ., dissenting, that the act of C. in issuing false bills of lading for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the company was therefore not liable. *Erb v. Great Western R. W. Co.*, v., 179.

3. Appointment of agent — Authority to bind principal—Fire insurance company—Interim receipts—Agent delegating authority.]—

Action brought on an interim receipt, signed by one S., as agent for the company. The plea denied that S. was an authorized agent, as alleged. The joint general managers for Ontario had appointed W. as a general local agent and S. was employed by W. to solicit applications, but had no authority from, or correspondence with, the head office of the company. The jury found that S. was authorized by W. to sign interim receipts. There was some information given to one of the joint general managers, but there was no evidence that the other knew that S. was acting in any capacity for the company. *Held*, affirming Court of Appeal for Ontario, that the general local agent had no power to delegate his functions, and that S. had no authority to bind the company by signing interim receipts. —*Per Strong, J.* That the general managers, being joint agents, could only bind the company by joint concurrent acts; any ratification of the appointment of S. by one of them without the concurrence of the other, would not have been sufficient to give S. authority to bind the company. *Summers v. Commercial Union Ins. Co.*, vi., 19.

Followed in the *Canadian Fire Ins. Co. v. Robinson* (31 Can. S. C. R. 488). See No. 33, *infra*.

4. Sale of goods in one lot — Independent principals—Contract by agent of two firms—Lump price — Excess of authority—Ratification.]—An agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a rateable apportionment except by the mere arbitrary will of the agent.—There can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly, or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf. *Cameron v. Tate*, xv., 622.

5. Sale of lands — Power of attorney—Authority to give credit—Power of sale in mortgage—Application of proceeds—Inquiry—Payment.]—A power of attorney by mortgagees authorized their agent to enter and take possession of the mortgaged lands and sell the same at public or private sale, and for the best price that could be gotten for them, and to execute all necessary receipts, &c., which receipts "should effectually exonerate every purchaser or other persons taking the same from all lia-

bility of seeing to the application of the money therein mentioned to be received and from being responsible for the loss, mis-application or non-application thereof." The agent took possession and sold the land, receiving part of the purchase money in cash and, for the balance, the purchaser's note payable to himself, which he discounted, appropriating the proceeds. The purchaser paid the note to the holders at maturity. *Held*, affirming the judgment appealed from (27 N. B. Rep. 175), that the power of attorney did not authorize a sale upon credit, and the sale by the agent was, therefore, invalid, and the purchaser was not relieved by the above clause from seeing that the authority of the agent was rightly exercised. The sale being invalid the subsequent payment of the note by the purchaser could not make it good. *Rodburn v. Swinney*, xvi., 297.

6. New agreement with agent — Principal standing by—Right of action.]—

W. sold land under power of sale, and F. became the purchaser, and paid part of the price, the balance was to be paid in notes. Shortly after A. brought a deed to F. and demanded the notes. The deed was left with F. on his delivering to A. a writing as follows:—"Received from E. A. a deed given by W. for a certain piece of land bought at auction. . . . The above mentioned deed I receive only to be examined, and if lawfully and properly executed to be kept, if not lawfully and properly executed to be returned to E. A. When the said deed is lawfully and properly executed to the satisfaction of my attorney, I will pay the amount of balance due on said deed, \$572, provided I am given a good warrantee deed, and the mortgage, which is on record, is properly cancelled if required." The deed was not returned and A. brought action for the \$572.—A verdict was given for defendant, under the direction of the judge, and leave reserved to plaintiff to move for a verdict in his favour for nominal damages, the purchase money having in the meantime been paid to W. On plaintiff moving for leave the Supreme Court set aside the verdict, and entered verdict for the plaintiff. *Held*, reversing the judgment appealed from (19 N. B. Rep. 22), Strong, J., dissenting, that the memorandum did not constitute a new contract between plaintiff and defendant to pay the purchase money to plaintiff, who was merely the agent of W., and therefore the verdict for defendant should stand.—*Per Strong, J.* That the writing did constitute a new agreement between the parties, but that if A. was merely an agent of W. in the transaction, he could still sue, as his principal had not interfered. Appeal allowed with costs. *Fawcett v. Anderson*, Cass. Dig. (2 ed.) 8.

7. Contract for towage—Quantum meruit.]—

Steamships brought by defendant from Glasgow to run on the Upper Lakes, having to be cut in two to be taken through the St. Lawrence Canals, an arrangement was made by B. (the person who was to manage the vessels) with the D. S. & W. Co., that this company should furnish tugs at specified rates per hour. The terms were contained in a letter in which, after specifying the rates per hour for the tugs, and when the time was to begin, it is stated as follows: "The company to furnish the main towing hauser free of charge and to send Capt. D. to superintend the towing and transportation of the vessels, and to

use his best endeavours to successfully complete the same, but in case you should require his services before the ordering of our boats or after their discharge, then this company to charge ten dollars per day for such extra services rendered by him." Nothing stated as to the place from or to which the vessels were to be taken. At that time it had not been definitely settled where the vessels should be re-fitted. Eventually it was decided to join the two parts of the vessels at Buffalo, and fix them up at Port Colborne. The two parts of the "Athabasca" left Montreal in tow of tugs furnished by the D. S. & W. Co. in charge of Captain D. After passing the St. Lawrence Canals the two pieces were fastened together at Prescott, and when they got to Kingston they were refastened more securely and started for Port Dalhousie. On arriving off Port Dalhousie, Capt. D. arranged with the owners of the tug "Bennett," the owners of the tug "Aikens," and the captain of the tug "Augusta," that these tugs should tow the two sections of the "Athabasca" from Port Dalhousie to Port Colborne, and should be paid at the rate of \$4 per hour when running, and \$3 an hour when lying still. The "Athabasca" was taken to Port Colborne by these three tugs accordingly. Defendants refused to pay the owners of the tugs for these services, and proceedings were taken in the Maritime Court for Ontario against the ship. Defendants shewed that before D. made the bargain, B., the general manager of the defendants' vessels, had entered into an agreement with Cloy, to take one or more of the vessels (at B.'s option) through the canal at a price much less than that agreed to be paid by D., and contended that D. had no authority to make any contract for the towing of the vessels through the canal, and that before the plaintiffs did anything under the contract they had notice of this and also of the bargain with Cloy from B., and were forbidden to take the vessel through the canal, and also that at the time plaintiffs made the agreement with D. they were aware that an arrangement had been made with Cloy, of which D. was ignorant, and that in contracting with D. under the circumstances they were guilty of a fraud.—The judgment was in favour of the owners of the tugs for the amounts claimed, holding that D. had authority to make the contract with plaintiffs, that the amounts claimed were reasonable, and that defendants had the benefit of the work done, and should pay therefor.—The Supreme Court of Canada affirmed the judgment appealed from, Henry and Taschereau, JJ., dissenting, on the ground that the authority of D. to make the contract was not established. *Canadian Pacific Railway Co. v. Neelon; Canadian Pacific Railway Co. v. Helmsell; "The Athabasca,"* Cass. Dig. (2 ed.) 522.

8. *Sale of goods — Sale through brokers—Agency—Acquiescence.*—If parties in Canada contract to purchase goods in New York through brokers, first by telegram and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the form of the contract or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract. (20 Ont. App. R. 673, affirmed.) *Trent Valley Woollen Mfg. Co. v. Oelrichs*, xxiii., 682.

9. *Vendor and purchaser — Sale of land—Authority to agent — Price of sale.*—M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place, "Sell if possible, writing particulars; will give you good commission." C. agreed to purchase it for \$600 and the solicitor telegraphed M. "Will you sell three-quarter interest sixty-seven acre parcel, Korah, for six hundred, half cash, balance year? Wire stating commission." M. replied, "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor, "Telegram received. I will accept \$600, \$300 cash and \$300 with interest at one year. This payment I may say must be a marked cheque at par for \$300, minus your commission \$15, and balance \$300 secured." The property was incumbered to the extent of over \$300 and the solicitor deducted this amount from the purchase money and sent M. the balance which she refused to accept. He also took a conveyance to himself from the former owner paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell; *Held*, affirming the judgment of the Court of Appeal, that the only authority the solicitor had from M. was to sell her interest for \$585 net and the attempted sale for a less sum was of no effect. *Held*, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. *Clergue v. Murray*, xxxii., 450.

10. *Carrier's contract — Shipping receipt—Limitation of liability—Damages—Negligence—Connecting lines — Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.*—A shipping receipt with conditions relieving the carrier from liability for loss or damages arising out of "the safe-keeping and carriage of the goods," even though caused by the negligence, carelessness or want of skill of the officers, servants or workmen of the carrier, without his fault or privity, and restricting claims to the cash value of the goods at the port of shipment, agreed for the carriage by the defendants' and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff, but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the season of 1899, the variation being shewn by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. *Held*, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to a wrongful conversion of the goods by the defendants, and that they were not exempted from liability in respect thereof, at their full value. *Canadian Development Co.*, xxxiii., 432.

Leave to appeal refused by the Privy Council, July, 1903.

11. *Authority of station agent — Railways — Perishable freight — Bill of lading — Condition stated verbally.*

See CARRIERS, 15.

12. *Commission merchant — Shipment of perishable goods — Delivery — Condition of prepayment — Loss on damaged cargo — Ownership.*

See CONTRACT, 210.

13. *Buying and selling land — Stock in trade — Partner indorsing cheques — Implied authority — Estoppel.*

See PARTNERSHIP, 16.

14. *Stock speculations — Instructions to broker — Margins paid — Action.*

See BROKER, 2.

15. *Vendor and purchaser — Principal and agent — Mistake — Contract — Agreement for sale of land — Agent exceeding authority — Specific performance — Findings of fact.*

See CONTRACT, 178.

16. *Statutory board of commissioners — Municipal waterworks — Contract — Action — Parties.*

See MUNICIPAL CORPORATIONS, 65.

17. *Debtor and creditor — Payment — Accord and satisfaction — Mistake — Principal acting on agent's report.*

See MISTAKE, 7.

18. *Contract under seal — Undisclosed principal — Partnership — Amendment.*

See ACTION, 107.

3. LIABILITY FOR ACTS OF AGENT.

19. *Revendication by trustee — Bonds pledged as collateral — Right of recovery on performance of condition precedent — Interest of plaintiff.] — B., as trustee for H. C. & Co., deposited with D. bonds of the M. C. & S. Ry. Co., as collateral security for drafts accepted by B. for the accommodation of H. C. & Co., to be availed of only upon failure of the Government to pay a subsidy previously transferred to D., and D. agreed that, on the subsidy being paid, he would return the bonds to B. The subsidy was paid and B. sued D. to recover back the bonds, but H. C. & Co. were not joined in the action. Held, that B. was not merely an agent for H. C. & Co., but being a party personally liable on the bills secured by the subsidy, and having complied with all the necessary conditions, was, as against D., the legal owner and entitled to recover possession of the bonds. Drummond v. Baylis, ii., 61*

20. *Deposits in bank — Husband and wife — Agency — Payment — Action — Art. 1143 C. C. — Parties.] — G. acquired during the life of his first wife, immoveable property, which formed part of the communauté between them. At his death, after marriage with his second wife, he was greatly involved. His widow accepted sous bénéfice d'inventaire his universal usufructuary legacy in her favour, continued in possession of her estate as well as that of the first wife, and administered them*

both, employing L. G. to collect, pay debts, &c. At a meeting of creditors, of whom the bank was chief, a resolution was adopted authorizing the widow to sell the properties, with the advice of an advocate and the cashier of the bank, and that the money should be deposited with the bank, to be apportioned among G.'s creditors pro rata. L. G. continued to collect the revenues and acted generally for the widow and under this advice, and deposited both the moneys derived from the estate of G. and those derived from the estate of the first wife, with the bank in an account headed "Succession S. G." A balance remained for which the action was brought by the heirs of the first wife. Held, affirming the judgment appealed from (See 26 L. C. Jur. 110), (Ritchie, C.J., and Fournier and Henry, JJ., contra) — That as between the heirs of the first wife and the bank there was no relation of creditor and debtor, fiduciary relation, nor any privity whatever; and as the moneys belonging to such heirs were so collected by L. G. as agent of the widow and not as agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate, and as the representatives of the widow were not parties to the action, the plaintiffs could not recover. Giraldi v. Banque Jacques-Cartier, ix., 597.

21. *Agent of bank dealing with funds contrary to instructions — Discounting for his own accommodation.] — K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank which he discounted as such agent, and, without indorsing them, used the proceeds, in violation of his instructions, in the business of his firm. The firm having become insolvent the question arose whether these drafts constituted a debt due from the estate to the bank, or whether the bank could repudiate the act of its agent and claim the whole amount from the solvent acceptors. Held, affirming the judgment appealed from (22 N. S. Rep. 200), Gwynne, J., dissenting, that the drafts were debts due and owing from the insolvents to the bank. Held, per Strong and Patterson, JJ., that the agent being bound to account to the bank for the funds placed at his disposal he became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he had failed to account. Merchants Bank of Halifax v. Whidden, xix., 53.*

22. *Acts of agency — Issue of policy of insurance — Evidence.] — A policy of marine insurance was signed by R. as the company's agent; he issued and countersigned it as agent, received the premium and acted throughout as such agent and was so recognized by the president of the company. Held, affirming the judgment appealed from (23 N. B. Rep. 105), that this was sufficient prima facie evidence on which a jury might find that R. was agent of the company. Providence Washington Ins. Co. v. Chapman, Cass. Dig. (2 ed.) 386.*

23. *Assignment of debt — Confidential relations — Knowledge of book-keeper.] — A contractor being in difficulties, his sureties took an assignment of the contract and assumed financial control of the business which was carried on as usual, the only accounts there of being kept by the contractor's book-keeper through whom the disbursement of all moneys was made and who appeared from the evidence to have been acting in the most confi-*

dential relations with the sureties, at least in so far as concerned the carrying on of that contract. *Held*, that under the circumstances, the book-keeper must be regarded as the agent of the sureties in respect of the contract in question and that consequently they were bound by his knowledge of an assignment and admission of a debt accruing due to a sub-contractor. *Scoullar v. McColl*, 24th March, 1896.

24. *Trustees and administrators — Fraudulent conversion — Past due bonds — Negotiable security — Debentures transferable by delivery — Equities of previous holders — Art. 2287 C. C. — Estoppel — Brokers and factors — Pledge — Implied notice — Duty of inquiry — Innocent holder for value — Arts. 1487, 1490, 2202 C. C.*—Quebec Turnpike Trust bonds (issued under special Acts and Ordinances, see R. S. Q. Supp. p. 505), are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of D. D. Y., deceased, had been exhibits and marked as such in a case in court, and were afterwards lost and advertised for in a newspaper. About ten years afterwards W., the administrator of the estate, had the bonds in his possession as such, and pledged them to a broker for advances on his own account, the bonds then being long past due, but payment being provided for under statutes. *Held*, affirming the judgment appealed from (Q. R. 3 Q. B. 539), Fournier and Taschereau, JJ., dissenting, that neither the advertisement nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a *bonâ fide* holder. *Young v. MacNider*, xxv., 272.

25. *Agent's authority — Representation by agent — Advantage to other than principal — Knowledge of agent — Constructive notice.*—Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else other than his principal, such representation cannot be called that of the principal.—In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it.—The local manager of a bank having received a draft to be accepted, induced the drawee to accept by representing that certain goods of his own were held by the bank as security for the drafts.—In an action on the draft against the acceptor, *Held*, that the bank was not bound by such representations; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank. Judgment appealed from (33 N. B. Rep. 412) affirmed. *Richards v. Bank of Nova Scotia*, xxvi., 381.

See No. 34, *infra*.

26. *Fire insurance—Conditions in policy—Breach—Waiver—Recognition of existing risk after breach—Authority of agent.*—A policy s. c. d.—37

of fire insurance on a factory and machinery contained a condition making it void if the said property were sold or conveyed or the interest of the parties therein changed. *Held*, affirming the decision appealed from, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition. *Held*, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Torrop v. Imperial Fire Ins. Co.*, xxvi., 585.

27. *Accident insurance—Renewal of policy—Payment of premium—Promissory note—Instructions to agent—Agent's authority—Finding of jury.*—A policy issued by the insurance company in favour of P., contained a provision that it might be renewed from year to year on payment of annual premium. One condition was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director, and countersigned by the agent. P. was killed by accident. Payment was refused on the ground that the policy had expired and not been renewed. It was shewn that the local agent of the company had requested P. to renew and had received from him a promissory note for \$15 (premium being \$16), which the father of assured swore the agent agreed to take for balance of premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P., that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company. *Held*, affirming the judgment appealed from (29 N. S. Rep. 124, 551), Gwynne, J., dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia. *Held*, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be con-

sidered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have supposed that the plaintiff would seek to shew that such receipt had been obtained and were not taken by surprise. *Manufacturers Accident Ins. Co. v. Pudsey*, xxvii., 374.

28. *Fire insurance — Condition in policy — Time limit for submitting particulars of loss — Condition precedent — Waiver — Authority of agent.* — A person not an officer of an insurance company, appointed to investigate the loss and report thereon to the company, is not an agent having authority to waive compliance with conditions precedent to liability, and if he has such authority he can not, after the fifteen days for delivery of proofs have expired, extend the time without express authority from his principal.—Judgment appealed from (31 N. S. Rep. 348) reversed. *Atlas Ass. Co. v. Brownell*, xxix., 537.

See No. 29, *infra*.

29. *Fire insurance — Construction of contract — "Until" — Condition precedent — Waiver — Estoppel — Authority of agent.* — Neither the local agent for soliciting risks nor an adjuster sent for the purpose in investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, and as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified. *Atlas Assurance Co. v. Brownell* (29 Can. S. C. R. 537) followed.—Judgment appealed from (31 N. S. Rep. 337) reversed. *Commercial Union Ass. Co. v. Margeson*, xxix., 601.

See No. 28, *ante*.

30. *Partnership — Mandate — Factor — Pledge — Lien — Notice — Right of action — Intervention — Res judicata — Arts. 1739, 1740, 1742, 1975 C. C.* — A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as a factor for the firm, pledge them for advances made to him personally and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only. *Dingwall v. McBean*, xxx., 441.

31. *Life insurance — Agency — Art. 610 C. C. — Unworthy beneficiary — Murder of assured — Exclusion from succession.* — The action to cancel policies was against the representatives of a deceased policy holder who was murdered by his wife and her lover, who were executed for the murder. Deceased left all his property to his wife, and had no issue surviving. The widow was judicially deprived of all rights as beneficiary under the policy and the will, as unworthy of succession. The company charged the remaining beneficiaries with endeavouring to take advantage of fraud and the felony. The judgment appealed from held that as there was no evidence that, at the date of the policies, assured was aware of the evil intentions of his wife, nor that she was acting as agent in effecting the assurances, the fact that she might then have had such intentions

and subsequently murdered her husband would not have the effect of discharging the insurer from liability under the policies towards the legal representatives of the assured. The judgment appealed from (Q. R. 9 Q. B. 499) was affirmed by the Supreme Court of Canada. *The Standard Life Assurance Company v. Trudeau, et al.*, xxxi., 376.

32. *Promoters of company — Agent to solicit subscriptions — False representations — Ratification — Benefit.* — Promoters of a company employed an agent to solicit subscriptions for stock and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters; *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 261) that the latter, having benefited by the sum paid by W., were liable to re-pay it, though they did not authorize and had no knowledge of the false representations of their agent. *Held, per Strong, C.J.*, that neither express authority to make the representations nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule of *respondent superior* applies as in other cases of agency. *Milburn v. Wilson*, xxxi., 481.

33. *Contract — Lex loci — Lex fori — Insurance agent — Payment of premium — Interim receipt — Repudiation of acts of sub-agent.* — The appointment of a local agent of a fire insurance company is one in the nature of *delectus personae*, and he cannot delegate his authority nor bind his principal through the medium of a sub-agent. *Summers v. The Commercial Union Assurance Company* (6 Can. S. C. R. 19) followed.—The local agent of a fire insurance company was authorized to effect interim insurances by issuing receipts countersigned by him on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt which he countersigned as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium. *Held*, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority. *Held*, further, that even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurance, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurance. *Canadian Fire Insurance Co. v. Robinson*, xxxi., 488.

See No. 3, *ante*.

34. *Banking — Bills and notes — Conditional indorsement — Principal and agent — Knowledge by agent — Constructive notice — Deceit.* — A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled. *Pym v. Campbell* (6 E. & B. 370) followed.—The principal is affected by notice to the agent unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the holder to shew that the agent had an interest in deceiving his principal. *Kettlewell v. Watson* (21 Ch. D. 685), and *Richards v. The Bank of Nova Scotia* (26 Can. S. C. R. 381),

referred to. *Commercial Bank of Windsor v. Morrison*, xxxii., 98.

See No. 25, *ante*.

35. *Principal and agent—Police constable—Negligent performance of duty—Liability of municipal corporation.*—A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. Judgment appealed from (35 N. B. Rep. 296) affirmed. *McCleave v. City of Moncton*, xxxii., 106.

36. *Sale of goods of principal by agent in his own name—Contra account against agent—Right of set-off in action by principal.*

See SET-OFF, 1.

37. *Sale by agent—Simulated purchase—Fraudulent conveyance—Laches.*

See TRUSTS, 1.

38. *Railway—Construction of Parkdale subways—Injury to property—Liability for misfeasance.*

See TORT, 2.

39. *Testamentary executor—Mandate—Fittingness of agent—Misappropriation—Negligence.*

See TRUSTS, 9.

40. *Application for insurance—Plan made by canvasser—Misdescription—Authority to bind insured.*

See INSURANCE, FIRE, 77.

41. *Application for insurance—Representations—Concealment—Authority of ship's husband.*

See INSURANCE, MARINE, 49.

42. *Assignment in trust for creditors—Power of attorney by trustee—Authority of attorney to use principal's name—Sale of goods—Credit.*

See DEBTOR AND CREDITOR, 46.

43. *Agent of creditor—False representation as to agency—Obtaining payment from debtor—Ratification—Fraud.*

See DEBTOR AND CREDITOR, 17.

44. *Debtor and creditor—Composition and discharge—Acquiescence—New arrangement of terms of settlement—Waiver of time clause—Principal and agent—Deed of discharge—Notice of withdrawal from agreement—Fraudulent preferences.*

See COMPOSITION AND DISCHARGE.

45. *Streets commissioners—Municipal drain—Trespass—Verdict.*

See MUNICIPAL CORPORATION, 95.

46. *Negligence—Personal injuries—Drains and sewers—Liability of municipality—Officers and employees of municipal corporation*—59 Vict. c. 55, s. 26, s.-s. 18 (Que.)

See MUNICIPAL CORPORATION, 67.

47. *Waiver of written condition—Policy of fire insurance—Proofs of loss—Waiver—Acts of officials.*

See INSURANCE, FIRE, 2.

4. LIABILITY OF AGENT TO THIRD PARTIES.

48. *Broker—Stock exchange custom—Sale of shares—Marginal transfer—Undisclosed principal—Acceptance—“Settlement”—Obligation of purchaser—Construction of contract—“The Bank Act,” R. S. C. c. 120, ss. 70-77—Liability of shareholder—“Stock jobbing.”*—The defendant, a broker doing business on the Toronto Stock Exchange, bought from C., another broker, certain bank shares that had been sold and transferred to C. by the plaintiff. At the time of the sale C. was not aware that the defendant was acting for an undisclosed principal and the name of a principal was not disclosed within the time limited for “settlement” of transactions by the custom of the exchange. The transferee's name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant who, three days after settlement was due, according to the custom of the exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions and the plaintiff's name being put upon the list of contributories, he was obliged to pay double liability upon the shares so transferred under the provisions of “The Bank Act,” for which he afterwards recovered judgment against C. and then, taking an assignment of C.'s right of indemnity against the defendant, instituted the present action. *Held*, reversing the judgment appealed from (24 Ont. App. R. 502), that as the defendant had not disclosed the name of any principal within the time limited for settlement by the custom of the exchange and the shares had been placed at his order and disposition by the seller, he became legal owner thereof, without the necessity of any formal acceptance upon the transfer books and that he was obliged to indemnify the seller against all consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of “The Bank Act.” *Boulton v. Gzowski*, xxix., 54.

5. RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

49. *Negligence of agent—Lending money for principal—Financial brokers—Liability for loss—Measure of damages.*—Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest, though their remuneration may come from the borrower.—An agent who invests money for his principal without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby.—The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land.—Judgment appealed from varied, *Taschereau and Gwynne, J.J.*, dissenting. *Louvenburg, Harris & Company v. Wolley*, xxv., 51.

50. *Principal and agent—Master and servant—Insurance agent—Duty—Appointment—Acting for rival company—Divided interests—Dismissal.*—To act as agent for a rival insurance company is a breach of an insurance agent's agreement “to fulfil conscientiously

all the duties assigned to him, and to act constantly for the best interests of (his employer)" and is sufficient justification for his dismissal.—Judgment appealed from (22 Ont. App. R. 408) affirmed. *Eastmure v. Canada Accident Assur. Co.*, xxv., 691.

51. *Trust—Principal and agent—Advances to agent to buy goods—Trust goods mixed with those of agent—Replevin—Equitable title.*—If an agent is entrusted by his principal with money to buy goods the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing it.—If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase as well as to the unexpended balance. Judgment appealed from (23 Ont. App. R. 121) affirmed. *Carter v. Long & Bisby*, xxvi., 430.

52. *Sale by agent—Commission—Evidence.*—The appellant company deal in electrical supplies at Halifax and have at times sold goods on commission for the defendant, a company manufacturing electric machinery in Montreal. In 1897 appellant telegraphed respondent as follows:—"Windsor Electric Station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply was "—Can furnish Windsor 180 Killowatt Stanley two phase, complete exciter and switchboard. \$4,900, including commission for you. Transformers, large sizes, 75 cents per light." The manager of appellant company went to Windsor but could not effect a sale of this machinery. Shortly after a travelling agent of the respondent company came to Halifax and saw the manager and they worked together for a time trying to make a sale, but the agent finally sold a smaller plant to the Windsor Company for \$1,800. The Starr Company claimed a commission on this sale and on its being refused brought an action therefor. *Held*, affirming the judgment appealed from (33 N. S. Rep. 156). Gwynne, J., dissenting, that the Starr Company was not employed to effect the sale actually made; that the Montreal Company offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the Starr Company to such commission. *Starr, Son & Co. v. Royal Electric Co.*, xxx., 384.

53. *Contract of sale—Contre lettre—Construction of contract—Deed—Absolute sale.*
See CONTRACT, 227.

54. *Building society—Liquidation—Administrators and trustees—Sales to—Prête-nom*—Art. 1484 C. C.
See TRUSTS, 19.

55. *Gift—Confidential relations—Parent and child—Public policy.*
See GIFT, 1.

PRINCIPAL AND SURETY.

1. *Indorser of note—Release of maker—Reservation of rights—Satisfaction of principal debt—Release of debtor—Release of surety.*—The plaintiff and the defendants J.

and H. were creditors of the other defendant. The debtor borrowed \$600 from the plaintiff, giving him a note for that amount, indorsed by J. and H., the indorsers also assigning to the plaintiff, to the extent of \$600, a chattel mortgage upon the debtor's property. The debtor, not being able to pay the claim against him, sold out his business to a third party, who was accepted by both creditors as their debtor and an agreement was entered into by the plaintiff and the new debtor by which time was given to the latter to pay his debt, but in the negotiations that took place no mention was made of the \$600 note. An action was brought against both the maker and the indorsers of the note, which, on the trial, was dismissed as against the maker, but the trial judge, holding that the plaintiff had reserved his rights as against the indorsers, gave judgment against them. This judgment was affirmed by the Divisional Court (22 O. R. 235), but was reversed by the Court of Appeal. *Held*, affirming the judgment appealed from (20 Ont. App. R. 298), that the indorsers were relieved from liability upon the note by the release of the maker. *Holliday v. Hogan*, 20th February, 1894.

2. *Suretyship—Continuing security—Appropriation of payments—Imputation of payment—Reference to take accounts.*—J. H. S. was a local agent for an insurance company and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st Jan., 1890, he was \$1,250 behind in his remittances, and afterwards became further in arrears until on 15th Oct., 1890, W. S. joined him in a note for the \$1,250 for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that payment of the note or renewals or any part thereof was to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, &c., and the notes which they retired from time to time as they became due, and crediting moneys received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account for cash. W. S. died 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On 31st July, 1893, J. H. S. owed on this account \$1,926, which included \$1,098 accrued since 1st January, 1890, and after he had been credited with general payments there remained due at the time of trial \$1,009. The note W. S. signed on 5th October, 1890, was payable 4 months after date with interest at 7%, and the mortgage was expressed to be payable in four equal instalments of \$312.50 each, with interest on unpaid principal. *Held*, *Taschereau and Girouard, JJ.*, dissenting, that the giving of the accommodation notes without reference to the amount secured had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was *prima facie* an admission that, at the respective dates of renewal, at least the amounts mentioned therein were still due upon the security

of the mortgage; that in the absence of evidence of such intention it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be *eo instanti* extinguished by entries of credit in the general account which included the debt secured by the mortgage; and that there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in *Clayton's Case* as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would not apply and there should have been a reference to the master to take the account. *Agricultural Ins. Co. v. Sargeant*, xxvi., 29.

3. *Giving time to principal—Reservation of rights against surety.*—Where a creditor gives his debtor an extension of time for payment a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given. *Wyke v. Rogers* (1 DeG. M. & G. 408) followed.—*Per Gwynne, J.*, dissenting. The evidence in this case was not sufficient to shew that the remedies were reserved. *Gorman v. Dixon*, xxvi., 87.

4. *Vendor and purchaser—Agreement for sale of lands—Assignment by vendee—Deviation from terms of agreement—Giving time—Depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.*—An agreement for the purchase and sale of certain specified lots of land in consideration of a price payable partly in cash and partly by deferred instalments on dates specified was subject to payments being made in advance of those dates under proviso that "the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendors' office and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accented from the assignee several payments upon interest and upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to this schedule and not in the ratio of the full number of lots to the unpaid balance of the price and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest and also allowed the assignee an extension of time for the payment of certain interest overdue and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers. *Held*, affirming the judgment appealed from (22 Ont. App. R. 151) that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement. *Held*, also, that though the course

of dealing did not change the relation of the parties to that of principal creditor, debtor and surety, notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously nor impede him in having recourse to it as a security.—In a suit taken by the vendors against the vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot and as having received on each transfer all arrears of interest.—In the absence of any sure indication in the agreement, the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein. *Wilson v. Land Security Co.*, xxvi., 149.

5. *Principal and surety—Guarantee bond—Default of principal—Non-disclosure by creditor.*—W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for the faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash, but at the end of each season he was in arrear in his remittances, which he attributed to slow collections and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the company discovered that W. had collected moneys of which he had made no return, and brought an action to recover the same from the sureties. *Held*, reversing the decision appealed from (23 Ont. App. R. 681), that each year there was an employment of W. distinct from, and independent of, those of previous years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment, nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed. *Niagara District Fruit Growers' Stock Co. v. Walker*, xxvi., 629.

6. *Recourse of sureties inter se—Ratable contribution—Action of warranty—Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts. 1156, 1959 C. C.*—Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. *Macdonald v. Whitfield; Whitfield v. Merchants Bank of Canada*, xxvii., 94.

7. *Action—Suretyship—Promissory note—Qualified indorsement.*—D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words “not negotiable and given as security.” The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm. *Held*, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Held*, further, *per* Sedgewick, J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser where the action is founded upon the instrument itself. *Robertson v. Davis*, xxvii., 571.

8. *Trustee—Misappropriation—Surety—Evidence—Knowledge by cestui que trust—Estoppel—Parties.*—Funds held by F. as trustee for C. were misappropriated by being deposited with the firm of F. F. & Co., of which F. was a member, and after being so kept on deposit for a period of upwards of six years, were lost in consequence of the failure of the firm. In an action against the defendants, who were sureties for F., to compel them to make good the funds so misappropriated and lost, the defence relied upon the knowledge of the misappropriation on the part of C., which knowledge was sought to be shewn by the fact that payments of interest were made to C., from time to time, by cheque of the insolvent firm.—The Supreme Court (N. S.), *en banc* held, that the manner in which these payments were made was not evidence of knowledge on the part of C., that she was bound to communicate to the sureties; that at most it shewed nothing more than assent by C. to the deposit of the income to which she was entitled with the firm of which her trustee was a member. The court also held, that the trial judge could have disposed of the contention raised on behalf of the defendants without making C. a party to the suit. And it also seemed to the court that knowledge on the part of C. that some part of the trust fund had been placed by the trustee temporarily with F. F. & Co., awaiting investment on good security, would not be held to be knowledge, assent or acquiescence by C. in the misconduct of the trustee which led to the loss of the funds.—On appeal, the Supreme Court of Canada affirmed the decision appealed from (30 N. S. Rep. 173, *sub nomine*, *Eastern Trust Co. v. Forrest*), and dismissed the appeal with costs. *Bayne v. The Eastern Trusts Co.*, xxviii., 606.

9. *Interference with rights of surety—Discharge.*

See SURETYSHIP, 5.

10. *Discharge of mortgage—Security for joint note—Release of joint maker.*

See MORTGAGE, 62.

11. *Right of action—Conveyance subject to mortgage—Obligation to indemnify—Assignment of—Principal and surety—Implied contract.*

See ACTION, 137.

AND see SURETYSHIP.

PRIVILEGE.

Prior claim—Insolvent bank—Lien of note-holders—R. S. C. c. 120.

See CONSTITUTIONAL LAW, 80.

AND see BREACH OF PRIVILEGE—LIBEL—PRIVILEGES AND HYPOTHECS—PUBLIC OFFICER.

PRIVILEGES AND HYPOTHECS.

1. *Sale by sheriff—Folle enchère—Re-sale for false bidding—690 et seq. C. C. P.—Questions of practice—Appeal—Art. 688 C. C. P.—Sheriff's deed—Registration of—Absolute nullity—Rectification of slight errors in judgment—Duty of appellate court.*

See SALE, 68.

2. *Unpaid vendor—Conditional sale—Moveables incorporated with the freehold—Immoveables by destination—Arts. 375 et seq. C. C.*

See MOVEABLES, 1—IMMOVEABLE PROPERTY, 1.

3. *Collocation and distribution—Art. 761 C. C. P.—Hypothecary claims—Assignment—Notice—Prête-nom—Arts. 20 & 144 C. C. P.—Nullity of deed—Incidental proceedings—Appeal—Parties.*

See JUDGMENT, 1.

AND see LIEN—MORTGAGE—REGISTRY LAWS—TITLE TO LAND.

PRIVY COUNCIL.

1. *Enforcement of judgment—Rule of court—Costs.*—Where the Privy Council reverses the judgment of the Supreme Court of Canada, its judgment is enforced by obtaining an order to make the Privy Council judgment a rule of the Supreme Court and, upon such rule being made, the costs received under the judgment so reversed may be ordered to be re paid. *Lewin v. Howe*, xiv., 722.

2. *Leave for appeal—Jurisdiction of Supreme Court of Canada—Practice—Motion paper.*—The Supreme Court of Canada has no jurisdiction in respect to the granting or refusal of applications for leave to appeal to the Judicial Committee of the Privy Council, and notice of such an application ought not to be put upon the motion paper. *Kelly v. Sullivan*; *Moore v. Connecticut Mutual Ins. Co.*; *Queen Ins. Co. v. Parsons*, Cass. Dig. (2 ed.) 695.

3. *Appeal—Privy Council cross-appeal—Practice—Costs.*—Where the respondent has taken an appeal to the Judicial Committee of Her Majesty's Privy Council, from the same judgment as is complained of in an appeal to the Supreme Court of Canada, the hearing of the appeal to the Supreme Court will be stayed

until the Privy Council appeal has been decided upon the respondent undertaking to proceed with diligence in the appeal so taken by him. —In the case in question the costs were ordered to be costs in the cause. *Eddy v. Eddy*, 4th October, 1898.

4. *Settlement of minutes of judgment—Interference of court to vary minutes—Special certificate as to proceedings—Appeal to Privy Council.*—A motion was made before the court to vary the minutes as settled by the registrar by reciting special features as to the proceedings (see 31 Can. S. C. R. 246-247), for the purposes of a proposed appeal to the Privy Council. The Chief Justice took no part, but the remainder of the court (Taschereau, Gwynne, Sedgewick and Girouard, J.J.), were of the opinion that the applicant should take nothing by his motion and refused to interfere with the minutes as settled, stating, however, that the registrar should grant a certificate to the applicant shewing the nature of the proceedings had for the purpose of being used upon the appeal to the Privy Council. *Consumers' Cordage Co. v. Connolly*, 7th May, 1901.

NOTE.—See CONTRACT. No. 165.—The Privy Council granted a new trial on terms, otherwise the Supreme Court order to be set aside and the judgment of the Court of Review to stand.

5. *Practice—Appeal to Privy Council—Stay of execution.*—A judge in chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the court to the Judicial Committee of the Privy Council. *Adams & Burns v. Bank of Montreal*, xxxi., 223.

6. *Appeal in formâ pauperis—Leave to appeal to Privy Council—Transmission of record—Payment of Supreme Court fees.*—On 7th October, 1902, Present: Sir Henry Strong, C.J., and Taschereau, Sedgewick, Girouard, Davies and Mills, J.J. A motion was made for an order directing the Registrar of the Supreme Court of Canada to transmit the record to the Registrar of Her Majesty's Privy Council, on an appeal by the respondent, without the payment of the fees in stamps as required by the statute and rules of practice of the court. After hearing counsel for the parties the motion was allowed and the order made as applied for, the Chief Justice stating that, as this was an extraordinary case in which the Judicial Committee of the Privy Council had granted special leave to appeal in formâ pauperis, the ordinary rules could not apply. *Dominion Cartridge Co. v. McArthur*, 7th October, 1902.

7. *Prerogative — Discretion in granting leave to appeal—Statutes affecting Supreme Court of Canada.*—On refusal of leave for an appeal, Lord Watson (in the Judicial Committee of the Privy Council) stated that the principles upon which leave to appeal to the Privy Council will be allowed do not admit of exhaustive definition. All rules must be subject to qualification. *Prince v. Gagnon* (8 App. Cas. 103) was commented on. *Éclésiastiques de St. Sulpice de Montréal v. City of Montreal*, xvi., at p. 407.

NOTE.—On the question as to the principles upon which an appeal will be allowed from the Supreme Court to the Privy Council, the cases referred to in Appendix B., may be consulted.

—As to the prerogative right to allow an appeal as an act of grace, see *Johnston v. St. Andrew's Church* (3 App. Cas. 159), and *Cushing v. Dupuy* (5 App. Cas. 409). On a petition for special leave to appeal from the Supreme Court of New Brunswick, the Judicial Committee gave reasons for refusing the application, to the following effect.—1. The policy of the Dominion Legislature is to discountenance appeals in matters of insolvency, so much so that not even an appeal to the Supreme Court of Canada is allowed, and the final decision is made to rest with the highest court in each province.—2. The Dominion Legislature cannot affect the prerogative of the Crown to grant special leave to appeal, but in advising Her Majesty whether the prerogative should be exercised, the Privy Council pays attention to the expressed wishes of the colony, and will not recommend its exercise except in cases of general interest and importance, and then only when it manifestly appears that the court below has erred in a matter of law.—3. But, if it should be shewn that the court below has so erred, leave will be refused, if it appear that the court below has decided the case independently of any point of law upon a particular view of the facts, for the Privy Council adopts the facts as found by the court below, and will not review such findings in an appeal entertained as an act of grace. *Bank of New Brunswick v. McLeod*, June, 1882, Cass. Dig. (2 ed.) 644.

8. *Privy Council practice—Appeal in formâ pauperis—Supreme Court Act.*

See APPEAL, 314.

9. *Reversal of Supreme Court judgment—Reimbursement of costs paid under Supreme Court order.*

See PRACTICE OF SUPREME COURT, 67.

10. *Cross-appeal pending in—Stay of proceedings—Practice.*

See APPEAL, 121.

11. *Appeal—Jurisdiction—Special leave—R. S. C. c. 135, ss. 44-42—Form of application and order—Cross-appeal to Privy Council—Inscription pending such appeal—Stay of proceedings—Costs.*

See APPEAL, 247, 423.

12. *Appeal—Court of Review—Right of appeal to Privy Council—Construction of statute—Final judgment—R. S. C. c. 135, ss. 24 (i), 28 & 29-54 & 55 Vict. c. 25, s. 3 (D.).*

See APPEAL, 197.

13. *Appeal—Stay of execution on Supreme Court judgment—Alleged appeal to Privy Council—Refusal of certiorari.*

See CERTIORARI, 2.

PROBABLE CAUSE.

See MALICE.

PROCEDURE.

See PRACTICE AND PROCEDURE—PRACTICE OF SUPREME COURT OF CANADA.

PROCES VERBAL.

1. *Municipal road—Statute labour—Contestation—Charge on land—Appeal.*

See **APPEAL**, 22.

2. *Appeal — Jurisdiction — Annulment of procès-verbal—Matter in controversy.*

See **APPEAL**, 292.

PROCURATION.

See **ATTORNEY**.

PROHIBITION.

1. *County Court Judge—Judicial functions—Inferior tribunal—Municipal affairs—Inquiry ordered by city council—R. S. O. (1887) c. 184, s. 477.]—The city council, under R. S. O. (1887) c. 184, s. 477, passed a resolution directing a County Court Judge to inquire into dealings between the city and persons who were or had been contractors for civic works and ascertain if the city had been defrauded in connection with contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts with the city; and to ascertain in what respect, if any, the system of city business in that respect was defective. G., who had been a contractor and whose name was mentioned in the resolution, attended before the judge and claimed that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and, the judge refusing to order such charges to be formulated, he applied for a writ of prohibition. *Held*, affirming the judgment appealed from (16 Ont. App. R. 452), Gwynne, J., dissenting, that the County Court Judge was not acting judicially in holding this inquiry; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a Superior Court. *Held, per Gwynne, J.*, that the writ of prohibition would lie and in the circumstances shewn it ought to issue. *Godson v. City of Toronto*, xviii., 36.*

2. *Jurisdiction of County Court (N. S.)—Proceedings after plea to jurisdiction sustained on demurrer—Pleading.]—In an action of trover in the County Court (N. S.) defendants pleaded a number of pleas including one to the jurisdiction of the court based on an allegation that the goods for which the action was brought, were of the value of \$600, the jurisdiction of the court in actions of tort being limited to \$200. Plaintiff's demurrer to this plea was overruled. No appeal was taken but plaintiff gave notice and entered the cause for trial at chambers before the County Court Judge, who announced his intention of trying the same on the remaining pleas. Defendants obtained a rule nisi for a writ of prohibition to restrain the judge from trying the cause, on the ground that the judgment on the demurrer disposed of the whole case. The rule was discharged.—On appeal, *Held*, Strong, J., dissenting, that the effect of the judgment on the demurrer was to quash the writ, and the rule nisi for a writ of prohibition should be made absolute.—*Per Strong, J.*, dissenting. The judgment on the demurrer did not dispose*

of the case, but he had a right to reconsider the same on the trial of the issues raised by the other pleas; that the plea to the jurisdiction by attorney was null and void and if judgment had been entered of record on the demurrer such judgment would have been likewise null and void; and that the amount claimed by the plaintiff's declaration being over \$200 the court had jurisdiction.—Appeal allowed with costs. *Wallace v. O'Toole*, Cass. Dig. (2 ed.) 713; Cass. Prac. (2 ed.) 23.

3. *Game laws—Arts. 1405-1409 R. S. Q.—Seizure of furs killed out of season—Justice of the Peace—Jurisdiction.]—Under art. 1405 read in connection with art. 1409 R. S. Q., a game-keeper is authorized to seize furs on view on board a schooner, without a search warrant, and to have them brought before a Justice of the Peace for examination. A writ of prohibition will not lie against a magistrate acting under arts. 1405-1409 R. S. Q., in examination of the furs so seized where he clearly has jurisdiction and the only complaint is irregularity in the seizure. *Company of Adventurers of England v. Joannette*, xxiii., 415.*

4. *Discipline—Jurisdiction—Irregular procedure—Domestic tribunal—Powers—Arts. 3504 et seq. R. S. Q.—58 Vict. c. 36 (Que.)]*—A writ of prohibition will not lie to prevent the execution of the sentence of an inferior tribunal where there has not been absence or excess of jurisdiction in the exercise of its powers. *Honan v. Bar of Montreal*, xxx., 1.

5. *Canada Temperance Act, 1878—Powers of Parliament—Sale of intoxicating liquors.*

See **CONSTITUTIONAL LAW**, 14.

6. *Writ of injunction — Quashing assessment—Remedy against proposed sale of lands for taxes—Art. 1031 C. C. P.*

See **ASSESSMENT AND TAXES**, 19.

7. *Licensed brewers—Quebec License Act—41 Vict. c. 3 (Que.)—43 Vict. c. 19 (D.)—Constitutional law—Jurisdiction of Court of Sessions.*

See **LIQUOR LAWS**, 4.

8. *Sale of liquor—Sale by retail—53 Vict. c. 56, s. 18 (O.)—54 Vict. c. 46 (O.)—Local option—Powers of Legislature—Canada Temperance Act.*

See **CONSTITUTIONAL LAW**, 45, 46.

PROHIBITIVE LAWS.

1. *Arts. 14, 1234 C. C.—Parol testimony—Nullity—Public order.*

See **APPEAL**, 212.

2. *Nullity—Art. 14 C. C.—The Bank Act—Special charter—Pledge of bank stock to another bank.*

See **BANKS AND BANKING**, 16.

3. *Constitutional law—Legislative powers—Criminal Code, 1892—Quebec lotteries—Indictable offences—Illegal consideration of contract—Nullity—Invalidity judicially noticed—Co-relative agreements.*

See **CONSTITUTIONAL LAW**, 31, 58.

AND see **LIQUOR LAWS**.

PROMISE OF SALE.

See CONTRACT—SALE.

PROMISSORY NOTE.

See BILLS AND NOTES.

PROTEST.

Payment of taxes under protest—Appeal from assessment.

See RES JUDICATA, 20.

PROTHONOTARY.

Controverted election—Status of petitioner—Evidence—Form of petition—Jurat on affidavit of verification—Preliminary objections.

See ELECTION LAW, 108.

PROVINCIAL SUBSIDIES.

Construction of statute—British North America Act, 1867, ss. 112, 114, 115, 116, 118—36 Vict. c. 30 (D.)—47 Vict. c. 4 (D.)—Half-yearly payments—Deduction of interest.

See CONSTITUTIONAL LAW, 3, 4, 7, 9.

PROVISIONAL POSSESSION.

See ENVOIE EN POSSESSION.

PROXIMATE CAUSE.

See NEGLIGENCE, 14-28.

PUBLICATION.

Mining law—Royalties—Dominion Lands Act—Publication of regulations—Renewal of license—Payment of royalties—Voluntary payment—R. S. C. c. 54, ss. 90, 91.]—The provision of s. 91 of the Dominion Lands Act that the regulations made thereunder shall have effect only after publication for four successive weeks in the *Canada Gazette*, means that the regulations do not come into force on publication in the last of the four successive issues of the *Gazette*, but only on the expiration of one week therefrom. Thus, where they were published for the fourth time in the issue of 4th September, they were not in force until the 11th, and did not affect a license granted on 9th September. *The King v. Chappelle*; *The King v. Carmack*; *The King v. Tweed & Woog*, xxiii., 586.

Leave to appeal and cross-appeal was granted by the Privy Council, 4th March, 1903. See Can. Gaz. vol. xl., p. 569.

AND see LIBEL.

PUBLIC INQUIRIES.

Crown—Contract—Right of action—Public officer—Solicitor and client—R. S. C. cc. 114, 115—Remuneration of commissioners—Quantum meruit.

See PUBLIC OFFICER, 2.

PUBLIC INSTRUCTION.

School corporation—Decision of superintendent of public instruction—Appeal—Final judgment—Mandamus practice.

See MANDAMUS, 2, 3.

AND see CONSTITUTIONAL LAW, 2, 69 — PUBLIC POLICY, 1.

PUBLIC LANDS.

Constitutional law—Navigable waters—Title to bed of stream—Crown—Dedication of public lands by—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.

See CONSTITUTIONAL LAW, 81.

AND see CROWN, 77-108.

PUBLIC OFFICER.

1. Chief post office inspector—Appointment of—Discharge of official duty—31 Vict. c. 10, s. 14—Offence under Post Office Act—Slander—Privileged communication.]—The chief post office inspector was making enquiries into irregularities at the St. John post office and in conversation with a clerk, alone in a room in the post office, charged him with abstracting missing letters. The assistant postmaster was called in, and the inspector said: "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The plaintiff in an action for slander against the inspector, was allowed to give evidence of the conversation between himself and appellant. There was no evidence that the inspector was actuated by motives of personal spite or ill-will. The jury found that the inspector was not actuated by ill-feeling in making the observation to the plaintiff, but found that he was so actuated in the communication made to the assistant postmaster, and plaintiff got a verdict which was sustained by the full court—On appeal, *Held*, reversing the judgment appealed from (3 Pugs. & Bur. 225), that in the making of the charge and in communicating the decision against the clerk the inspector acted in the due discharge of his duty as a public officer duly appointed under the Post Office Act, and that the words addressed to the assistant postmaster were privileged. *Dewé v. Waterbury*, vi., 143.

2. Crown—Contract—Right of action—Solicitor and client—R. S. C. cc. 114, 115—Inquiry as to public matters—Remuneration of commissioner—Quantum meruit.]—The judgment appealed from (7 Ex. C. R. 351) held that a person appointed under R. S. C. c. 115, as commissioner to make inquiry and report on conduct in office of an officer or servant of the Crown, could not recover for his services as such commissioner, there being no provision for such payment; that such service was not rendered in virtue of any contract, but merely by virtue of appointment under the statute, and that such appointment partakes more of the character of a public office than of a mere employment under a contract express or implied. The Supreme Court affirmed the judgment appealed from, Strong, C.J., and Gir-

ouard, J., dissenting. *Tucker v. The King*, xxxii., 722.

3. *Action for false arrest—Form of notice.*
See NOTICE, 30.

4. *Summary dismissal of municipal official—Notice—Libellous resolution.*
See LIBEL, 6.

5. *Officers and employees of municipality—Superintendence of works—Liability of corporation.*
See NEGLIGENCE, 124.

6. *Expiry of patent of invention—Manufacturing in Canada—Extension of time limit—Acting-Deputy-Commissioner.*
See PATENT OF INVENTION, 15.

AND see CONSTABLE—POLICE OFFICER.

PUBLIC ORDER.

1. *Prohibitive law — Nullity — Receipt—Error—Parol testimony—Arts. 14, 1234 C. C.*
See EVIDENCE, 222.

2. *Prohibitive law — Nullity — Pledge of bank shares to another bank—Special charter.*
See BANKS AND BANKING, 16.

3. *Laws of public order—Matters judicially noticed—Malum prohibitum.*
See CONSPIRACY.

PUBLIC POLICY.

1. *Will — Condition of legacy — Religious liberty — Public policy — Restrictions as to marriage—Education—Exclusion from succession.*—In the Province of Quebec the English law rules on the subject of testamentary dispositions, and, therefore, in that province, a testator may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rites of any church recognized by the laws of the province, and that the grandchildren should be educated according to the teachings of such church and may also exclude from benefit under his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages or who may not have been educated as directed. *Renaud v. Lamothe*, xxxii., 357.

2. *Company law — “The Companies Act, 1890” (B.C.), and amendment—Construction of statute—Memorandum of association—Conditions imposed by statute — Public policy—Preference stock—Election of directors.*—In the memorandum of association of a joint stock company formed under the provisions of the British Columbia “Companies Act, 1890,” and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors or trustees for the management of the business of the company, notwithstanding anything contained in the Act.

Held, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that such an agreement was *ultra vires* of the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of trustees and directors imposed by the Act as matters of public policy. Judgment appealed from (9 B. C. Rep. 275) reversed. *Colonist Printing and Publishing Co. et al. v. Dunsmuir et al.*, xxxii., 679.

3. *Foreign corporation — Telegraph lines—Exclusive right—Restraint of trade.*
See COMITY.

4. *Husband and wife — Judicial separation as to property—Debts incurred by husband before dissolution of community—Obligation by wife—Art. 1301 C. C.—Nullity.*
See HUSBAND AND WIFE, 8.

5. *Monopoly — Trade combination—Unlawful consideration—Matters judicially noticed.*
See CONSPIRACY.

6. *Gift—Confidential relations—Parent and child—Principal and agent.*
See GIFT, 1.

AND see COMPANY LAW, 2—DEDICATION, 1—FORESHORE.

PUBLIC PRINTING.

Controverted election petition—Imprint of Queen's Printer—Certified copy of voters' list—Evidence—Status of petitioner.
See ELECTION LAW, 108.

AND see PUBLICATION.

PUBLIC WAY.

See HIGHWAY—MUNICIPAL CORPORATION.

PUBLIC WORK.

1. *Intercolonial Railway — Acceptance of tender by commissioners—Liability of Crown—Breach of contract—Extras—Damages—Executed contract — 31 Vict. c. 13—37 Vict. c. 15 — Certificate of engineer — Condition precedent — Waiver.*—In January, 1872, the commissioners of the Intercolonial Railway called for tenders for the erection of engine houses, and in October following, I. was instructed by them to proceed in the execution of work, according to his accepted tender, the price being \$21,989. The work was completed and delivered to the Government in October, 1874. The specification provided.—“The commissioners will provide and lay railway iron, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof.” In September, 1873, I. was unable to proceed further with his work, in consequence of neglect in the supply of iron girders, &c., until March following, and owing to the delay he suffered loss. During the work, he was directed by the commissioners,

or their engineers, to perform, and did perform, extra works not included in his tender, and not according to the plans, drawings and specifications.—I. claimed \$3,795.75 damages, and \$8,505.10 for extras.—The Crown demurred, traversed negligence and delay, admitted extras to the amount of \$5,056.60, and set up 31 Vict. c. 13, s. 18, which required the certificate of the engineer-in-chief as a condition precedent to payment.—By 37 Vict. c. 15, on 1st June, 1874, the railway became a public work, under the control of the Minister of Public Works, all powers and duties of the commissioners were transferred to the minister, 31 Vict. c. 13, s. 3, was repealed, with the other inconsistent parts of the Act. *Held*, by the Exchequer Court of Canada, Fournier, J.: That the tender and its acceptance by the commissioners constituted a valid contract binding on the Crown; that the delay and neglect on the part of the commissioners, acting for the Crown, to provide and fix the cast-iron columns, &c., to be provided and fixed by them, was a breach of the contract, and the Crown was liable for damages resulting from such breach; that the extras claimed being for less than \$10,000, the commissioners had power to order the same under the statute 31 Vict. c. 13, s. 16, and suppliant could recover, for such part of the extras claimed as he had been directed to perform; 3. That the 18th section of 31 Vict. c. 13, not having been embodied in the agreement, as a condition precedent to payment for work executed, the Crown could not now rely on that section of the statute in respect of work done, accepted, and received by the Government; 4. That 37 Vict. c. 15, abolished the office of chief engineer of the Intercolonial Railway, and for work performed and received on or after 1st June, 1874, dispensed with the condition precedent as to obtaining his certificate, in accordance with 31 Vict. c. 13, s. 18. *Isbester v. The Queen*, vii., 696.

2. *Government railway—Agreement binding on Crown—Damages to property—Parcel undertaking by chief engineer.*—Where by the Government railway works in St. John, the pipes for city water supply were interfered with, the cost reasonably and properly incurred to restore the property to its former safe and serviceable condition, may be recovered under arrangement with the chief government railway engineer, and upon his undertaking to indemnify the city. Judgment appealed from (2 Ex. C. R. 78) affirmed, Strong and Gwynne, JJ., dissenting, on the ground that the chief engineer had no authority to bind the Crown to pay damages beyond any injury done. *The Queen v. St. John Water Commissioners*, xix., 125.

3. *Crown—Construction of public work—Interference with public rights—Injury to private owner.*—The Exchequer Court of Canada refused compensation to the suppliant for injury to his property by the construction of a public work.—The suppliant owned a sawmill in Cape Breton, and claimed that he was prevented from rafting his lumber to a shipping point, as formerly, by the construction of a bridge across a pond some distance from the mill, in connection with the building of the Cape Breton railway. The Exchequer Court held (3 Ex. C. R. 251), that the right alleged to be interfered with was a right common to the public, and that an individual affected by the interference was not entitled

to compensation.—The Supreme Court dismissed an appeal from this decision with costs. *Archibald v. The Queen*, xxiii., 147.

4. *Interference with private property—Injury to property caused by public work—Damages peculiar to property in question—Compensation—Eminent domain.*—The Exchequer Court of Canada (4 Ex. C. R. 439), awarded the suppliant damages for injurious affection of his wharf at St. John, N. B., caused by the construction of a branch of the Intercolonial Railway along the water front of Courtenay Bay, holding, at the same time, that in order to entitle the owner of property to compensation for alleged injury caused through the construction of a public work, it should appear that there was an interference with some right incident to his property, such as a right of way by land or water, which differs in kind from that to which Her Majesty's subjects are ordinarily exposed and that it was not enough that the interference should be greater in degree only than that which is suffered in common with the public.—On appeal to the Supreme Court of Canada, the decision of the Exchequer Court was affirmed and the appeal dismissed with costs. *The Queen v. Robinson*, xxv., 692.

5. *Public works—Railways and canals—R. S. C. c. 37, s. 23—Contracts binding on the Crown—Goods sold and delivered—Verbal order—Crown officials—Supplies in excess of tender—Errors and omissions in accounts—Findings of fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 Vict. c. 16, s. 33.*—The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" (R. S. C. c. 37), which requires all contracts affecting the department to be signed by the minister, the deputy of the minister, or some person especially authorized, and countersigned by the secretary, have reference only to contracts in writing made by the department. (Gwynne, J., *contra*).—Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra*).—Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, the thirty-third section of "The Exchequer Court Act" does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that province.—Judgment appealed from (6 Ex. C. R. 39) affirmed. *The Queen v. Henderson*, xxviii., 425.

6. *Formation of contract—Ratification—Breach.*—On November 22nd, 1879, the Government of Canada entered into a contract with C. by which the latter undertook to do all the Government binding for five years from said date. The contract was executed under the authority of 32 & 33 Vict. c. 7, s. 6, and on November 25th, 1879, was assigned to W. who performed all the work sent to him up to December 5th, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's Printer as follows: "I am directed by the Honourable the Secretary of State to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution under the same rates and conditions as under

the contract which has just expired." W. performed the work for two years under authority of this letter and then brought an action for the profits he would have had on work given to other parties during the seven years. *Held*, that the letter of the Queen's Printer did not constitute a contract binding on the Crown; that the statute authorizing such contracts was not directory but limited the power of the Queen's Printer to make a contract except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer, and that he could not recover in respect of the work done after the original contract had expired.—On October 30th, 1886, an order-in-council was passed, which recited the execution and assignment of the original contract, the execution of the work by W., after it expired, and the recommendation of the Secretary of State that a formal contract should be entered into extending the original to December 1st, 1887, and then authorized the Secretary of State to enter into such formal contract with W. but subject to the condition that the Government should waive all claims for damages by reason of non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other parties up to the date of said extension. W. refused to accept the extension on such terms. *Held*, that W. could not rely on the order-in-council as a ratification of the contract formed by the letter of the Queen's Printer; that the element of *consensus* enters as much into a ratification of a contract as into the contract itself; and that W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.—Judgment appealed from (6 Ex. C. R. 12) reversed. *The Queen v. Woodburn*, xxix., 112.

7. *Government rifle range—50 & 51 Vict. c. 16, s. 16 (c) (D.)—R. S. C. c. 41, ss. 10, 69.]*—A rifle range under control of the Department of Militia and Defence is not a "public work" within the meaning of s. 16 (c) of the Exchequer Court Act. Judgment appealed from (6 Ex. C. R. 425) affirmed. *Larose v. The King*, xxxi., 206.

8. *Expropriation of land—Damages—Valuation—Evidence.]*—The Crown expropriated land of L. and had it appraised by valuers who assessed it at \$11,400, which sum was tendered to L. who refused it and brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him \$17,000. On appeal by the Crown, *Held*, reversing the judgment appealed from, Girouard, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuers was a very generous compensation to L. for the loss of his land and the increase by the judgment appealed from was not justified.—The court, while considering that a less sum than that fixed by the valuers should not be given in this case expressly stated that the same course would not necessarily be followed in future cases of the kind. *The King v. Likely*, xxxii., 47.

9. *Contract—Public work—Abandonment and substitution of work—Implied contract.]*—The suppliants contracted with the Crown to do certain work on the Cornwall Canal, the contract providing that they should pro-

vide all labour, plant, &c., for executing and completing all the works set out or referred to in the specifications, namely, "all the dredging and other works connected with the deepening and widening of the Cornwall Canal on section No. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By s. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done the Crown abandoned the scheme of constructing dams contemplated by the contract and adopted another plan the work on which was given to other contractors. After it was completed the suppliants filed a petition of right for the profits they would have made had it been given to them. *Held*, affirming the judgment of the Exchequer Court (7 Ex. C. R. 221), that the contract contained no express covenant by the Crown to give all the work done to the suppliants and s. 34 prohibited any implied covenant therefor. Therefore the petition of right was properly dismissed. *Gilbert Blasting & Dredging Co. v. The King*, xxxiii., 21.

10. *Injury from public work—Negligence of Crown officials—Right of action—Liability of the Crown—50 & 51 Vict. c. 16, ss. 16, 23, 58—Jurisdiction of the Exchequer Court—Prescription—Art. 2261 C. C.]*—Lands in the vicinity of the Lachine Canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it. *Held*, reversing the judgment appealed from (7 Ex. C. R. 1), Davies, J., dissenting, that the owner had a right of action and was entitled to recover damages for the injuries sustained and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisions of the 16th, 23rd and 58th sections of the Exchequer Court Act. *The Queen v. Filion* (24 Can. S. C. R. 482) approved; *City of Quebec v. The Queen* (24 Can. S. C. R. 430) referred to. The prescription established by art. 2261 of the Civil Code of Lower Canada applies to the damages claimed by appellant in his petition of right. *Letourneau v. The King*, xxxiii., 335.

11. *Ship channel—Navigation of River St. Lawrence—Negligence—Repair—Parliamentary appropriation—Discretion as to expenditure.]*—Action for damages to S.S. "Arabia," sustained by striking an obstruction in the River St. Lawrence ship channel, which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear and that

failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150) held that the channel was not a public work after the work of deepening was completed and, even if it was, no negligence had been proved to make the Crown liable under s. 16 (c) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with money voted by Parliament for that purpose was not obliged to expend the appropriation as such matters were within the discretion of the Governor-in-Council and minister who were responsible only to Parliament in respect thereof. The Supreme Court affirmed the judgment appealed from. *Hamburg American Packet Co. v. The King*, xxxiii., 252.

[Leave to appeal to Privy Council granted, July, 1903.]

12. *Expropriation of lands—Damages for use of rifle range—Mode of assessment—Valuation roll—Present uses—Prospective value—Evidence.*—The judgments appealed from (see 8 Ex. C. R. 163) decided, in effect, that as the lands taken for use as part of a rifle range, at the time of expropriation, had a prospective value for residential and other uses beyond that which then attached to them as lands in use for agricultural and other similar purposes, such prospective values should be taken into consideration in assessing what would be sufficient and just compensation to be paid upon the expropriation of the lands for such public uses as would, in various ways, affect the lands injuriously and diminish their prospective values.—In making the assessment of such compensation, the court below consulted the municipal assessment rolls, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the lands expropriated. The Supreme Court of Canada affirmed the judgment appealed from. *The Turnbull Real Estate Co. v. The King; Corkery et al. v. The King; DeBury et al. v. The King*, 6th October, 1903, xxxiii., 677.

13. *Assignment of contract—Assent by Crown—Evidence—Knowledge by Crown officers—Cancellation—Breach of contract—Right to damages.*

See CONTRACT, 93.

14. *Statutory extinction of right of way—Access to alluvial lands—Indemnity for obstruction.*

See TITLE TO LAND, 32.

15. *Contracts binding on the Crown—31 Vict. c. 12 (D.)—Extras—Certificate of engineer—Orders by subordinate officers.*

See CONTRACT, 89.

16. *Payment of tolls—Contract binding on the Crown—Negligence of public servants—Common carriers.*

See ACTION, 109.

17. *Intercolonial railway—Extras—Engineer's certificate—Tort—Fraud or misconduct by Crown servants—Misrepresentation—Time limit—Forfeiture—Liquidated damages.*

See CONTRACT, 90.

18. *Executory contract—Appropriation by Parliament—Unauthorized expenditure—Petition of right—Quantum meruit—31 Vict. c. 12, ss. 7, 15, 20.*

See CONTRACT, 91.

19. *Rideau canal lands—By estate—Contract by trustee.*

*See RIDEAU CANAL LANDS, 1.

20. *Government railways—Public servants—Misfeasance—Non-feasance—Negligence—Petition of right.*

See RAILWAYS, 100.

21. *Expropriation of lands—Reversion of lands not used for canal purposes—Maintenance.*

See RIDEAU CANAL LANDS, 2.

22. *Claim for extras—Certificate of engineer—Condition precedent—Reference to arbitration—Waiver of legal rights.*

See ARBITRATIONS, 20.

23. *Intercolonial railway—"Employee"—Notice of action—Expropriation.*

See TRESPASS, 1.

24. *Claim for extras—Condition precedent—Chief engineer's certificate.*

See CONTRACT, 96.

25. *Negligence of servant—Liability of Crown.*

See NEGLIGENCE, 206.

26. *Contract for—Authority of Government engineer to vary terms—Delay.*

See CONTRACT, 97.

27. *Injury to property by—Obstruction of canal—Evidence of use of canal.*

See EXPROPRIATION, 2.

28. *Injury to property on—Liability of Crown for tort—50 & 51 Vict. c. 16 (D.).*

See CONSTITUTIONAL LAW, 25.

29. *Contract—Final certificate of engineer—Previous decision—Necessity to follow.*

See RES JUDICATA, 9.

30. *Contract—Public work—Progress estimates—Engineer's certificate—Revision by succeeding engineer—Action for payment on monthly certificate.*

See ACTION, 111.

31. *Progress estimates—Arbitration—Engineer's certificate—Approval by head of department—Final estimates—Condition precedent—Arbitration.*

See CONTRACT, 101.

32. *Contract binding on the Crown—Public work—Formation of contract—Order-in-council—Ratification—Breach.*

See CONTRACT, 103.

33. *Breach of contract—Appropriation of plant—Damages—Interest.*

See CONTRACT, 21.

PUPPET.

See ACTION—PRETE-NOM.

QUAKERS.

Title to land — Society of Friends, or Quakers — Lands held in trust for—Authority of governing body.—The supreme or governing body of the Society of Friends, or Quakers, in Canada, as well in respect to matters of discipline as to the general government of the society, is the Canada yearly meeting.—The Canada yearly meeting having adopted a book of discipline which certain members of the society refused to accept, these dissentient members, therefore, could not hold, nor exercise any right over, property granted to a subordinate branch of the society to which they had formerly belonged. Judgment appealed from (12 Ont. App. R. 543) affirmed. *Jones v. Dorland*, xiv., 39.

QUANTUM MERUIT.

1. *Towage of vessel — Contract by agent in charge — Action for services rendered.*

See PRINCIPAL AND AGENT, 7.

2. *Crown — Contract — Right of action — Public officer — Solicitor and client — R. S. C. cc. 114, 115 — Inquiry as to public matters — Remuneration of commissioner.*

See ACTION, 112.

QUASH, MOTION TO.

See APPEAL—COSTS—PRACTICE OF SUPREME COURT.

QUASI-DELIT.

Action for damages — River improvements — Arbitration — C. S. L. C. c. 51.

See PRESCRIPTION, 28.

AND see NEGLIGENCE—TORT.

"QUEBEC ELECTIONS ACT."

Controverted election — Preliminary objections—Status of petitioner—Dominion franchise—Construction of statute—Right to vote.

See ELECTION LAW, 98.

QUEBEC FIRE.

37 Vict. c. 15 (Que.) — *Continuation of suits—Prescription.*

See CONTRACT, 10.

QUEBEC HARBOUR WORKS.

Bulk sum contract — Extras — Engineer's certificate—Errors in calculation—Deductions—Interest.

See CONTRACT, 57.

"QUEBEC PHARMACY ACT."

Construction of statute — Retroactive legislation — Second offence—Unlicensed sale of drugs.

See STATUTE, 36.

QUEBEC TURNPIKE TRUST.

1. *North shore roads—4 Vict. c. 17 (Can.)—16 Vict. c. 235 (Can.)—Debentures—Legislative acknowledgment — Liability of the Crown for acts by agents.*—*Held*, Ritchie, C.J., and Gwynne, J., dissenting, that the trustees of the Quebec North Shore Turnpike Trust, appointed under ordinance, 4 Vict. c. 17, when issuing debentures, under 16 Vict. c. 235, were agents of the late Province of Canada, and that province was obliged to provide for the payment of the principal of the debentures when they became due.—*Per* Henry and Taschereau, JJ. That the Province of Canada had, by its conduct and legislation, recognized its liability to pay the debentures and that the trustees were entitled to succeed on their cross-appeal as to interest from the date of the maturing of the debentures.—*Per* Ritchie, C.J., and Gwynne, J. That the trustees, being empowered by the ordinance to borrow moneys "on the credit and security of the tolls thereby authorized to be imposed, and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the ordinance, and not to be paid out of or chargeable against the general revenue of this province," the debentures did not create a liability on the part of this province in respect of either the principal or interest thereof.—*Belleau v. The Queen*, vii., 53.

[The Privy Council reversed the judgment of the Supreme Court (7 App. Cas. 473).]

2. *Width of roads—Title to right of way—Middle of roadway — Quebec North Shore Turnpike road trustees — Petitory action—Possession by trustees—User by public—Expropriation—36 Geo. III. c. 9—4 Vict. c. 17—18 Vict. c. 100, s. 41 (Q.)*—The trustees of a turnpike road, from Quebec to Saut à la Puce, instituted the suit to remove an encroachment upon the road, alleging: "that in June, 1880, or about that time, defendant illegally and without any right whatsoever, unjustly took possession of a part of the property belonging to plaintiffs, to wit: of a part of the road, about 20 feet by 6 feet in depth, situate in the parish of Château Richer on the north side of said road, opposite a lot of land belonging to and possessed by defendant. . . . That defendant dug deeply in and under the road and erected and built on the said piece of land a building or cellar, and committed other acts and encroachments, which he had no right to commit, thereby decreasing the legal width of the road by at least 5 feet."—The time limited for action *en démolition* having expired, plain-

tiffs asked to be declared proprietors in possession of said road and to have the said building or cellar removed in the ordinary course of law.—Pleas:—(1) general issue (2) peremptory exception that the part of the said road which ran through defendant's land was a portion of said land; and he acquired said land at sheriff's sale; that he was owner of the land on each side of the road, which, at the *locus in quo*, was bounded on the north by a ditch and on the south by a fence, and that the building of the said cellar in no way encroached upon the road in question.—The road was put under control of the trustees by 16 Vict. c. 235, s. 5, s.-s. 9, in 1853. The width of main roads or the King's highways was regulated then by 36 Geo. III. c. 9, s. 2, at 30 feet (French measure) between 2 ditches, each 3 feet wide, and of sufficient depth to drain off the water, and where the said highways were not already 30 feet wide, the *Grand Voyer*, if he thought it necessary and practicable, should cause them to be widened by the person bound to repair the same.—The trust ordinance, 4 Vict. c. 17, s. 3, vested the trustees with all powers which were vested in *Grand Voyers* or municipal councils by 36 Geo. III. c. 9, and by ordinance, 4 Vict. c. 4, ss. 37 and 45; 8 Vict. c. 40, ss. 28 and 30; 10 & 11 Vict. c. 7, ss. 33 and 39, and enacted that the trustees, in the manner which they deem fit, might cause the said roads, and the bridges thereupon, to be improved and widened, repaired and made anew, and might, for the purposes aforesaid, or any of them, by themselves, their agents and servants, go into and enter upon, and take any land or real property.—In support of their contention that the road should be 36 feet wide (French measure) the ditches forming part of the road, appellants cited 18 Vict. c. 100, s. 41, as to the width of highways, and argued that this Act must have been based on the general custom which had existed up to that time of making all front roads 30 feet wide (French measure).—In 1854 appellants macadamized the road and made the ditch on the north side, thereby fixing, themselves, the limit of the road; and the evidence shewed they placed it there because there is on the north side of the road a hill which terminates at the ditch, and at the distance of one foot, and one foot nine inches from the edge of the ditch, in front of the cellar, the ground is four feet some inches higher than the level of the road, therefore it was not possible to pass there, or to make a ditch to drain the road.—The appellants made the ditch at the foot of the hill, the only place where it was practicable to make it; and they thereby left beyond the ditch and consequently beyond the road the ground they claimed as forming part of the road. The south side of the road was bounded by a fence, and between the fence and the north-east side of the ditch there was a width of 30 feet, and from the edge of the north-east side of the ditch to that of the corner of the cellar, there was a width of one foot nine inches; at the north corner the width was nine inches less.—The action was maintained in the Superior Court and the Queen's Bench reversed the judgment (3 Dor. Q. B. 65).—On appeal the trustees claimed that: 1st. They had a right to bring the action; 2ndly. The road in question should be 38 feet 3 inches (equal to 36 feet French measure) wide at least; and 3rdly. Respondent had decreased the legal width of the road by at least 5 feet, which he was bound to restore to the appellants.—*Held, per Ritchie, C.J., and Fournier and Henry, JJ.,* that the road was an ancient road which was not of

the width of 30 feet (French measure) when the appellants received control of it; that the law clearly recognized such roads, and contemplated that the *Grand Voyer*, if he should think it necessary and practicable, should cause such roads to be widened, and this he had never done as regards this road; that the appellants, in 1854, appear to have taken the road in the state it then was, and never to have exercised the power of widening it given them by 4 Vict. c. 17, upon paying an indemnity to the proprietor; and that whether or not the road was the legal width the appellants had no right to any ground beyond what formed part of the road, and served as such for the use of the public and for the ditches, if any, and therefore could not claim the ground beyond the ditch on the north side of the road which could not be, and never was, used by the public, and never formed part of the road.—*Per Strong and Henry, JJ.,* that the property of the road was vested in the Crown, and the effect of the statutes was not to take the property out of the Crown and vest it in the trustees, but to make them custodians of the road and the tolls for the benefit of the bondholders and the public. The appellants failed to shew either title or possession, and the action therefore failed.—Appeal dismissed with costs. (Gwynne, J., dissenting.) *Quebec North Shore Turnpike Road Trustees v. Vezina*, 8th March, 1884; Cass. Dig. (2 ed.) 758.

QUEEN'S COUNSEL.

Prerogative — Appointment — Precedence—37 Vict. c. 20, 21 (N. S.).—*Retrospective legislation—Great seal of Nova Scotia—40 Vict. c. 5 (D.).—40 Vict. c. 2 (N.S.).—Appeal—Jurisdiction—Prerogative.*—By 37 Vict. c. 20 (N.S.), the Lieutenant-Governor was authorized to appoint Queen's Counsel for the province, and by 37 Vict. c. 21 (N.S.) to grant to any member of the bar a patent of precedence in the courts of the province. R. was appointed on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the province, several members of the bar were appointed Queen's Counsel for Nova Scotia, and precedence was granted to them, as well as to other Queen's Counsel appointed by the Governor-General after the 1st July, 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant-Governor, was published in the *Royal Gazette*, and the name of R. was included, but it gave precedence and pre-audience before him to several persons, including appellants, who did not enjoy it before. R. obtained a rule *nisi* to grant him rank and precedence over all Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R.'s precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia which held.—1. That the letters patent of precedence, issued by the Lieutenant-Governor of Nova Scotia, were not issued under the great seal of the Province of Nova Scotia; 2. That 37 Vict. c. 20, 21 (N.S.), were not *ultra vires*; 3. That s. 2, c. 21, 37 Vict., was not retrospective, and that the letters patent of

the 26th May 1876, issued under that Act could not affect the precedence. A preliminary objection was raised to the jurisdiction of the court to hear the appeal.—On the argument in appeal before the Supreme Court of Canada the question of the validity of the great seal of Nova Scotia was declared to have been settled by 40 Vict. c. 3 (D.) and 40 Vict. c. 2 (N.S.) and it was *Held*, 1. That the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada; (Fournier, J., dissenting). 2. *Per* Strong, Fournier and Taschereau, JJ. That 37 Vict. c. 21 (N.S.), has no retrospective effect, and letters patent issued under it could not affect the precedence of the Queen's Counsel appointed by the Crown. 3. *Per* Henry, Taschereau and Gwynne, JJ. That the B. N. A. Act, 1867, has not invested the Legislatures of the provinces with any control over the appointment of Queen's Counsel; that Her Majesty forms no part of the Provincial Legislatures, as she does of the Dominion Parliament, and therefore no provincial Act can affect Her prerogative right to appoint Queen's Counsel in Canada directly, or through Her representative, the Governor-General, nor vest such prerogative right in the Lieutenant-Governors of the provinces; and that 37 Vict. cc. 20 & 21 (N.S.) are *ultra vires* and void. (*See NOTE*.) 4. *Per* Strong and Fournier, JJ. That this court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, and that there was no necessity in this case to express an opinion upon the validity of the Acts in question. *Lenoir v. Ritchie*, iii., 575.

[NOTE.—Reversed in *Maritime Bank v. Receiver-General of New Brunswick* (20 Can. S. C. R. 695) and *Atty.-Gen. of Can. v. Atty.-Gen. of Ont.* (23 Can. S. C. R. 458).]

See CONSTITUTIONAL LAW, 44, 80.

QUORUM.

1. *Appeal — Disqualification of judge — Quorum in such case*—52 Vict. c. 37, s. 1—*Practice*.]—Where a judge of the Supreme Court of Canada had, before his appointment, sat during the hearing of the cause upon the appeal in the court below, he is disqualified from sitting or taking part in the hearing or adjudication of an appeal from the judgment rendered therein to the Supreme Court of Canada, notwithstanding that he did not give any opinion nor take any part in the adjudication of the court below nor in the trial court.—The opinion of the court was asked by His Lordship, Mr. Justice King, as to his qualification to sit on the appeal to the Supreme Court of Canada under the above mentioned circumstances. His Lordship Sir Henry Strong, C.J., was of opinion that under the first section of the Act, 52 Vict. c. 37, Mr. Justice King was disqualified. Fournier, Taschereau and Sedgewick, JJ., concurred. His Lordship Mr. Justice King thereupon retired from the bench and the hearing of the appeal was proceeded with before the four other judges constituting a quorum under the statute cited. *Grant v. McLaren*, 9th May, 1894.

2. *Territorial court of Yukon Territory—Quorum to constitute court for hearing appeals*.]—*Semble*, Under the provisions of the Yukon Territory Act, 62 & 63 Vict. c. 11, s. 6, and s. 42 of c. 50, R. S. C. thereby made applicable to the Territorial Court of

Yukon Territory, three judges of that court are necessary to constitute a quorum for the hearing of appeals from judgments rendered upon the trial of causes therein. *Barrett v. Le Syndicat Lyonnais du Klondyke*, 24th August, 1903, xxxiii., 667.

See Amending Act of 1903.

3. *Absent in Court of Appeal below—Appeal direct to Supreme Court—Sup. Ct. Act*, 1879, s. 6.

See PRACTICE OF SUPREME COURT, 184.

QUO WARRANTO.

Appeal — Jurisdiction.]—No appeal lies from a judgment on proceedings by *quo warranto* to the Supreme Court of Canada. *Walsh v. Hefferman*, xiv., 738.

RAILWAYS.

1. CARRYING GOODS, 1-7.
2. CARRYING PASSENGERS, 8-15.
3. CONDITION OF WAY; WORKS, &c., 16-23.
4. CUSTOMS DUTIES, 24.
5. EXPROPRIATIONS, 25-40.
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7. INJURIES TO PERSONS, 47-67a.
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10. MUNICIPAL AID; CONTROL OF STREETS, &c., 87-98.
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13. TAXES, 135-139.
14. TELEGRAPH LINES, 140.
15. TRAFFIC ARRANGEMENTS, 141-144.
16. OTHER MATTERS, 145-166.

1. CARRYING GOODS.

1. *Bill of lading — Verbal condition — Perishable freight — Agent's authority — Negligence*.]—The station agent of a railway company in the ordinary course of business agreed that oil shipped should be carried in covered cars and with dispatch.—The bill of lading had no such clause, but stated that such goods should be carried "at owner's risk."—In an action for negligent breach, *Held*, affirming judgment appealed from (28 U. C. C. P. 587), that evidence of the condition by parcel was admissible, that it became incorporated with the bill of lading as part of the contract for carriage; that the agent had authority to make the condition with the shipper; that it was negligence on the part of the company to fail to provide fit and proper means of transportation for such perishable goods, and that by failure to carry in covered cars with dispatch the company was estopped from setting up the printed condition as to carriage "at owner's risk" in order to avoid liability. *Grand Trunk Ry. Co. v. Fitzgerald*, v., 204.

2. *Bill of lading—Notice — Condition — Carriage by railway — Contract against liability — Negligence — Live stock at owner's risk — Railway Act, 1868, 31 Vict. c. 68, s. 20, s.-s. 4—34 Vict. c. 43, s. 5—42 Vict. c. 9.]*

—A dealer in horses hired a car from the company to transport stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other conditions:—"The owner of animals undertakes all risks of loss, injury, damage and other contingencies, in loading, &c." "3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing, or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes, . . . the person using any such pass takes all risks of every kind, no matter how caused."

—The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip. Through the negligence of the company's servants a collision occurred by which the said horses were injured. —On appeal from the Court of Appeal for Ontario (10 Ont. App. R. 162), affirming the judgments of the Divisional Court (2 O. R. 197) in favour of the defendants, *Held, per Ritchie, C.J., and Fournier and Henry, JJ., that as the General Railway Act, 1868 (31 Vict. c. 68, s. 20, s.-s. 4), as amended by 34 Vict. c. 43, s. 5, re-enacted by Consol. Ry. Act, 1879 (42 Vict. c. 9, s. 25, s. ss. 2, 3, 4), prohibits railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the Grand Trunk Ry. Co., the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.—Per Strong and Taschereau, JJ., dissenting. That the words "notice, condition or declaration," in the said statute contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability. *Grand Trunk Ry. Co. v. Vogel; Grand Trunk Ry. Co. v. Morton*, xi, 612.*

[*Cf. — Grand Trunk Ry. Co. v. McMillan* (16 Can. S. C. R. 543); *Robertson v. Grand Trunk Ry. Co.* (24 Can. S. C. R. 611); *Glen-goil Steamship Co. v. Pilkington* (28 Can. S. C. R. 146); *The Queen v. Grenier* (30 Can. S. C. R. 42).]

NOTE.—The decision in *Grand Trunk Ry. Co. v. Vogel* may be considered as overruled by subsequent jurisprudence. See Nos. 3, 5.

3. *Bill of lading — Conditions — Connecting lines — Carriage beyond terminus — Contract for whole transit—Loss after transit—Warehousemen — Bailment — Notice in writing — Statutory liability — Joint tort feorsors — Partial loss — Release — Estoppel — R. S. C. c. 109 — Pleading — Res judicata.]*

—Where a railway company undertakes to carry goods to a point beyond the terminus of its own line its contract is for carriage of the goods over the whole transit, and the other companies over whose lines they must pass are merely agents of the contracting company for such carriage, and in no privy of contract with the shipper. *Bristol & Exeter Ry. Co. v. Collins* (7 H. L. Cas. 194) s. c. d.—38

followed.—Such a contract being one which a railway company might refuse to enter into, s. 104 of the Railway Act (R. S. C. c. 109) does not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they had left its own line. The decision in *Vogel v. G. T. R. Co.* (11 Can. S. C. R. 612) does not govern such a contract.—One of the conditions in a contract to carry goods to P., a place beyond the terminus of the company's line, provided that the company "should not be responsible for any loss, mis-delivery, damage or detention that might happen to goods sent by them, if such loss, mis-delivery, damage or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits." *Held*, that this condition would not relieve the company from liability for loss or damage occurring during transit, even if such loss occurred beyond the limits of the company's own line. *Held, per Strong and Taschereau, JJ.*, that the loss having occurred after transit was over, and the goods delivered at P., and the liability of the company as carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line P. was situate, as bailees for the shipper. *Fournier and Gwynne, JJ.*, dissenting.—Another condition provided that no claim for damage, loss, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within 36 hours after delivery of the goods in respect to which the claim was made. *Held, per Strong, J.*, that a plea setting up non-compliance with this condition having been demurred to, and plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*. *Held, also, per Strong, J. (Gwynne, J., contra)* that part of the consignment having been lost, such notice must be given in respect to the same within 36 hours after delivery of those which arrive safely.—*Quære*, In the present state of the law is a release to, or satisfaction from, one of several joint tort feorsors, a bar to an action against the others?—Judgment appealed from (15 Ont. App. R. 14) reversed. *Grand Trunk Ry. Co. v. McMillan*, xvi, 543.

[Leave to appeal to the Privy Council was refused on the ground that the case did not affect considerable value and was not of very substantial character, and the judgment did not determine a question of great public interest, nor of legal importance. *Gagnon v. Prince* (8 App. Cas. 103) approved, 17th May, 1889. See *Cass. Dig.* (2 ed.) 741; *Wheeler, P. C. Law*, 982.]

4. *Carriage of goods—Carriage of connecting lines—Contract for—Authority of agent—Shipment to order of consignor — Delivery.]* —E., in British Columbia, being about to purchase goods from G. in Ontario, signed, on request of the freight agent of the N. P. Ry. Co. in B. C., a letter to G. asking him to ship goods via G. T. Ry. and C. & N. W., care N. P. Ry. at St. Paul. This letter was forwarded to the freight agent of the N. P. Ry. Co. at Toronto, who sent it to G., and wrote to him, "I enclose you card of advice and if you

will kindly fill it up when you make the shipment send it to me. I will trace and hurry them through and advise you of delivery to consignee." G. shipped the goods as suggested in this letter deliverable to his own order in B. C. *Held*, affirming the decision appealed from (21 Ont. App. R. 322), that on arrival of the goods at St. Paul, the N. P. Ry. Co. was bound to accept delivery of them for carriage to B. C. and to expedite such carriage; that they were in the care of said company from St. Paul to B. C.; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G. and not paid for. *Northern Pacific Ry. Co. v. Grant*, xxiv., 546.

5. *Construction of statute—Railway Act, 1888, s. 246 (3)—Carriage of goods—Contract limiting liability—Negligence.*—By the Railway Act, 1888 (51 Vict. c. 29 [D.]), s. 246 (3), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants." *Held*, affirming the decision appealed from (21 Ont. App. R. 204), that this provision does not disab a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods, arising from negligence. *Vogel v. Grand Trunk Ry. Co.* (11 Can. S. C. R. 612), and *Bate v. Canadian Pacific Ry. Co.* (15 Ont. App. R. 388), distinguished.—The Grand Trunk Ry. Co. received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage which contained this provision: "The company shall in no case be responsible for any amount exceeding \$100 for each and any horse," &c. *Held*, affirming the decision appealed from, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than \$100, though the value of the horse largely exceeded that amount. *Robertson v. Grand Trunk Ry. Co.*, xxiv., 611.

See No. 8, *infra*.

6. *Carriage of goods—Connecting lines—Special contract—Loss by fire in warehouse—Negligence.*—In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Railway Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G. T. R. Co., and the rest to the C.P.R. Co. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, &c., Co., for carriage to Merlin. That on receipt by the Lake Erie Co. of the goods it became their duty to carry them safely to Merlin and deliver them to S. There was also an allegation of a contract by the Lake Erie Co. for storage of the goods and delivery to S. when requested, and a lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin. *Held*, reversing the decision appealed from, that as to the goods delivered to the G. T. R. Co. to be transferred

to the Lake Erie Co. as alleged, if the cause of action stated was one arising *ex delicto* it must fail as the evidence shewed that the goods were received from the G. T. R. Co. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G. T. R. Co. to the consignors, and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G. T. R. Co. provided among other things, that the company would not be liable for the loss of goods by fire, that goods stored should be at sole risk of the owners, and that the provisions should apply to and for the benefit of every carrier. *Held*, further, that as to the goods delivered to the companies other than the G. T. Co. to be transferred to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G. T. R. Co., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., and such finding should not be interfered with. *Held*, also, that as to goods carried on a bill of lading by the Lake Erie Co., the company was not liable as there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one as the company only undertakes to warehouse goods of necessity and for convenience of shippers. *Lake Erie and Detroit River Ry. Co. v. Sales*, xxvi., 663.

7. *Carriage of goods—Special instructions—Acceptance by consignee—Warehousemen—Negligence—Amendment.*—F. Bros., dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a Rolling Mills Co. at Sunnyside in Toronto West. The G. T. R. Co. had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the Rolling Mills Co. had a siding capable of holding three or four cars. In 1897 F. Bros. instructed the G. T. R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co., and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to 2nd January, 1900, five cars, one addressed to the company and the others to themselves at Sunnyside. On 10th January the company notified F. Bros. that previous shipments had contained iron not suitable for their business and not of the kind contracted for and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On 4th February the cars were placed on a siding to be out of the way and were there frozen in. On 9th February F. Bros. were notified that the cars were there subject to their orders, and two days later F., one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills in teams. The cars could not be moved until the end of April when the price of the iron had fallen and F. Bros. would not accept them, but after considerable correspondence

and negotiation they took them away in the following October and brought an action against the G. T. R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company, but sometimes they were sent without instructions, and on 3rd February the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the rolling mills. *Held*, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive them.—The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen and ordered a reference to ascertain the damages on that head. *Held*, reversing such decision, Mills, J., dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence and the question of negligence had never been raised nor tried, the action must be dismissed *in toto*, with reservation of the right of F. Bros. to bring a further action should they see fit. *The Grand Trunk Ry. Co. v. Frankel*, xxxiii., 115.

2. CARRYING PASSENGERS.

8. *Passenger ticket—Loss of baggage—Special contract—Reduced fare—Notice of conditions—Negligence.*—Plaintiff purchased from an agent of the company at Ottawa what was called a "land seeker's ticket," the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying less than the single fare each way. The ticket was not transferable and had conditions printed on it, one of which limited the liability of the company for baggage to wearing apparel not exceeding \$100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained plaintiff's signature to the ticket explaining that it was for the purpose of identification; but did not read nor explain to her any of the conditions, and having sore eyes at the time she was unable to read them herself. On the trip to Winnipeg an accident happened to the train and plaintiff's baggage, valued at over \$1,000, caught fire and was destroyed. The jury found for plaintiff for the alleged value of the baggage. *Held*, reversing the judgment appealed from (15 Ont. App. R. 388), Gwynne, J., dissenting, that there was sufficient evidence that the loss of the baggage was caused by defendants' negligence, and, the special conditions printed on the ticket not having been brought to the notice of plaintiff, she was not bound by them and could recover her loss from the company. *Bate v. Canadian Pacific Ry. Co.*, xviii., 697.

See No. 5, ante.

9. *Passenger — Implied contract—Production of ticket—Refusal—Ejection from train—Liability — General Railway Act, 51 Vict. c. 29 (D.), ss. 247 and 248.*—By 51 Vict. c. 29, s. 248, any passenger on a railway train who refuses to pay his fare may be put off

the train. *Held*, reversing the decision appealed from (20 Ont. App. R. 476), Fournier, J., dissenting, that the contract between the person buying a railway ticket and the company on whose line it is intended to be used implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejection. *Grand Trunk Ry. Co. v. Beaver*, xxii., 498.

10. *Carriage of passengers — Derailment—Broken rail—Latent defects—Arts. 1053, 1673, 1675 C. C.*—Where the breaking of a rail is shown to be due to the severity of the climate and the suddenly great variations of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. Fournier, J., dissented, and was of opinion that the accident was caused by a latent defect in the rail which was known or ought to have been known to the company, and that a railway company is responsible under the Civil Code, for injuries resulting from such a defect. —Judgment appealed from (M. L. R. 3 Q. Q. 324) reversed. *Canadian Pacific Ry. Co. v. Chalfoux*, xxii., 721.

11. *Railway ticket—Right to stop over.*—By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. *Craig v. Great Western Ry. Co.* (24 U. C. Q. B. 509); *Briggs v. Grand Trunk Ry. Co.* (24 U. C. Q. B. 516); and *Cunningham v. The Grand Trunk Ry. Co.* (9 L. C. Jur. 57; 11 L. C. Jur. 107), approved and followed. Judgment appealed from (4 Ex. C. R. 321) affirmed. *Coombs v. The Queen*, xxvi., 13.

12. *Government railway — Non-feasance—Misfeasance—Public service—Carriers—"The King can do no wrong."*—In 1880, a passenger travelling on the P. E. I. railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, sustained injuries through an accident to the train. — The Exchequer Court found that the railway was in a most unsafe state from the rottenness of the ties, that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of contract to carry the suppliant safely and securely upon his transportation ticket, and awarded damages for the injuries sustained. — *Held*, reversing the judgment appealed from (8 Can. S. C. R. 2), Fournier and Henry, JJ., dissenting, that the establishment of Government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public service created by statute for public convenience, and not to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the non-feasance or misfeasance, wrongs, negligences or omissions of duty of the subordinate officers or agents employed on such railways; that the Crown is

not liable as a common carrier for the safety and security of passengers using such railways. *The Queen v. McLeod*, viii., 1.

13. *Conductor calling "All aboard"*—*Accident to passenger boarding train*—*Contributory negligence*—*Running of trains*—*Tacit license*—*Estoppel*—*Boarding moving train*—*Right of action*.]—Plaintiff, having a first-class ticket by the Intercolonial Railway, intended going home by the mixed freight and passenger train which, on that day, was unusually long and, when it stopped at the station, the forward part of the first-class car was opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was on the platform when the train came in, but did not then get aboard. The conductor (defendant) got off the train and went to a hotel for dinner. While he was absent the train was, without his knowledge, backed down, so that only the second-class car remained opposite the platform. The jury found that the first-class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after dinner, came over hastily (being behind time and therefore in somewhat of a hurry), called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track), and almost immediately the train started.—The 124th regulation prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which was not done in this instance. Plaintiff and a friend were on the platform, and when they heard "all aboard," went towards the cars quickly, but plaintiff, who had a paper box in her hands, in attempting to get on board, caught the hand-rail of the car, slipped owing to the motion of the train and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board. *Held*, affirming the Supreme Court of New Brunswick (19 N. B. Rep. 340; 19 N. B. Rep. 586), that although the plaintiff's contract was with the Crown, the defendant owed to her, as a passenger, a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury. Taschereau and Gwynne, J.J., dissented. — *Per Ritchie, C.J.* There was no obligation on the part of the passengers to go on board the train until it was ready to start or until invited to do so by the intimation from the conductor "all aboard." It was the duty of the conductor to have had his first-class car up in front of the platform. Should circumstances have prevented this, it was his duty to be careful before starting his train to see that sufficient time and opportunity were afforded passengers to board the car in the inconvenient position in which it was placed, and the evidence shewed that the defendant exercised no care in this respect.—*Per Henry, J.* There was no satisfactory proof of contributory negligence on the part of plaintiff. The package she carried was a light one, and such as is often carried by passengers with the knowledge and sanction of railway conductors and managers, and a tacit license is therefore given to passengers to carry such parcels with them into the cars.—The plaintiff violated regulations in attempting to get on the car while in motion. But

the defendant could not shelter himself under those regulations, for when he gave the order "all aboard" he knew, or ought to have known, that the first-class car was away from the platform, and he ought to have advanced the train and stopped it, so that the plaintiff could have entered that car. The conductor was estopped from complaining that the plaintiff did what, by calling "all aboard," he invited her to do. After the notification "all aboard" is given by a conductor, it is his duty to wait a reasonable time for passengers to get to their places.—*Per Taschereau and Gwynne, J.J.*, dissenting. Whether the omission to stop the first-class car at the platform, or the conductor's failure to wait a reasonable time after calling "all aboard" before giving the starting signal were or were not breaches of the defendant's duty, such breaches could not be said to have caused the accident if the plaintiff had not voluntarily attempted to get on the train while it was in motion, which she was not justified in doing. *Hall v. McFadden*, Cass. Dig. (2 ed.) 723.

14. *Train extending beyond platform*—*Accident to passenger*—*Contributory negligence*.]—L. was the holder of a ticket, and passenger on the company's train from Lévis to Ste. Marie, Beauce. When the train arrived at Ste. Marie station the car upon which L. had been travelling was some distance from the station platform, the train being longer than the platform, and L. fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out of the end of the car, the distance to the ground from the steps being about two feet and a half, and in so doing he fell and broke his leg, which had to be amputated. The action was for \$5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence, the Superior Court, the judgment being affirmed by the Court of Queen's Bench, decided in favour of L. and awarded him the full amount of damages claimed. On appeal to the Supreme Court of Canada, *Held*, reversing the judgment appealed from, that in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident was wholly attributable to his own fault in alighting as he did and that, therefore, he could not recover. Fournier, J., dissenting. *Quebec Central Ry. Co. v. Lortie*, xxii., 336.

15. *Injury to passenger in sleeping berth*—*Running of train*—*Negligence*.]—While in a sleeping berth at night a passenger believing that she was riding with her back to the engine, tried to turn around in the berth and, the car going round a curve at the time, she was thrown out on to the floor and injured. In an action against the railway company for damages it was not shewn that the speed of the train was excessive or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed. *Held*, reversing the judgment appealed from, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. *Canadian Pacific Ry. Co. v. Smith*, xxxi., 367.

3. CONDITION OF WAY; WORKS, &C.

16. *Approach*—*Crossings*—*Construction of road*—*Level of crossing*—*Impairing usefulness*

of highway—Liability by user.]—A railway company has no authority to build its road with part of the road bed considerably below the level of the highway unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road and any other company operating it is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it.—Judgments appealed from (18 Ont. App. R. 184) affirmed. *Grand Trunk Ry. Co. v. Sibbold*; *Grand Trunk Ry. Co. v. Tremaine*, xx., 259.

17. Construction of statute—51 Vict. c. 29, s. 262 (D.).—Railway crossings—Packing railway frogs, wing-rails, &c.—Negligence.]—The proviso of "The Railway Act" (51 Vict. c. 29 (D.)), s. 262, s.-s. 4, does not apply to the fillings referred to in the third sub-section, and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails and switches during the winter months. Judgment appealed from (24 Ont. App. R. 183) reversed. *Washington v. Grand Trunk Ry. Co.*, xxviii., 184.

[Affirmed by the Privy Council, 24th February, 1899, (1898) A. C. 275.]

18. Negligence — Grass on siding—Injury to employee.]—For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable for compensation to an employee who is injured in consequence of such growth while walking on the side track. *Wood v. Canadian Pacific Ry. Co.*, xxx., 110.

19. Special leave to appeal — Matter in controversy — Special reasons against judgment in court below—Railways—Overhead bridge — Headway — Car of foreign company—"Used on railway."—51 Vict. c. 29, s. 192 (D.).—Transfers from connecting lines.]—In affirming a judgment for \$500 damages, the Court of Appeal for Ontario (1 Ont. L. R. 168), held that "when a car of a foreign railway company forms part of a train of a Canadian railway company, it is 'used' by the latter company within the meaning of s. 192 of the Railway Act, 51 Vict. c. 29 (D.), so as to make the company liable in damages for the death of a brakeman caused by the car being so high as not to leave the prescribed headway between it and an overhead bridge." On special application for leave to appeal from this judgment, it was urged that the car had been taken over from an American line to which the Act limiting the height of cars in the Dominion could not apply, that the company was by statute obliged to accept and haul the car, that in hauling the car the company could not, at most, be subject to any other than the penalty prescribed by statute, and that, in any case deceased was insured against accidents in the company's association and his representatives could claim no more than \$250 for which he was insured. The application was refused, (Present: Taschereau, Gwynne, Sedgewick, King and Girouard, JJ.) on the ground that a sufficient *prima facie* case for granting special leave for an appeal had not been made out. *Grand Trunk Ry. Co. v. Atchison*, 5th March, 1901.

20. Government railway — Injury to passenger—Kotten ties—Public service.

See No. 100, *infra*.

21. Broken rail — Climatic influences — Latent defect.

See No. 10, *ante*.

22. Derailment of train — Defective bridge — Defective snow-plough—Negligence.

See No. 49, *infra*.

23. Sparks from engine—Rubbish on railway term—Damage by fire—Findings of jury —Evidence—Concurrent findings of courts appealed from.

See NEGLIGENCE, 217.

4. CUSTOMS DUTIES.

24. Customs duties—Exemptions from duty —Street rails for use on railways—Application to street railways.]—The exemption from duty in 50 & 51 Vict. c. 39, item 173, of "steel rails weighing not less than 25 pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways which are subject to duty as "rails for railways and tramways of any form" under item 88. Strong, C.J., and King, J., dissenting. Judgment appealed from (4 Ex. C. R. 262) affirmed. *Toronto Ry. Co. v. The Queen*, xxv., 24.

[On appeal to Privy Council this decision was reversed ([1896] A. C. 551).]

5. EXPROPRIATIONS.

25. Expropriation of land—Abandonment of notice—Enforcing award—Possession—R. S. C. c. 109, s. 88, s.-ss. 26, 31—43 Vict. c. 9, s. 9.]—Per Gwynne and Patterson, JJ., an abandonment of a notice to take lands for railway purposes, under R. S. C. c. 109, s. 8, s.-s. 26, must take place while the notice is still a notice, and before the intention has been exercised by taking the lands.—The proper mode of enforcing an award of compensation, made under the Railway Act, is by an order from the judge.—*Quære*, Whether the Act R. S. C. c. 109, s. 8, s.-s. 31, permits possession to be given before the price is fixed and paid of any land, except land on which some work of construction is to be at once proceeded with. *Canadian Pacific Ry. Co. v. Little Seminary of Ste. Thérèse*, xvi., 600.

26. Expropriation of land — Damages—R. S. C. c. 39, s. 3, s.-s. (e)—Farm crossings—R. S. C. c. 38, s. 16.]—Where land is taken by a railway company for use of gravel, the owner is entitled to compensation only as for farm land, where there is no market for the gravel.—The compensation for damages sustained by reason of anything done under and by authority of R. S. C. c. 39, s. 3, s.-s. (e), or any other Act respecting public works or government railways, includes damages resulting to the land from the operation as well as from the construction of the railway.—The right to have a farm crossing over one of the government railways is not a statutory right, and in awarding damages full compensation for the future as well as for the past for the

want of a farm crossing should be granted.—*Per Gwynne, J.*, dissenting, the owner had the option of demanding, and the government had a like option of giving, a crossing in lieu of compensation, and on the whole case, full compensation had been awarded by the court below. Judgment appealed from (2 Ex. C. R. 11, reversed, and see 52 Vict. c. 38, s. 3.) *Vezina v. The Queen*, xvii., 1.

27. *Expropriation — Government railway — Severance of land — Farm crossings — Compensation.*—When land expropriated for government railway purposes severed a farm the owner, although not at the time entitled to a farm crossing apart from contract, was entitled to full compensation covering the future as well as the past for the depreciation of his land by want of such a crossing. *Gwynne, J.*, dissented on the ground that the owner was entitled to a crossing as a matter of law. Judgment appealed from (2 Ex. C. R. 13, reversed, and see 52 Vict. c. 38, s. 3.) *Guay v. The Queen*, xvii., 30.

28. *Deviation from line located — Extension — Completion of railway — Expropriation of land — Description in map or plan filed.*—42 Vict. c. 9.]—A railway company built its line to the termini mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired, but the company had terminated the representation on the board of directors which, by statute, was to continue during construction and had claimed and obtained from the city exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute. *Held*, affirming the judgment appealed from (11 O. R. 320, 582), that the statutory provisions that land required for a railway shall be indicated on a map or plan filed in the Department of Railways before it can be expropriated applies as well to a deviation from the original line as to the line itself, and the company, having failed to shew any statutory authority therefor, could not take the said land against the owner's consent. *Held*, also, that the proposed extension was not a deviation within the meaning of the statute, 42 Vict. c. 9, s. 8, s.s. 11 (D.)—*Per Ritchie, C.J.*, *Strong, Fournier and Taschereau, J.J.*, that the road authorized was completed as shewn by the acts of the company, and upon such compensation the compulsory power to expropriate ceased.—*Per Gwynne, J.*, that the time limited by the charter for the completion of the road not having expired the company could still file a map or plan shewing the lands in question, and acquire the land under 42 Vict. c. 9, s. 7, s.s. 19. *Kingston & Pembroke Ry. Co. v. Murphy*, xvii., 582.

29. *Expropriation — R. S. Q., art. 516½, ss. 12, 16, 17, 18, 24 — Award — Arbitrators — Jurisdiction — Lands injuriously affected — 43 & 44 Vict. c. 43 (Que.) — Appeal — Amount in controversy.*—On an expropriation respondent, naming his arbitrator, declared he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of \$1,974.25 damages and costs for land expropriated was made under art. 516½, R. S. Q. The demand for expropriation as formulated in the notice to arbitrate was for the width of

the track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action by the company to set aside the award, *Held*, affirming the judgment appealed from (following 15 Q. L. R. 300), that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.—*Strong and Taschereau, J.J.*, doubted if the matter in controversy was within the appellate jurisdiction, but assuming, without deciding, that it could be maintained, concurred in the judgment, dismissing the appeal on the merits. *Quebec, Montmorency & Charlevoix Ry. Co. v. Mathieu*, xix., 426.

30. *Appeal — Jurisdiction — 54 & 55 Vict. c. 25, s. 2 — Prohibition — Expropriation of lands — Arbitration — Death of arbitrator pending award.*—51 Vict. c. 29, ss. 156, 157—*Lapse of time for making award — Statute, construction of.*—Art. 12 C. C.]—The provisions of the second section of the statute, 54 & 55 Vict. c. 25, giving the Supreme Court of Canada jurisdiction to hear appeals in matters of prohibition, apply to such appeals from the Province of Quebec as well as to all other parts of Canada.—In relation to the expropriation of lands for railway purposes, ss. 156 and 157 of "The Railway Act" (51 Vict. c. 29, D.), provide as follows:—"156. A majority of the arbitrators at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made; and, if the same is not made on or before such day, or some other day to which the time for making it has been prolonged, either by consent of the parties or by resolution of the arbitrators, then the sum offered by the company as aforesaid, shall be the compensation to be paid by the company." "157. If the sole arbitrator appointed by the judge, or any other arbitrator appointed by the two arbitrators, dies before the award has been made, or is qualified, or refuses or fails to act within a reasonable time, then in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of the parties, the company and party respectively may each appoint an arbitrator in the place of its or his arbitrator so deceased or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of s. 151 shall apply; but no re-commencement or repetition of the previous proceedings shall be required in any case."—Section 151 provides for the appointment of a third arbitrator either by the two arbitrators or by a judge. *Held*, that the provisions of the 157th section apply to a case where the arbitrator appointed by the proprietor died before the award had been made and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy thus caused and to have the arbitration proceedings continued although the time so fixed had expired without any award having been made or the time for the making thereof having been prolonged. *Shannon v. Montreal Park and Island Ry. Co.*, xxviii., 374.

31. *Eminent domain — Expropriation of lands — Arbitration — Evidence — Findings of fact — Duty of appellate court*—51 *Vict. c. 29 (D.)*—On an arbitration in a matter of the expropriation of land under the provisions of "The Railway Act" the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them. *Held*, reversing the decision appealed from and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded. *Grand Trunk Ry. Co. v. Coupal*, xxviii., 531.

Followed in *Fairman v. City of Montreal* (31 Can. S. C. R. 210). See EXPROPRIATION OF LANDS, 12.

32. *Expropriation of land—Tenants in common — Propriétaires par indivis—Construction of agreement—Misdescription—Plans and books of reference—Condition—Indemnity—Registry laws—Estoppel—R. S. Q. arts. 5163, 5164—Art. 1590 C. C.*—In matters of expropriation where the railway company has complied with the directions and conditions of arts. 5163 and 5164, R. S. Q., as to deposit of plans and books of reference, notice and settlement of indemnity with the owners, or with at least one-third of the owners *par indivis*, of lands taken for railway purposes, the title to the lands passes forthwith to the company for the whole of the property by mere operation of the statute, even without the consent of the other owners *par indivis*, and without the necessity of formal conveyance by deed or compliance with the formalities prescribed by the Civil Code as to registration of real rights.—The provisions of the Civil Code respecting the registration of real rights have no application to proceedings in matters of expropriation of lands for railway purposes under the provisions of the Revised Statutes of Quebec.—Pending expropriation proceedings begun against lands held in common, (*par indivis*), for the purposes of appellant's railway, the following instrument was signed and delivered to the company by six out of nine of the owners *par indivis*, viz.: "Be it known by these presents that we the legatées P. of the Parish of Beaufort, County of Quebec, do promise and agree that as soon as the Q., M. and C. Ry. is located through our land in the parishes of Notre-Dame des Anges, Beaufort and L'Ange Gardien, and in consideration of its being so located, we will sell, bargain and transfer to the Q., M. and C. Ry. Co., for the sum of one dollar, such part of our said land as may be required for the construction and maintenance of the said railway, and exempt the said company from all damages to the rest of the said property and that, pending the execution of the deeds, we will permit the construction of the said railway to be proceeded with over our said land, without hindrance of any kind, provided that the said railway is located to our satisfaction. As witness our hands at Quebec this 11th day of June, 1886." Afterwards, the line of the railway was altered and more than one year elapsed without the deposit of an amended plan and book of reference to shew the deviation from the line as originally located. The

company, however, took possession of the land and constructed the railway across it and, in August, 1889, the same persons who had signed the above instrument granted an absolute deed of the lands to the company for a consideration of five dollars, acknowledged to have been paid, reciting therein that the said lands had "been selected and set apart by the said railway company for the ends and purposes of its railway and being already in the possession of the said railway company since the 11th of June, 1886, in virtue of a certain promise of sale *sous seing privé* by the said vendors in favour of the said company." Neither of the instruments were registered. G. purchased the New Waterford Cove property in 1889 and, after registering his deed, executed by all the owners *par indivis*, brought a petitory action to recover that part of the property taken by the railway company, alleging that the instruments mentioned constituted a donation of the lands and did not come within the operation of arts. 5163 and 5164 R. S. Q. *Held*, that the terms of s.s. 10 of art. 5164, R. S. Q., were sufficiently wide to include and apply to donations; that the instrument in question was not properly a donation, but a valid agreement or *accord* within the provisions of said tenth sub-section, under onerous conditions of indemnity which appeared to have been satisfied by the company; that, as the agreement stipulated no time within which the new plan should be filed and the location appeared to have been made to the satisfaction of the required proportion of the owners, it was sufficient for the company to file the amended plan and book of reference at any time thereafter and that, as the indemnity agreed upon by six out of nine of the owners *par indivis* had been satisfied by changing the location of the railway line as desired, the requirements of art. 5164 R. S. Q., had been fully complied with and the plaintiff's action could not, under the circumstances, be maintained. *Quebec, Montmorency and Charlevoix Ry. Co. v. Gibsons; Gibsons v. Quebec, Montmorency and Charlevoix Ry. Co.*, xxix., 340.

33. *Construction of Railway Act — Tramway for transportation of material—Expropriation—51 Vict. c. 29, s. 114 (D.)—2 Edw. VII. c. 29 (D.)*—The place where materials are found referred to in the one hundred and fortieth section of "The Railway Act" means the spot where the stone, gravel, earth, sand or water required for the construction or maintenance of railways are naturally situated and not any other place to which they may have been subsequently transported.—*Per* Taschereau and Girouard, JJ. The provisions of the one hundred and fourteenth section of "The Railway Act" confer upon railway companies a servitude consisting merely in the right of passage and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction. *Quebec Bridge Co. v. Roy*, xxxii., 572.

34. *Expropriation — Arbitration — Estimation of award — Refusal of costs.*—Under special circumstances, it was held, affirming the decision of the Court of Appeal for Ontario, Gwynne, J., dissenting, that neither party was entitled to costs. *Ontario & Quebec Ry. Co. v. Philbrick*, xii., 288.

See ARBITRATIONS, 28.

35. *Expropriation — Description of land—objection to award—43 & 44 Vict. c. 43, s. 9 (Que.)*—Where no uncertainty exists as to the description of the property, the judgment of the Court of Queen's Bench reversing the Superior Court judgment was set aside. *Beaudet v. North Shore Ry. Co.*, xv., 44.

See ARBITRATIONS, 42.

36. *Obstruction of riparian rights—Award for lands taken — Compensation for beach privileges—Misdescription in award—Tort.*—Adequate descriptions of the expropriated lands are sufficient. — Compensation may be exacted by a riparian owner for the loss of egress and access to a navigable river. *Bigouatte v. North Shore Ry. Co.*, xvii., 363.

See EXPROPRIATION OF LANDS, 21.

37. *Expropriation — Estimating damages—Prospective capabilities of property—Value to owner—Unity of possession — Advantage accruing to paper town — Railway terminus — Set-off.*—Value to the owner and the effect of severing the unity of real estate are proper grounds to consider in estimating compensation.—The advantages of a station terminus and probable town site may be set off on an expropriation for railway purposes. *Paint v. The Queen*, xviii., 718.

See EXPROPRIATION OF LANDS, 22.

38. *Disqualification of arbitrator—44 Vict. c. 43 (Que.)*

See ARBITRATIONS, 9.

39. *Valuation of lands—Town plot—Assessment of damages—Crossings.*

See EXPROPRIATION OF LANDS, 1.

40. *44 Vict. c. 1, s. 18—Powers of Canadian Pacific Ry. Co to take and use foreshore — 49 Vict. c. 32 (B. C.) — City of Vancouver — Right to extend streets to deep water—Crossing of railway — Jus publicum — Implied extinction by statute—Injunction.*

See MUNICIPAL CORPORATION, 110.

6. FARM CROSSINGS.

41. *Farm crossing—Parol agreement—Reliance on statutory provisions—Estoppel—14 & 15 Vict. c. 51, s. 13—Substitution of "at" for "and"—C. S. C. c. 66, s. 13—Construction of statute.*—The company for the purposes of their railway took lands of C., made a verbal agreement with C., through their agent, for purchase at \$662, and also agreed to make 5 farm crossings on C.'s farm, 3 level and 2 under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay and reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a writ-

ten agreement and the purchase money paid. The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction. *Held*, reversing the judgment appealed from (11 Ont. App. R. 287), Ritenie, C.J., dissenting, that the evidence shewed that plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm.—*Held*, also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the master of the court below.—The substitution of the word "at," in C. S. C. c. 66 for the word "and" in 14 & 15 Vict. c. 51, s. 13, is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect. *Brown v. Toronto & Nipissing Ry. Co.* (26 U. C. C. P. 206) overruled. *Canada Southern Ry. Co. v. Clouse*, xiii., 139.

See Nos. 42, 43, *infra*.

42. *Farm crossing—Under crossing—Agreement for cattle pass — Trestle bridge — Embankment.*—An agreement was reduced to writing, in negotiating for lands taken for railway purposes, which had a clause to the effect that the owner of lands taken could remove for his own use all buildings on the right of way, and in the event of construction on the same lot of a trestle bridge of sufficient height to allow the passage of cattle that the company would construct their fences to each side thereof, so as not to impede the passage thereunder.—*Held*, reversing the judgment appealed from (11 Ont. App. R. 306), Ritchie, C.J., dissenting, that under the agreement the only obligation on the company was to maintain a cattle pass so long as the trestle bridge was in existence, and did not prevent the discontinuance of the trestle and substitution of a solid embankment thereof without providing a pass under the embankment. (*Canada Southern Ry. Co. v. Clouse* (13 Can. S. C. R. 139) referred to.) *Canada Southern Ry. Co. v. Erwin*, xiii., 162.

See No. 41, *ante*.

43. *Farm crossings — Servitude — Arts. 540-544 C. C.—Right of way—Grand Trunk Railway of Canada—Interpretation of Statute—"The Railway Act" of Canada, s. 191-16 Vict. c. 37, s. 2—18 Vict. c. 33, s. 4-14 & 15 Vict. c. 51-42 Vict. c. 9, s. 16 (D.)—Constitutional law—Jurisdiction of Provincial Legislature.*—An owner whose lands adjoin a railway subject to "The Railway Act" of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act, and the special statutes in respect of the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than "The Railway Act" of Canada. *Midland Ry. Co. v. Gribble*

([1895] 2 Ch. 827) and *Canada Southern Ry. Co. v. Clouse* (13 Can. S. C. R. 139) [No. 41, ante], referred to.—The Provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of "The Railway Act" of Canada. *Canadian Pacific Ry. Co. v. Corporation of Notre-Dame de Bonsecours* ([1899] A. C. 367) followed. *Grand Trunk Ry. Co. v. Therrien*, xxx., 485.

44. *Farm crossings—Filling in at trestle—Easement—Right of way—User—Prescription.*—A railway passed over N. $\frac{1}{2}$ lots 32, 33 and 34, respectively, 8th concession, North Dumfries, having a trestle bridge over a ravine on 84, near the boundary of 33. G., owner of 33 (except the part owned by the railway company) for a number of years used the passage under the trestle to reach a lane on S. $\frac{1}{2}$ 34 over which he could pass, his predecessor in title (who owned all these lots), having used the same route for the purpose. The company having filled up the ravine, G. applied for injunction to have it re-opened. *Held*, reversing the judgment appealed from (27 Ont. App. R. 64) that such user could never ripen into a title by prescription of the right of way nor entitle G. to a farm crossing on lot 34. *Canadian Pacific Ry. Co. v. Guthrie*, xxxi., 155.

45. *Railway culverts—Fencing—Negligence—Cattle on highway*—51 Vict. c. 29, s. 194—53 Vict. c. 28, s. 2.]—A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a water-course and where cattle went through the culvert into a field and thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. *Taschereau, J.*, dissenting. *Grand Trunk Ry. Co. v. James*, xxxi., 420.

46. *Riparian rights—Access to river—Obstruction of way.*

See No. 68, *infra*.

7. INJURIES TO PERSONS.

47. *Notice at crossing—Negligence—Running trains through town—Contributory negligence—Insurance on life of deceased—Reduction of damages.*—In an action for causing the death of plaintiff's husband by negligence, it was proved that the accident occurred while the train was passing through the Town of Strathroy; that it was going at a rate of over 30 miles an hour; and that no bell was rung nor whistle sounded until a few seconds before the accident. *Held*, affirming the judgment appealed from (13 Ont. App. R. 174), that the company was liable in damages.—For the defence it was shewn that deceased was driving slowly across the track with his head down and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching, when he whipped up his horses and endeavoured to drive across the track and was killed. Against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view. The jury found that there was no contributory negligence. *Held*, per Ritchie, C.J., and Fournier and Henry, J.J., that the finding of the jury should not be disturbed. *Strong*,

Taschereau and Gwynne, J.J., contra.—The life of deceased was insured, and the judge deducted the insurance from the damages assessed. The Divisional Court overruled this, and directed the verdict to stand for the full amount found by the jury. This was affirmed by the Court of Appeal. *Held*, that the judgment appealed from (13 Ont. App. R. 174), in this respect should be affirmed. *Grand Trunk Ry. Co. v. Beckett*, xvi., 713.

[Leave to appeal to Privy Council was refused. In *Grand Trunk Ry. Co. v. Jennings* (13 App. Cas. 800), this case was discussed and approved.]

48. *Negligence—Broken rail—Effect of climate—Latent defects—Arts. 1053, 1675 C. C.*—Where the breaking of a rail is shewn to be due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. *Fournier, J.*, dissenting, on the ground that as the accident was caused by a latent defect in the rail in use, which was known or ought to have been known to the company, the company were responsible. Judgment appealed from (M. L. R. 3 Q. B. 324) reversed. *Canadian Pacific Ry. Co. v. Chalifoux*, xxii., 721.

49. *Defective snow-plough and bridge—Derailment of train—Contributory negligence—Findings of jury—Failure to answer questions—New trial.*—A locomotive engineer in the company's employ was killed through the derailing of a snow-plough and consequent breaking of a bridge. The jury found that the derailing was the proximate cause of the accident; that deceased was not guilty of contributory negligence; that the snow-plough and bridge were defective and that the train crew was insufficient. They answered, "We do not know" to the questions, as to whose negligence caused the accident; whether or not the defects were known to defendant before or at the time of accident, or could have been discovered by careful inspection; whether defendant was aware of insufficiency of the crew; whether different construction of the bridge would have secured the safety of the train; whether deceased knew the train was off the track before it reached the bridge, and if by reasonable care of the deceased or crew, the accident could have been prevented. The court below were equally divided as to necessity for a new trial. The trial judge instructed that the proximate cause was what caused the accident and not that without which it would not have happened. The court below were also divided in opinion on this point. The Supreme Court of Canada ordered the new trial and affirmed the holdings of the judgment appealed from (27 N. S. Rep. 498), in other respects. *Pudsey v. Dominion Atlantic Ry. Co.*, xxv., 691.

50. *Regular depot—Traffic facilities—Railway crossings—Negligence—Walking on line of railway—Trespass—Invitation—License*—51 Vict. c. 29, ss. 240, 256, 273 (D.)—A passenger aboard a railway train stormbound, at a place called Lucan Crossing, on the Grand Trunk Railway, left the train and attempted to walk through the storm to his home a few miles distant. Whilst proceeding along the line of the railway, in the direction of an ad-

jacent public highway, he was struck by a locomotive engine and killed. There was no depot or agent maintained by the company at Lucan Crossing, but a room in a small building there was used as a waiting room, passenger tickets were sold and fares charged to and from this point, and, for a number of years, travellers had been allowed to make use of the permanent way in order to reach the nearest highways, there being no other passage way provided.—In an action by his administrators for damages: — *Held*, reversing the judgment appealed from (24 Ont. App. R. 672), Taschereau and King, JJ., dissenting, that notwithstanding the long user of the permanent way in passing to and from the highways by passengers taking and leaving the company's trains, the deceased could not, under the circumstances, be said to have been there by the invitation or license of the company at the time he was killed, and that the action would not lie. *Grand Trunk Ry. Co. v. Anderson*, xxviii., 541.

51. *Government railways — Injury to employee—Lord Campbell's Act—Art. 1056 C. C.—Exoneraton from liability—R. S. C. c. 38, s. 50.*—Art. 1056 C. C. embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act. *Robinson v. Canadian Pacific Ry. Co.* ([1892] A. C. 481) distinguished.—A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. *Griffiths v. Earl Dudley* (9 Q. B. D. 357 followed.*—In s. 50 of the Government Railways Act (R. S. C. c. 38) providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the minister," the words "notice, condition or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow-servants. *Grand Trunk Ry. Co. v. Vogel* (11 Can. S. C. R. 612) disapproved. An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief Assurance Association, to the funds of which the Government contributed annually \$6,000. In consequence of such contribution a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant; *Held*, reversing the judgment of the Exchequer Court (6 Can. Ex. C. R. 276), that the rule of the association was an answer to an action by his widow under art. 1056 C. C. to recover compensation for his death.*—The doctrine of common employment does not prevail in the Province of Quebec. *The Queen v. Fillion* (24 Can. S. C. R. 482) followed. *The Queen v. Grenier*, xxx., 42.

52. *Operation of passenger trains — Negligence—Injury to passengers in sleeping berth.*—While in a sleeping berth at night a passenger believing that she was riding with her back to the engine, tried to turn around in the berth and, the car going round a curve at the time, she was thrown out on to the floor and injured. In an action against the railway

company for damages it was not shewn that the speed of the train was excessive or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed. *Held*, reversing the judgment appealed from, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. *Canadian Pacific Ry. Co. v. Smith*, xxxi., 367.

53. *Public work—Negligence of Crown servant—50 & 51 Vict. c. 16.*—The Crown is liable for negligence of its servants in the operation of a Government railway. *The Queen v. Martin*, xx., 240.

See NEGLIGENCE, 206.

54. *Defective Air-brakes — Level crossing—Vis major—Operation of railway.*

See No. 99, *infra*.

55. *Government railway—Injury to passenger—Condition of roadbed.*

See No. 100, *infra*.

56. *Operation of railway—Ringing bell and whistling at level crossing—Injury to person using highway.*

See No. 101, *infra*.

57. *Train approaching siding — Bells and whistles—Horses taking fright—Negligence.*

See No. 104, *infra*.

58. *Running trains — Ringing bell — Employee injured in station yard — Workmen's Compensation Act—Contributory negligence.*

See No. 105, *infra*.

59. *Public planked way — Invitation—Imprudence—Negligence—Running of trains.*

See No. 106, *infra*.

60. *Running of trains — Injury to persons and vehicle on highway—Ringing bell, &c—Horse taking fright.*

See No. 107, *infra*.

61. *Ferry landing — Insufficient lighting of wharf—Want of due care—Gates left open.*

See NEGLIGENCE, 85.

62. *Carriage of passengers — Broken rail—Latent defect.*

See No. 10, *ante*.

63. *Packing of frogs, wing-rails, &c.—Personal injuries—Negligence.*

See No. 17, *ante*.

64. *Injury to employee—Negligence of conductor—Authority—Unsatisfactory findings of jury—Interference on appeal.*

See NEGLIGENCE, 212.

65. *Injury to employee—Grass on siding—Negligence.*

See No. 18, *ante*.

66. *Shunting cars—Injury to person using level crossing—Warning—Negligence.*

See No. 112, *infra*.

* See foot note to col. 967, *ante*.

66a. *Defective ways—Lock on switch—Assessment of damages.*

See No. 113, *infra*.

67. *Operation of railway — Defective machinery—Contributory negligence — Disobedience of orders—Kunning rules.*

See No. 119, *infra*.

67a. *Overhead bridge—Headway — Foreign car transferred—Liability of Canadian company—Injury to brakeman standing on top of car higher than permitted by regulations.*

See No. 19, *ante*.

67b. *Heavily loaded train — Running up-grade—Sparks from engine—Negligence.*

See No. 69, *infra*.

8. INJURIES TO PROPERTY.

68. *Riparian rights — Navigable river—Access—Obstruction—Damages — 43 & 44 Vict. c. 43 (Que.)—Action.]—A riparian owner can recover damages from a railway company for injury and diminution of value to his property by reason of obstruction of access between it and a navigable river and where the company has not complied with the provisions of 43 & 44 Vict. c. 43, s. 7, s.-ss. 3-5 (Que.), the owner has a remedy by action. The judgment appealed from (4 Dor. Q. B. 258; 12 Q. L. R. 205) was reversed. *Pion v. North Shore Ry. Co.*, xiv., 677.*

[This judgment was affirmed on further appeal (14 App. Cas. 612) by the Privy Council.]

69. *Running of trains—Negligence—Sparks from locomotive—R. S. C. c. 109, s. 27—51 Vict. c. 29, s. 287 — Limitation of actions—"Damage."]* — Running a train too heavily laden on an up-grade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railway track, was set on fire and destroyed. *Held*, affirming the judgment appealed from (M. L. R. 5 Q. B. 122; 34 L. C. Jur. 55), that there was sufficient evidence of negligence to make the company liable for the damage caused by the fire.—*Per Gwynne, J.* The "damage" referred to in R. S. C. c. 109, s. 27, and 51 Vict. c. 29, s. 287, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it; and therefore the prescription of six months referred to in said sections is not available in an action like the present. *North Shore Ry. Co. v. McWillie*, xvii., 511.

70. *Leased lines — Damage to lands—Control of works—Liability of lessee—Evidence.]—Action on the case against the Grand Trunk Ry. Co. for depriving plaintiff of access from his property to the street by building an embankment. Defendants claimed the work was done by the P. & C. Lake Ry. Co. who were the parties, if any, liable. The Grand Trunk Ry. Co. had acquired the use of the P. & C. Lake Ry. Co.'s line and its president and officers owned most of the latter company's stock; the construction was paid for by Grand Trunk Ry. Co., the engineer in charge of the work*

got his instructions from and the roadmaster and foreman were in the employ of the Grand Trunk Ry. Co. *Held*, affirming the judgment appealed from, that the evidence established the liability of the defendants. *Grand Trunk Ry. Co. v. Fitzgerald*, xix., 359.

71. *Construction of railway—Authority to use streets—Nuisance—Damages—16 Vict. c. 100; 39 Vict. c. 2, s. 2 (D.)—Right of action.]—By 16 Vict. c. 100, the North Shore Ry. Co. was authorized to construct a railway to connect Quebec and Montreal, with the restriction that the railway was not to be brought within the limits of the city without the permission expressed by a by-law.—In July, 1872, the city council, by resolution, had given the company liberty to choose one of the streets to the north of St. Francis street in exchange for St. Joseph street, which had been at one time chosen for that purpose. In 1874 the city council were informed by the company that the line of railway had been located in Prince Edward street, and the company asked the council to take the necessary steps to legalize the line, but the corporation did not take any further action in the matter. In 1875, the company being unable to carry on its enterprise, the railway was transferred to the Province of Quebec, and the transfer ratified by 39 Vict. c. 2 (D.), the name of the railway being changed. The Legislature authorized the construction of the road to deep water in the port of Quebec; declared that the railway should be a public work and should be made in such places and in such manner as the Lieutenant-Governor-in-Council should determine and appoint as best adapted to the general interest of the province. After the passing of this Act the Provincial Government caused the road to be completed, and it crossed part of the City of Quebec from its western boundary by passing through Prince Edward street along its entire length.—The road was completed in 1876. In 1878, L., owner of houses on Prince Edward street, sued the city for damages on account of the construction and working of the railway. *Held*, affirming the judgment appealed from, that he had no right of action against the corporation for damages suffered by the construction and working of the railway in question. If the corporation gave the authorization required by 16 Vict. c. 100, s. 3, there was a complete justification of the acts complained of. The imposing of terms was discretionary with the corporation. But the corporation never acted on the demand to legalize, and never authorized, the building of the railway through Prince Edward street. If the corporation could have prevented the Government from constructing the railway in the streets of the city, in the face of the provisions of 39 Vict. c. 2, L. could also have prevented it. His recourse, if any, was not against the corporation but against the Provincial Government, the owners of the railway. *Lefebvre v. City of Quebec*, Cass. Dig. (2 ed.) 176.*

72. *Construction of railway — Prescription—Commencement—Continuing damage—Tortious act—Liability for act of contractor.]—The prescription of a right of action for injury to property, through the construction of a railway, runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time.—A company*

building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner not authorized by the contract. *Kerr v. Atlantic and North-West Ry. Co.*, xxv., 197.

73. *Defective machinery—Negligence—Sparks from engine or "hot-box"—Damages by fire—Evidence—Burden of proof—C. C. art. 1053—Questions of fact.*—In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from a defective engine or hot-box of a passing train, in which the court appealed from held that there was not sufficient proof that the fire occurred through the fault or negligence of the company and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. Judgment appealed from (*Q. R. 9 S. C. 319*) affirmed. *Sénézac v. Central Vermont Ry. Co.*, xxvi., 641.

[Followed in *Grand Trunk Ry. Co. v. Rainville* (29 Can. S. C. R. 201), No. 74, *infra*.

74. *Negligence—Findings of jury—Evidence—Concurrent findings of courts appealed from.*—In an action against a railway company for damages in consequence of plaintiffs' property being destroyed by fire alleged to be caused by sparks from an engine of the company the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiffs' property which, in case of emission of sparks or cinders, would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiffs' property. A verdict against the company was sustained. *Held*, affirming the judgment appealed from (25 Ont. App. R. 242), and following *Sénézac v. Central Vermont Ry. Co.* (26 Can. S. C. R. 541); *George Matthews Co. v. Bouchard* (28 Can. S. C. R. 580); that the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial court and Court of Appeal, it should not be disturbed by a second appellate court. *Grand Trunk Ry. Co. v. Rainville*, xxix., 201.

See NEGLIGENCE, 121, and No. 73, *ante*.

75. *Running of trains—Sparks from engine—Fire communicated from company's premises—14 Geo. III. c. 78, s. 86 (Imp.)—Questions for jury.*—Action against the company for negligence causing destruction of respondent's buildings by fire from one of their locomotives. The freight shed of the company was first ignited by the sparks and the fire extended to respondent's premises. The following questions were submitted and answers given by the jury:—"Q. Was the fire occasioned by sparks from the locomotive? A. Yes. Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes. Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on

duty. Q. Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A. Out of order."—Verdict for plaintiff for \$800 was unanimously sustained by the Queen's Bench Division. *Held*, affirming the judgment appealed from, Henry, J., dissenting, 1. That the questions were proper questions to put to the jury and that there was sufficient evidence of negligence on the part of the appellant's servant to sustain the finding. 2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused by the burning property of the railway company, ignited by fire escaping from the engine, coming directly in contact therewith. 3. The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6 & 7, is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act, 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence. *Canada Southern Ry. Co. v. Phelps*, xiv., 132.

76. *Government railway—43 Vict. c. 8—Damage from overflow of water—Boundary ditches.*—*Held*, affirming the judgment appealed from (2 Ex. C. R. 396), that under 43 Vict. c. 8, confirming the agreement of sale to the Crown of the Rivière du Loup branch of the Grand Trunk Railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879, unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear, by the evidence relied on, to have been caused through the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim of damages must be dismissed. *Morin v. The Queen*, xx., 515.

77. *Sparks from locomotive engine—Defective construction—Destruction of timber.*

See No. 103, *infra*.

78. *Negligence in approaching crossing—Ringing bell, &c.—Injury to persons and vehicle—Horse taking fright.*

See No. 107, *infra*.

79. *Parkdale subways—Misfeasance—46 Vict. c. 45 (Ont.)—46 Vict. c. 24 (D.)—Liability for injury to property.*

See TORT, 2.

80. *Public work—Construction of trestles—Interference with private property—Injury caused by the works—Damages peculiar to the property in question—Compensation—Eminent domain.*

See PUBLIC WORK, 4.

81. *Location of permanent way—Fencing—Laying out boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Riparian*

rights—Possession — Acquisitive possession—
Tenant by sufferance—Emphyteutic lease—Do-
maine direct—Domaine utile—Right of action
—Adding parties.

See No. 153, *infra*.

9. LEASE OR SALE OF RAILWAY.

82. Agreement for purchase — Hire of rolling stock—Arbitration—Consent reference—*appeal*.]—B., a contractor for building the E. & H. Ry., and, practically, owner thereof, negotiated with the solicitor of the C. S. Ry. for the sale to the latter of the E. & H. Ry. when built. While negotiations were pending B. went to California, and the agents who looked after the affairs of the E. & H. Ry. in his absence applied to the manager of the C. S. Ry. for some rolling stock to assist in construction. The manager of the C. S. Ry. was willing to supply the rolling stock on execution of the agreement for sale of the road which was communicated to B., who wrote a letter to the manager in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars and any other assistance or advantage you may have given Mr. Farquier (the agent)."—The negotiations for the purchase of B.'s railway by the C. S. Ry. having fallen through, an action was brought by the company against B. and the E. & H. Ry. Co., for the hire of the rolling stock which was resisted by B. on two grounds, one that the rolling stock was supplied in pursuance of the negotiations for sale, which had fallen through by no fault of B. and the other, that if plaintiffs had any right of action it was only against the E. & H. Ry. Co., and not against him.—By consent the matter was referred to arbitration of a County Court Judge, with provision in the submission that proceedings should be same as on reference by order of court, and that there should be a right of appeal from the award as under R. S. O. (1877) c. 50, s. 189.—The arbitrator gave an award in favour of plaintiff; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits but upheld the award. The Supreme Court of Canada *Held*, affirming the Court of Appeal, that the arbitrator was justified in awarding the amount to the plaintiff, and that B., as well as the company, was liable therefor. *Bickford v. Canada Southern Ry. Co.*, xiv., 743.

83. Lease of railway—Damage to lands—Control of works—Liability of lessee.

See No. 70, *ante*.

84. Lease of railway—Transfer of corporate rights—Foreign corporation.

See No. 141, *infra*.

85. Railway embankment—Trespass—Nuisance—Continuing damages—Right of action.

See DAMAGES, 76.

86. Location of permanent way — Fencing—Laying out boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Riparian

rights—Possession — Acquisitive possession—
Tenant by sufferance—Emphyteutic lease—Do-
maine direct—Domaine utile—Right of action
—Adding parties.

See No. 153, *infra*.

10. MUNICIPAL AID; CONTROL OF STREETS, &C.

87. Municipal aid—Subscription for shares—Breach of agreement — Special damages—*Arts. 1065, 1070, 1073, 1077, 1840, 1841 C. C.*]—A municipal corporation agreed to take shares in a railway company, by way of aiding the enterprise, to be paid for by an issue of debentures, and subsequently without any valid cause or reason, refused to issue said debentures. In an action solely for damages for their neglect to issue said debentures. *Held*, affirming the judgment appealed from (M. L. R. 1 Q. B. 46), Ritchie, C.J., and Gwynne, J., dissenting, that the corporation was liable under arts. 1065, 1073, 1840 and 1841 C. C., for damages for breach of the covenant apart from any liability in respect of the debentures themselves. *County of Ottawa v. Montreal, Ottawa and Western Ry. Co.*, xiv., 193.

88. By-law — Conditions of bonus aid — Municipal debentures — Future conditions—*Municipal Code, art. 982.*]—A debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to the debentures, free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the future keeping up of the road, &c. Judgment appealed from (M. L. R. 2 Q. B. 160) affirmed, Fournier, J., dissenting. *Parish of St. Césaire v. McFarlane*, xiv., 738.

89. Municipal aid — Bonus by-law—Conditions of prior agreement—"All necessary accommodation"—Specific performance—Damages for non-performance—Registration of by-law—44 Vict. c. 24, s. 28 (Ont.)—46 Vict. c. 52 (Ont.)—*Municipal Act.*]—By an agreement between the E. & H. Ry. Co., the Town of Chatham agreed to pass a bonus by-law in aid of construction on specified conditions. The by-law as passed and approved by the ratepayers did not contain all the conditions of the agreement. In an action to compel delivery of debentures, defendant pleaded non-performance of conditions of agreement as justification for withholding the debentures and by way of counterclaim prayed specific performance of these conditions. *Held, per* Ritchie, C.J., and Strong, Fournier, and Henry, JJ. (Taschereau and Gwynne, JJ., *contra*), that the title to the debentures did not depend upon prior performance of conditions in the agreement not included in the by-law, but upon performance of those in the by-law alone, and the latter having been complied with the debentures should issue. *Per* Fournier, that the debentures should nevertheless be withheld until the damages for non-performance of the conditions in the agreement were paid or secured. *Per* Ritchie, C.J., and Strong and Henry, JJ. (Fournier, J., *contra*), that specific performance was not an appropriate remedy in such a case and the defendants could only claim damages for non-performance. *Per* Ritchie, C.J., and Strong and

Fournier, J.J., that the claim of defendants for damages could be disposed of in this action under the counterclaim and there should be a reference to assess the same. *Per* Henry, J., that the evidence did not justify a reference and the counterclaim should be dismissed with a reservation of the defendant's rights.—One of the conditions in the agreement to be performed by the company was "to construct at or near the corner of Colbourne and William streets (in Toronto), a freight and passenger station with all necessary accommodation, connected by switches, sidings or otherwise with said road" upon the council of the town passing a by-law granting a necessary right of way. *Held*, that such condition was not complied with by the erection of a station building not used, nor intended to be used, and for which proper officers, such as station master, ticket agent, &c., were not appointed. Strong, J., dissenting. *Per* Strong, J., that the condition only called for the construction of a building with the required accommodation and connections and did not amount to a covenant to run the trains to such station or to make any other use of it. *Held*, also, that the words "all necessary accommodation" in the condition, required that grounds and yards sufficient for freight and passenger traffic, in case the station should be used, should be provided.—The Act incorporating the railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act. *Held*, that such special Act was not restrictive of the Municipal Act and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. *Held*, also, that all defects of form in the by-law were cured by 44 Vict. c. 24, s. 28, providing for registration of by-laws and requiring an application to quash to be made within three months after such registration. Judgment appealed from (14 Ont. App. R. 32) affirmed. *Bickford v. Town of Chatham*, xvi, 235.

90. *Aid in construction—Municipal bonus—Condition in bond—Re-payment on company ceasing to be independent—Breach.*—The County of H., in 1874, gave to the H. & N. W. Ry. Co. a bonus of \$65,000 to be used in the construction of their railway, and the company executed a bond, one of the conditions of which was that the bonus should be re-paid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." In 1888 the H. & N. W. Ry. Co. became merged in the G. T. R. and, as was held on the facts proved by the trial judge and the Divisional Court, ceased to be an independent line. *Held*, affirming the decision appealed from (19 Ont. App. R. 252), that there had been a breach of the above condition and the county was entitled to recover from the G. T. R. Co. the whole amount of the bonus as unliquidated damages under said bond. *Grand Trunk Ry. Co. v. County of Halton*, Cass. Dig. (2 ed.) 91.

91. *Bonus by-law—Validating Act—Remedy at law—Mandamus.*—By 18 Vict. c. 33, the G. J. Ry. Co. amalgamated with the G. T. Ry. Co., but, not having been built within the specified time, its charter expired. In May, 1870, an Act to revive the charter gave it a slightly different name, and made some changes, and a by-law to aid the company by a bonus introduced in the County Council of Peterborough was read twice only, and, although it was declared that the ratepayers should vote on the by-law on 16th November,

it was on the 23rd November that they voted to grant a bonus, construction to be commenced before 1st May, 1872. At the time of the voting there was no power in the municipality to grant a bonus. On 15th February, 1871, 34 Vict. c. 48 (O.) was passed declaring the by-law as valid as if it had been read a third time, and passed after the Act, and another Act, c. 30, was passed giving power to municipalities to aid railways by granting bonuses, and in 1874, 37 Vict. c. 43 (O.) was passed, amending and consolidating the Acts relating to the company. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 34 Vict. c. 48 (O.) In 1872 the council served formal notice, repudiating liability under the by-law. Work commenced in 1872, and time for completion was extended by 39 Vict. c. 71 (O.) No interest or sinking fund had been collected by the county, and no demand was made for the debentures until 1879, when the company applied for mandamus for the issue and delivery of them to the trustees. *Held*, affirming the judgment appealed from, that the effect of 34 Vict. c. 48 (O.), apart from any effect it might have of recognizing the existence of the railway company, was not to legalize the by-law, but merely to make it as valid as if it had been read a third time, and as if the municipality had had power to give the bonus, and, there being other defects in the by-law not cured by the statute, the appellants could not recover the bonus. — *Per* Gwynne, J., (Fournier and Taschereau, J.J., concurring): As the undertaking by the corporation in by-law is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated, the only way, in Ontario, in which delivery to trustees on behalf of the company can be enforced, before it shall have acquired a right to the actual receipt and benefit by fulfilment of the conditions, is by an action under the statutes in force then regulating proceedings in actions, and not by summary process by motion for mandamus.—*Per* Henry, J.: If appellants had made out a right to a bill for performance of a contract ratified by the legislature, they would not have the right to ask for the present writ of mandamus. (See 45 U. C. Q. B. 302; 6 Ont. App. R. 339). *Grand Junction Ry. Co. v. County of Peterborough*, viii, 76.

92. *By-law in aid of right of way—Guarantee of cost of expropriation—Powers of council*—44 & 45 Vict. c. 40, s. 2 (Que.)

See MUNICIPAL CORPORATION, 105.

93. *Bonus—Submission of by-law—Premature vote—Error in copy*—36 Vict. c. 48 (Ont.)—Ont. Mun. Act. ss. 226, 231—Judicial functions of council.

See MUNICIPAL CORPORATION, 106.

94. *Municipal aid—Warden de facto—Signing of debentures—Condition precedent—Admission by co-defendant—Onus of proof*—44 & 45 Vict. c. 2, s. 19 (Que.)

See MUNICIPAL CORPORATION, 83.

95. *Municipal corporation—By-law—Railway aid—Subscription for shares—Debentures—Division of county—Erection of new separate municipalities*—34 Vict. c. 30 (Que.)—Assessment—Sales of shares at discount—Action on redemption of comptes—Trustee—Debtor and creditor.

See MUNICIPAL CORPORATION, 62.

96. *Bonus by-law — Exemption from municipal rates—School taxes.*

MUNICIPAL CORPORATIONS, 10.

97. *Municipal regulations — Operation of tramway—Use of streets — Crossings—Powers — By-law or resolution—Construction of statute.*

See TRAMWAY, 6.

98. *Crossing highway—Control of streets—Compensation to municipality.*

See No. 152, *infra*.

11. OPERATION OF RAILWAY.

99. *Negligence — Failure to stop at crossing—Defective air-brakes—C. S. C. c. 166, ss. 142, 143—Vis major.]—At a point where the G. T. Ry. crosses the G. W. Ry. on a level crossing, a Grand Trunk train, on which plaintiff was conductor, before crossing, was brought to a stand. The signal-man in charge, an employee of the G. W. Ry. Co., dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the tracks appellant's train, which had not been stopped, owing to defective air-brakes, ran into the Grand Trunk train and injured plaintiff. It was shewn that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand brakes, in case of the air-brakes giving way. *Held*, affirming the judgment appealed from (2 Ont. App. R. 64.), that the appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped, by hand brakes in case of the air-brakes giving way. That there was no contributory negligence on the part of the plaintiff as he had brought his train to a full stop, and only proceeded to cross appellant's track when authorized to do so by the officer in charge of the semaphore, who was a servant of the Great Western Railway Company. *Great Western Ry. Co. v. Brown*, iii., 159.*

[Compare *Canadian Pacific Ry. Co. v. Roy* ([1902] A. C. 220).]

100. *Negligence — Tort — Petition of right — Government railway—Non-feasance—Misfeasance—Public servants — Carriers—"The King can do no wrong."—In 1880, a passenger travelling on the P. E. I. railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, sustained injuries through an accident to the train. — The Exchequer Court found that the railway was in a most unsafe state from the rottenness of the ties, that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of contract to carry the suppliant safely and securely upon his transportation ticket, and awarded damages for the injuries sustained.—*Held*, reversing the judgment of the Exchequer Court of Canada appealed from (8 Can. S. C. R. 2), Fournier and Henry, JJ., dissenting, that the establishment of Government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statu-*

tory provisions, for the benefit and advantage of the public, is a branch of the public service created by statute for public convenience, and not to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the non-feasance or misfeasance, wrongs, negligences or omissions of duty of the subordinate officers or agents employed on such railways; that the Crown is not liable as a common carrier for the safety and security of passengers using such railways. *The Queen v. McLeod*, viii., 1.

See CROWN, 47-55 and 109-122.

101. *Level crossing—Negligence — Bell — Whistle—Accident from horse taking fright—C. S. C. c. 66, s. 104 — Finding of jury — Evidence.]—Held*, affirming the judgment appealed from (8 Ont. App. R. 482), that C. S. C., c. 63, s. 104, must be construed as enuring to the benefit of persons using highways crossed by a railway on the level for injuries to the person or property from neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by the statute, whether or not such injuries arise from actual collision or, as in this case, by a horse near the crossing taking fright at the appearance or noise of the train.—The jury, in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "Yes." *Held*, though the question was indefinite, the answers to the questions as a whole, viewed in connection with the judge's charge and the evidence, warranted the verdict. *Grand Trunk Ry. Co. v. Rosenberger*, ix., 311.

[Followed in *Grand Trunk Ry. Co. v. Sibbald*; *Grand Trunk Ry. Co. v. Tremayne* (20 Can. S. C. R. 259), No. 107, *infra*.]

102. *Negligence — Running of trains — Sparks from engine—Proper care—Use of wood or coal for fuel—Evidence—Findings of jury—New trial.]—R's barn about 200 feet from the N. B. Ry. Co's line, was destroyed by fire, caused, as alleged, by sparks from an engine. In an action to recover damages, it appeared that the fuel used by the company over this line was wood; that coal was less apt to throw out sparks; that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the company did not use reasonable care in running the engine, but in what the want of such care consisted, did not appear by their finding. *Held*, reversing the judgment appealed from (23 N. B. Rep. 323), that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial. *New Brunswick Ry. Co. v. Robinson*, xi., 688.*

103. *Running of trains — Sparks from engine—Jury drawing inference — Presumption — Cause of fire — Defective engine — Negligence — Use of wood or coal for fuel — Evidence — Officers of corporation — R. S. O. (1877) c. 50, s. 136 — Company's books.]—A train of the company passed plaintiff's farm about 10.30 a.m., and another train*

passed about noon. Some time after the second train passed it was discovered that the timber and wood on plaintiff's land were on fire, which fire spread rapidly after being discovered and destroyed a quantity of the standing timber. It was shewn that the engine which passed at 10.30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous. *Held*, affirming the judgment appealed from (14 Ont. App. R. 309), that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed. *Held*, also, Henry, J., dissenting, that the locomotive superintendent and locomotive foreman of a railway company are "officers of the corporation" who may be examined as provided in R. S. O. (1877) c. 50, s. 136, and the evidence of such officers as to the conditions of the respective engines and the difference as to danger from fire between a wood-burning and a coal-burning engine, taken under said section, was properly admitted on the trial of this cause; and certain books of the company containing statements of repairs required, on these engines among others, were also properly admitted in evidence without calling the persons by whom the entries were made. *Canada Atlantic Ry. Co. v. Mowley*, xv., 145.

104. *Running of trains—Horses taking fright—Bells—Whistling—Negligence—Approaching siding.*—At a place which had no station nor highway crossing the company had a siding for loading lumber. Deceased was at the platform with a team taking away lumber when a train coming out of a cutting frightened the horses, which dragged deceased to the main track where he was killed by the train. *Held*, reversing the judgment appealed from (27 N. B. Rep. 59), that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding. *New Brunswick Ry. Co. v. Vanwart*, xvii., 35.

105. *Running trains—Ringing bell—Negligence—Accident to employee—Defective ways—Performance of duty—Contributory negligence—Workmen's Compensation Act.*—A switch-tender was obliged in the ordinary discharge of his duty to cross a track in the station yard to get to a switch and walked along the ends of ties which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. The jury found negligence in the management of the engine in not ringing the bell and in going faster than the law allowed, but that the accident could have been avoided by the exercise of reasonable care. *Held*, that the Workmen's Compensation for Injuries Act of Ontario, applies to the C. S. Ry. Co., notwithstanding it has been brought under the operation of the Government Railways Act of the

Dominion.—*Held*, also, Gwynne and Patterson, JJ., dissenting, that there was no such contributory negligence as would relieve the company from liability for the injury caused by improper conduct of their servants. *Canada Southern Ry. Co. v. Jackson*, xvii., 316.

106. *Running of trains—Approaches to station—Planked way—Public use—Negligence—Imprudence.*—The approach to a station from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass round the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go round the rear, when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow, *Held*, Fournier and Gwynne, JJ., dissenting, that the company had neglected no duty which it owed to the deceased as one of the public.—*Per Strong and Patterson, JJ.*, while the public was invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass round a train in motion.—*Per Tascherneau, J.*, the death of deceased was caused by his own negligence.—Judgment appealed from (16 Ont. App. R. 37) affirmed. *Jones v. Grand Trunk Ry. Co.*, xviii., 696.

107. *Running of trains—Approaching crossing—Ringing bell, &c.—Frightening horses—Injury to persons and property.*—A railway company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over a dangerous part of the highway on to the track though there was no contact between the train and the carriage or its occupants. *Grand Trunk Ry. Co. v. Rosenberger* (9 Can. S. C. R. 311) followed.—Judgment appealed from (18 Ont. App. R. 184) affirmed. *Grand Trunk Ry. Co. v. Sibbald*; *Grand Trunk Ry. Co. v. Tremayne*, xx., 259.

See No. 101, ante.

108. *Running trains—Crossings—Ringing bell—Sounding whistle—Negligence—Verdict—Motion for judgment on verdict—New trial—Court of Review—34 Vict. c. 4, s. 10, and 35 Vict. c. 6, s. 13 (Que.)*—W. obtained a verdict from a jury in the District of Iberville, for injuries sustained by being run over on 21st Nov., 1876, by a locomotive engine of the company, while he was crossing the railway track on a public highway. The motion for judgment on the verdict was not made before the Superior Court, District of Iberville, but was drawn up and placed on the record while the case was pending before the Court of

Review, at Montreal. That court, on motion, directed a new trial, but the Queen's Bench, on appeal, held that from the evidence in the record it appeared that the accident occurred through the gross negligence of the employees of the appellant in not ringing the bell and sounding the whistle, as they were bound to do, when approaching the crossing, and that the verdict rendered by the jury ought, therefore, to be maintained and the motion for a new trial rejected. *Held*, Taschereau and Gwynne, JJ., dissenting, that the judgment appealed from (2 Dor. Q. B. 131) should be affirmed.—*Per* Taschereau and Gwynne, JJ., dissenting. — The Superior Court, sitting in review, at Montreal, has no jurisdiction, either under 34 Vict. c. 4 s. 10, or 35 Vict. c. 6, s. 13 (Que.), to determine a motion for judgment upon the verdict in a case tried in one of the rural judicial districts, and therefore the Court of Queen's Bench had no power to enter judgment for the respondent upon the verdict.—2. The Court of Review, on a motion for new trial in the first instance, having in its discretion granted same, judgment should not have been reversed on appeal. *Grand Trunk Ry. Co. v. Wilson*, Cass. Dig. (2 ed.) 722.

109. *Railway and traffic bridge—Running of trains—“Stop” notice—Bridge approaches—Res ipsa loquitur—Reckless conduct—Disobedience by employees—Estoppel.*—A railway company breaking rules made to insure public safety upon a railway and traffic bridge is guilty of negligence and liable for damages occasioned through the disobedience of orders or recklessness of its employees. *Canadian Pacific Ry. Co. v. Lawson*, Cass. Dig. (2 ed.) 729.

110. *Railway company — Loan of cars — Reasonable care—Breach of duty—Negligence—Risk voluntarily incurred—“Volenti non fit injuria.”*—A lumber company had railway sidings laid in their yard for convenience in shipping lumber, over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway thereupon sending their locomotives and crew to the respective sidings in the lumber yard, and bringing away the cars to be despatched from their depot as directed by the bills of lading. *Held*, that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk of injury to them.—On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted the jury found that “the deceased voluntarily accepted the risk of shunting” and that the death of the deceased was caused by defendant's negligence in the shunting, in giving the car too strong a push. *Held*, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the
s. c. d.—39

maxim “*volenti non fit injuria*” had no application. *Smith v. Baker* ([1891] A. C. 325) applied. Judgment appealed from (22 Ont. App. R. 292) affirmed. *Canada Atlantic Ry. Co. v. Hurdman*, xxv., 205.

111. *Running of trains — Approaching crossing—Warning—Shunting—Railway Act, 1888, s. 256.*—Section 256 of the Railway Act, 1888, providing that “the bell with which the engine is furnished shall be rung, or the whistle sounded at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway” applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic.—Judgment appealed from (25 Ont. App. R. 437) affirmed. *Canada Atlantic Ry. Co. v. Henderson*, xxix., 632.

112. *Negligence — Railway accident — Shunting cars — Warning — Proof of negligence.*—B., in driving towards his home on a night in September, had to cross a railway track between nine and ten o'clock, on a level crossing near a station. Shortly before a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made up, and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal. *Held*, affirming the judgment appealed from, Gwynne, J., dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line. *Lake Erie & Detroit River Co. v. Barclay*, xxx., 360.

Compare No. 117, *infra*.

113. *Operation of railway—Defective ways—Lock on switch—Finding of negligence—Evidence.*—The absence of a lock or guard on a railway switch is a defect in the construction of the ways, works, machinery or plant connected with the construction of works sufficient to support findings of negligence by a jury. *Balch & Peppard v. Romburgh*, 12th June, 1900.

114. *Negligence — Railway company — Injury to passengers in sleeping berth.*—S., an elderly lady, was travelling on a train of the Canadian Pacific Railway Company from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding

with her back to the engine she tried to turn around in the berth and, the car going around a curve at the time, she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages, it was not shewn that the speed of the train was excessive nor that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. *Canadian Pacific Railway Co. v. Smith*, xxxi., 367.

115. *Railway culverts — Fencing — Negligence—Cattle on highway—51 Vict. c. 29, s. 194—53 Vict. c. 28, s. 2.*—A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse and where cattle went through the culvert into a field and thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. *Taschereau, J.*, dissenting. *Grand Trunk Railway Co. v. James*, xxxi., 420.

116. *Operation of trains — Negligence — Sparks from railway engine — Evidence — Findings of jury—Defective construction.*—Fire was discovered on J.'s farm a short time after a train of the Grand Trunk Railway had passed it drawn by two engines, one having a long, and the other a short, or medium, smoke-box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a larger smoke-box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine and they believed it was from that with the short smoke-box; and that the use of said box constituted negligence in the company which had not taken the proper means to prevent emission of sparks. *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 689) that the latter finding was not justified by the evidence and the verdict for plaintiff at the trial was properly set aside. *Jackson v. Grand Trunk Ry. Co.*, xxxii., 245.

117. *Backing trains in station yard—Negligence—Findings of jury—Operation of railway—Lights on train—Evidence.*—A conductor in defendant's employ while engaged in the performance of the duty for which he was engaged at the Windsor Station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train nor was there any person stationed there to give warning of the movement of the train. *Held*, affirming the judgment appealed from (Q. R. 11 K. B. 394), that by omitting to have a light on the rear end of the train the railway company failed in its duty and this constituted *prima facie* evidence of negligence. *Canadian Pacific Ry. Co. v. Boisseau*, xxxiii., 424.

Compare No. 112, *ante*.

118. *Operation of trains — Negligence — Collision—Duty of engineman—Rules—Con-*

tributory negligence.—By rule 232 of the Grand Trunk Ry. Co., "conductors and enginemen will be held responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains even if not provided for by the rules." By rule 52, enginemen must obey the conductor's orders as to starting their trains unless such orders involve violation of the rules or endanger the train's safety, and rule 65 forbids them to leave the engine except in case of necessity. Another rule provides that a train must not pass from double to single track until it is ascertained that all trains due which have the right of way have arrived or left. M. was engineman on a special train which was about to pass from a double to a single track and when the time for starting arrived, he asked the conductor if it was all right to go, knowing that the regular train passed over the single track about that time. He received from the conductor the usual signal to start and did so. After proceeding about two miles his train collided with the regular train and he was injured. In an action against the company for damages in consequence of such injury; *Held*, affirming the judgment of the Court of Appeal, that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone, that he was bound to obey the conductor's order to start the train, having no reason to question its propriety, and he was, therefore, not guilty of contributory negligence in starting as he did. *Grand Trunk Ry. Co. v. Müller*, xxxii., 454.

119. *Operation of railway — Defective machinery — Contributory negligence — Disobeying orders—Running rules.*—The judgment appealed from (8 B. C. Rep. 393) affirmed the order of the trial judge withdrawing the case from the jury on the grounds, in effect, that a conductor who had been injured through an accident caused by a defective brake-mast, had been guilty of contributory negligence in failing to see that his train was in proper condition before starting it and thus disobeying running rules. The Supreme Court affirmed the judgment appealed from. *Fawcett v. Canadian Pacific Ry. Co.*, xxxii., 721.

120. *Running trains — Bells and whistles at crossings—Coming round curves.*

See No. 47, *ante*.

121. *Speed on up-grade — Sparks from engine—"Damage."*

See No. 69, *ante*.

122. *Running of trains—Duty of conductor —Intercolonial Railway regulations—Calling "all aboard"—License—Estoppel—Accident to passenger boarding train — Contributory negligence.*

See NEGLIGENCE, 209.

123. *Derailement of train — Broken rail — Latent defect—Injury to passenger.*

See No. 10, *ante*.

124. *Derailement of train—Defective bridge and snow-plough — Insufficient crew—Negligence.*

See No. 49, *ante*.

125. *Negligence — Accident at crossing — Notice of approach.*

See APPEAL, 225.

126. *Traffic facilities—Regular depot—Persons walking along permanent way.*

See No. 50, ante.

127. *Negligence—Excessive speed—Prompt action.*

See TRAMWAY, 1.

128. *Running of passenger trains — Sleep- ing berth—Injury to passenger.*

See No. 52, ante.

129. *Municipal regulations — Operation of tramway—Use of streets—Crossings—Powers — By-law or resolution — Construction of statute.*

See TRAMWAY, 6.

130. *Transfer of foreign car — Overhead bridge — Headway — Liability of Canadian company.*

See No. 19, ante.

131. *Highway crossings — Negligence in giving warning—Contributory negligence—Nonsuit—Refusal of special leave for an appeal to the Supreme Court.*

See APPEAL, 334.

12. SUBSIDIES.

132. 51 & 52 Vict. c. 91, ss. 9, 14 (Que.)—*Interpretation—Art. 19, R. S. Q.—Railway subsidy — Discretionary power of Lieutenant-Governor-in-Council—Petition of right—Misappropriation of subsidy moneys by order-in-council.*—Where money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown no trust is imposed enforceable against the Crown by petition of right.—The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vict. c. 91 (Que.), the Lieutenant-Governor-in-Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order-in-council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said c. 91, 51 & 52 Vict., enacting that "it shall be lawful," &c., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and order-in-council, and built the railway in accordance with the Act 51 & 52 Vict. c. 91, and the provisions of the Railway Act of Canada, 51 Vict. c. 29, and they claimed to be entitled to the sum of \$49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by order-in-council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties and signed a receipt for the balance of \$6,500 due on account of the first subsidy. The petition of right was dismissed. *Held*, affirming the judgment appealed from, Taschereau and Sedgewick, JJ., dissenting, that the statute and documents relied on did not create a liability on the part

of the Crown to pay the money voted to the appellant company, enforceable by petition of right; but assuming it did the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy. *Hereford Ry. Co. v. The Queen*, xxiv., 1.

133. *Railway subsidy — Dominion Lands Act — Reservation in grant.*—By an equal division of opinion, the Supreme Court affirmed the decision of the Exchequer Court (8 Ex. C. R. 83) by which it was held that lands granted as subsidy to railways under 53 Vict. c. 54 (D.), were subject to the existing regulations respecting reservation of baser minerals in the grants thereof, notwithstanding that there was no reference thereto in the orders-in-council allotting the lands to the railway, and that the grant was expressed in the statute to be a free grant subject merely to costs of survey. *Calgary & Edmonton Ry. Co. v. The King*, 29th April, 1903.

[Leave to appeal to the Privy Council was granted, July, 1903.]

134. *Action — Conductio indebiti — Répétition de l'indu — Fictitious claims—Misrepresentation—Evidence—Onus probandi—Art. s. 1947, 1048, 1140, C. C.—Railway subsidies—54 Vict. c. 88 (Que.)—Insolvent company—Construction of railroad by new company—Payment of claims by Crown—Transfer by payee.*

See ACTION, 14.

13. TAXES.

135. *Assessment and taxes—Tax on railway — N. S. Railway Act — Exemption — Mining company — Construction of railway — R. S. N. S. (5 ser.) c. 53.—By R. S. N. S. (5 ser.) c. 53, s. 99, s.s. 30, the road, bed, &c., of all railway companies in the province is exempt from local taxation. By s. 1 the first part of the Act, from ss. 5 to 33 inclusive, applies to every railway constructed and in operation or thereafter to be constructed under the authority of any Act of the legislature, and by s. 4, part 2, applies to all railways constructed under authority of any special Act and to all companies incorporated for their construction and working. By s. 5, s.s. 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway. *Held*, reversing the decision appealed from (24 N. S. Rep. 496), Gwynne, J., dissenting, that part one of this Act applies to all railways constructed under provincial statutes and is not exclusive of those mentioned in part two; that a company incorporated by an Act of the legislature as a mining company with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coal from the mines to the place of shipment and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act (49 Vict. c. 45 [N.S.]) to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as*

well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part second of c. 53, R. S. N. S. 5 ser., entitled 'of railways,' is a railway company within the meaning of the Act; and that the reference in 49 Vict. c. 145, s. 1, to part two does not prevent said railway from coming under the operation of the first part of the Act. *International Coal Co. v. County of Cape Breton*, xxii., 305.

136. *Municipal corporation—Railways—Taxation—By-laws—Construction of statute—Voluntary payment—Action en répétition—29 Vict. c. 57, s. 21 (Can.)—29 & 30 Vict. c. 57 (Can.)*—The statute 29 Vict. c. 57, (Can.), consolidating and amending the Acts and ordinances incorporating the City of Quebec, by s.-s. 1 of s. 21, authorizes the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactories, occupations, business, arts, professions or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised or in operation in the city; and all persons by whom the same are or may be carried on, exercised or put in operation therein, either on their own account or as agent for others: and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation." *Held*, that the general words of the statute quoted are sufficiently comprehensive to authorize the imposition of a business tax upon railway companies; and further that the power thus conferred might be validly exercised by the passing of a by-law to impose the tax in the same general terms as those expressed in the statute. Judgment of the Court of Queen's Bench (Q. R. 8 Q. B. 246) affirmed. *Canadian Pacific Ry. Co. v. City of Quebec*; *Grand Trunk Ry. Co. v. City of Quebec*, xxx. 73.

137. *Exemption from taxes—Bridges and tracts—Navigable waters—40 Vict. c. 29, ss. 326, 327 (Que.)—Municipal boundary—43 & 44 Vict. c. 62 (Que.)*.

See ASSESSMENT AND TAXES, 41.

138. *Municipal tax—St. John, N. B., city assessment—52 Vict. c. 27, s. 21 (N.B.)—Alteration of statutory form—Arbitrary rating—Appeal*.

See ASSESSMENT AND TAXES, 9.

139. *Municipal corporation—By-law—Assessment—Local improvements—Agreement with owners of property—Construction of subway—Benefit to lands*.

See MUNICIPAL CORPORATION, 126.

14. TELEGRAPH LINES.

140. *Telegraph lines—Foreign corporation—Monopoly—Public policy—Restraint of trade*.

See COMITY.

15. TRAFFIC ARRANGEMENTS.

141. *Agreement with foreign company—Lease of road for term of years—Transfer of*

corporate rights.—The Canada Southern Ry. Co., by its charter and amendments thereto, has authority to enter into agreement with any other railway company with respect to traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879 it is authorized to enter into traffic arrangements and agreements for the management and working of the railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years. *Held*, reversing the decision appealed from (21 Ont. App. R. 297), that authority to enter into an arrangement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Ry. Co. is itself protected. *Michigan Central Rd. Co. v. Wealleans*, xxiv., 309.

142. *Carriage of goods—Connecting lines—Contract for through transit—Warehousing—Bailment—Joint tortfeasors—Loss after transit*.

See No. 3, ante.

143. *Defective construction of roadbed—Level of crossing—Approaches to crossing—Impairing highway—Liability of companies using railway*.

See No. 16, ante.

144. *Transferring foreign cars—Overhead bridge—Headway—Injury to brakeman—Liability of Canadian company*.

See No. 19, ante.

16. OTHER MATTERS.

145. *Issue of bonds—39 Vict. c. 57 (Q.),—Condition precedent—Certificate of engineer—Parol evidence—Onus probandi.*—The L. & K. Ry. Co. incorporated in 1869 [32 Vict. c. 54 (Q.)], to construct a railway a distance of 90 miles, was authorized by that Act to issue bonds for construction, limited by 36 Vict. c. 45 (Q.), to \$3,000,000 in amount but without limitation of time, and without restriction as to length of the railway. In 1874, 37 Vict. c. 23 (Q.), declared that debentures to the amount of \$280,000 had already been issued, and limited the future issuing of bonds to £300,000 stg., to be issued:—1st, issue £100,000 at once; 2nd, issue £100,000 when 45 miles should have been completed and in running order, as certified by the government inspecting engineer, and 3rd, issue £100,000 as soon as 30 additional miles—all 75 miles—should have been completed, with the same privilege for the three issues. In 1875, 39 Vict. c. 57 amended the condition as to the third issue and enacted "so soon as the rails and fastenings required for the completion of the remaining 45 miles or thereabouts of the company's line shall have been provided, then the remaining 1,000 bonds of £100 each, to be termed the third

issue, may be issued by the company." The preamble declared: "Whereas it appears that a total length of 45 miles of the company's line having been completed, a first and second issue each of £100,000 of the company's debentures have been made."—In March, 1881, the railway was sold by the sheriff and brought by the Q. C. Ry. Co., for \$195,000. In April, 1881, the City of Quebec filed an opposition *afin de conserver* for \$218,099, the amount of 300 debentures of £100 sterling and interest of the second series issued on 25th January, 1875, payable 1st January, 1894, and for payment of which opposants alleged the railway was hypothecated. The Q. C. Ry. Co., also opposants in the case, contested the opposition of the city, and claimed the issue of the bonds of the second issue held by appellant was illegal. At the trial no certificate was produced but the government engineer stated that he had reported to the minister that there were only 43½ miles completed, and the secretary of the company testified that the total length of railway certified by the government engineer as being completed and in running order had never exceeded 43½ miles. The trial judge found that there were only 43½ miles completed and held the bonds of the second issue invalid. This judgment was affirmed by the Queen's Bench. *Held*, reversing the judgment appealed from (Ritchie, C.J., and Strong, J., dissenting), that the effect of 39 Vict. c. 57, is to make the bonds therein mentioned good, valid and binding upon the company, although the conditions precedent specified in 37 Vict. c. 23, might not have been fulfilled when they were issued.—*Per Fournier and Henry, JJ.*, that as there was evidence that a certificate or report had been given, oral evidence of the contents of the certificate or report was inadmissible and therefore respondents had failed to prove the illegality of the second issue. *City of Quebec v. Quebec Central Ry. Co.*, x., 563.

[The Privy Council allowed leave to appeal in this case, but the appeal was not prosecuted.]

146. *Consolidated Railway Act, 1879, 42 Vict. c. 9—Special Act—Canadian Pacific Railway, 44 Vict. c. 1—Powers to build beyond terminus.*—The Canadian Pacific Ry. Co. have power, under their charter, to extend their line from Port Moody, in British Columbia, to English Bay. (Henry, J., dissenting). *Canadian Pacific Ry. Co. v. Major*, xiii., 233.

147. *Official arbitrators—Intercolonial railway extension—Damages—42 Vict. c. 8.*—Petition of right for damages by the I. C. Ry. extension destroying appellant's road and compelling it to sell plant, &c., at a loss. A demurrer argued before Richards, C.J., was allowed on the ground that the only remedy was by reference to the official arbitrators (2 Ex. C. R. 433). On a reference to the official arbitrators the special terms were that "Whereas, the company claimed damages by reason of the construction of the I. C. Ry., and requested a reference to the official arbitrators under the statutes in that behalf: 1. That the company shall, before the matter is entered upon before the arbitrators, furnish to the Government a statement of the various claims classifying separately each kind of claim. 2. That the Government admit liability to the extent by law bound to make compensation. 3. That the arbitrators shall deal with each separate kind

of claim separately, reporting findings as to the facts connected therewith, and compensation (if any) which should be made. 4. That either party shall be at liberty to make this submission a rule of the Exchequer Court pursuant to 42 Vict. c. 8 (D.), and to proceed under the provisions of said Act before that court with respect to the award, or any part thereof. 5. That any judgment, order, rule or decision of the Exchequer Court in the premises may be appealed from to the Supreme Court pursuant to s. 9 of the Act. The H. C. Ry. Co. lodged a claim stating the following claims for compensation:—1. Total loss as a chartered property possessing exclusive privileges within the city, with all its plant and real and personal properties, the estimated value of which was at the date of the Government taking possession of the track the sum of \$260,000. 2. Damage for the dividing of the road into two portions rendering each valueless, and thus, in other words, destroying the whole value \$260,000. 3. Damages actually done to the crossing for loss in having to sacrifice horses, plant and properties which were sacrificed in consequence, and for general depreciation in value of their real property, and for loss of the charter and the privileges and rights guaranteed under it by the Provincial Legislature, \$260,000. 4. Interest at 6% per annum on the amount to be allowed for damages from the time of breaking up the track (17th May, 1876).—The matter was heard on the submission and on 27th August, 1880, the following award was made. "1. We find with regard to the first item of the claim, that the company are not entitled to recover for the loss of their railroad and its plant and real and personal properties, because that railroad was neither totally or partially lost by any actual interference of the Government with the company's property. 2. We find, with regard to the second item of the claim, that the company are not entitled to be paid any compensation, because the Government have not "divided the railroad into two portions, rendering each valueless," or destroyed the value of the railroad. 3. We find, with regard to the third item of the claim, that the company is not entitled to any compensation, because the Government did no actual damage to the crossing, and because the company were not obliged to sacrifice horses, plant, or properties, in consequence of any act of the Government, and did not suffer any depreciation in the value of their real estate within the meaning of 31 Vict. c. 12, and did not lose their charter and the privileges and rights guaranteed under it by any act of the Government. 4. We find, with regard to the fourth item of the claim, that nothing is due to the company for interest.—On appeal Henry, J., gave a judgment for \$8,000. (2 Ex. C. C. 449.) The Supreme Court held, Henry, J., dissenting, that an appeal of the H. S. Ry. Co. should be dismissed with costs, and an appeal by the Crown should be allowed with costs. *Halifax City Ry. Co. v. The Queen*, Cass. Dig. (2 ed.) 37.

148. *Constitutional law—Legislative jurisdiction—Portage extension R. R. V. Railway—Reference under 51 Vict. c. 29, s. 19—51 Vict. c. 5 (Man.)—Railway Act, 1888 (D.) ss. 306 & 307—R. S. C. c. 109, s. 121.*—Under 51 Vict. c. 5 (Man.) the railway commissioner was constructing the Portage extension of the R. R. V. Railway, from Winnipeg to Portage-la-Prairie, in Manitoba, and

made application to the Railway Committee of the Privy Council of Canada under s. 173 of the Railway Act of 1888 (D.), for approval of the place at which and the mode by which it was proposed to cross the Pembina Mountain branch of the Can. Pac. Ry. The following question was submitted:—Is the said statute of Manitoba, in view of the provision of c. 109, R. S. C., particularly s. 121 thereof, and in view of the Railway Act of 1888, particularly ss. 306 & 307, valid and effectual so as to confer authority on the railway commissioner in said statute of Manitoba mentioned, to construct such a railway as the said Portage extension of the R. R. V. Ry. crossing the Can. Pac. Ry., the Railway Committee first approving of the mode and place of crossing, and first giving their directions as to the matters mentioned in ss. 174, 175 & 176 of the said Railway Act?—The Court was unanimously of opinion that the said statute of Manitoba was valid and effectual so as to confer authority on the railway commissioner in the said statute of Manitoba mentioned, to construct such a railway as the Portage extension of the R. R. V. Ry. crossing the Can. Pac. Ry., the Railway Committee first approving of the mode and place of crossing and first giving their directions as to the matters mentioned in ss. 174, 175, & 176 of the said Railway Act. *In re Portage extension of the Red River Valley Railway*, Cass. Dig. (2 ed.) 487.

149. *Title to land—Tenant for life—Conveyance to railway company by—Railway Acts—C. S. C. c. 66, s. 11, s.-s. 1—24 Vict. c. 17, s. 1.*—By C. S. C. c. 66, s. 11 (Railway Act), all corporations and persons whatever, tenants in tail or for life, *grévés de substitution*, guardians, &c., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent . . . seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company), all or any part thereof; and any contract, &c., so made shall be valid and effectual in law. *Held*, affirming the decision appealed from (19 Ont. App. R. 265), that a tenant for life is authorized by this Act to convey to a railway company in fee, but the company must pay to the remainderman or into court the proportion of the purchase money representing the remainderman's interest. *Midland Ry. of Canada v. Young*, xxii., 190.

150. *Findings of jury—Answers to questions—New trial—Negligence—Railway company—Act of incorporation—Change of name.*—Where it appeared on the argument before the Supreme Court of Canada, that the jury had not properly answered some of the questions submitted to them at the trial, a new trial was ordered. [NOTE.—In other respects the judgment of the Supreme Court of Nova Scotia (27 N. S. Rep. 498) was affirmed.] *Pudsey v. Dominion Atlantic Ry. Co.*, xxv., 691.

151. *Constitutional law—Powers of Canadian Parliament—Prohibited contract—Consolidated Railway Act, 1879.*—For the reasons given by the judgment appealed from, (Q. R. 8 Q. B. 555), the Supreme Court of Canada affirmed the judgment appealed from which held, that the "Consolidated Railway Act, 1879," s. 19, s.-s. 16,

the legislative jurisdiction of the Parliament of Canada, which, having power to legislate on railway matters, could also legislate on all incidents required to carry out the objects it had in view connected with and primarily intended to assist in carrying out such principal object; that the capacity of directors was such an object, essentially connected with the internal economy of a railway company; that a contract prohibited by statute is void although not specially stated to be so in the statute which merely provides a penalty against an offender, and that, where the president of a railway company, subject to that Act, entered secretly into partnership with contractors for the construction of the railway, no action could be maintained upon the partnership contract by him against his partners. *Macdonald v. Riordon*, xxx., 619.

152. *Railway—Highway crossing—Control of streets—Compensation to municipality—Terminus "at or near" point named.*—Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road. A charter authorized construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the Counties of Vaudreuil, Prescott and Russell. *Held*, that if it were necessary the railway could pass through the County of Carleton, in which the City of Ottawa is situated, though it was not named. *Held*, also, that in this Act the words "at or near the City of Ottawa," meant "in or near" said city.—Judgment of the Court of Appeal (4 Ont. L. R. 56), affirming the judgment at the trial (2 Ont. L. R. 336) affirmed. *City of Ottawa v. Canada Atlantic Ry. Co.*; *City of Ottawa v. Montreal & Ottawa Ry. Co.*, xxxiii., 376.

153. *Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Riparian rights—Possession—Acquisitive prescription—Tenant by sufferance—Arts. 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 C. C.—Art. 77 C. P. Q.—14 & 15 Vict. c. 51—25 Vict. c. 61, s. 15—Findings of fact—Assessment of damages—Emphyteutic lease—Domaine direct—Domaine utile—Alienation—Right of action—Adding parties.*—A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines, but the railway fencing was placed, at some of the disputed points, above the water-line, although the company could not have the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream *ad medium flum*, and, after the registration of the deed to the company, sold the rest of his property including water rights, mills and dams constructed in the stream to the defendant's *auteur*, describing the property sold as "including that part of the river which is not included in the right of way, &c." The plaintiffs never operated their line of railway but, immediately on its completion, under powers conferred by their charter, and The Railway

to another company and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas (1) that the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) that the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by permitting P. to retain possession of the strip of land in question and the river *ad medium flum*; (3) that by ten years' possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years and (4) that, by thirty years' adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question. On appeal the Supreme Court, *Held*, 1. That the description in the deed to the railway company included, *ex jure nature*, the river *ad medium flum aquæ* as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance. 2. That the possession of the strip of land and the waters and bed of the river *ad medium flum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under art. 2251 C. C., but merely an occupation as tenant by sufrance upon which no such prescription could be based.—3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed.—4. That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years' prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company.—5. That the acquisitive prescription of thirty years under art. 2242 C. C. could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property which he had failed to deliver *animo domini* nor in good faith.—The judgment appealed from was reversed on the questions of law as summarized, *Davies, J., dubitante*, but the findings, on confictory testimony in respect of damages, made by the trial judge were not disturbed on the appeal.—On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was *Held*, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs' rights in respect of the railway, reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of action *au pétitoire* as owners of the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees.

Semble, that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

154. *Statutory powers to borrow—Mortgage of railway—Sale of rights—Ultra vires.*
See MORTGAGE, 19.

155. *False bill of lading—No goods shipped—Accepted draft with bill attached—Advance on consignment—Fraud of agent—Liability of company.*

See PRINCIPAL AND AGENT, 2.

156. *Organization of company—Subscription of stock—Allotment—Notice—Liability of subscriber.*

See COMPANY, 34.

157. *Passes—Conveyance of voters to polls—Free transportation—Corrupt acts.*

See ELECTION LAW, 50.

158. *Contract for continuous possession of Government railway—Breach by officers in assertion of supposed right—Damages—37 Vict. c. 16 (D.).*

See TORT, 1.

159. *Construction of tramway—Use of traction engine—Steam engine—Breach of contract.*

See CONTRACT, 5.

160. *Construction trains—Damages—Engineer's certificate—Condition precedent—Want of diligence—Laches.*

See CONTRACT, 51.

161. *Rolling stock and materials—Unpaid vendor—Immoveables by destination—Priority of mortgage—Receiver in possession—Privileged claim—Current earnings—Current expenses.*

See LIEN, 3.

162. *Advances to insolvent company—Pledge of railway property—Fraudulent preference—Priority.*

See LIEN, 7.

163. *Municipal by-law—Special assessments—Drainage—Powers of councils as to additional necessary works—Ultra vires resolutions—Executed contract.*

See MUNICIPAL CORPORATION, 90.

164. *Construction contract—Condition precedent to payment—Certificate of engineer.*

See CONTRACT, 69.

165. *Mining claim—Registered description—Error—Certificate of improvements—Adverse action—R. S. B. C. c. 135, s. 28.*

See MINES AND MINERALS, 8.

166. *Capacity of directors—Partnership with contractor—Powers of Canadian Parliament—Prohibited contract—The Consolidated Railway Act, 1879.*

See CONSTITUTIONAL LAW, 30.

RATABLE CONTRIBUTION.

Water lots—Accretion to lands—After acquired property — Falsa demonstratio—Discharge of mortgage.

See MORTGAGE, 52.

RATEPAYER.

Suit against school trustees—Taxing costs —Locus standi of ratepayer.

See APPEAL, 179.

AND see ASSESSMENT AND TAXES—DRAINAGE —MUNICIPAL CORPORATIONS.

RATIFICATION.

1. Execution of deed—Agreement to compound with debtor—Estoppel.

See DEBTOR AND CREDITOR, 5.

2. Rescission of contract—Delays in bringing action—Laches—Estoppel—Waiver.

See VENDOR AND PURCHASER, 26.

3. Principal and agent—Promoters of company—Agent to solicit subscriptions—False representations—Benefit.

See COMPANY LAW, 24.

REAL PROPERTY.

Gas pipes — Fixtures — Assessment—Exemption from taxes—Title to portion of highway.

See ASSESSMENT AND TAXES, 13.

AND see IMMOVEABLE PROPERTY—TITLE TO LAND.

REAL PROPERTY ACTS.

See REGISTRY LAWS—TITLE TO LANDS.

RECAPTION.

See SAISIE GAGERIE.

RECEIVER.

Of stolen property—Unlawful appropriation —Simultaneous acts—Appropriation by bailee or trustee.

See CRIMINAL LAW, 13.

AND see ASSIGNMENTS—WINDING-UP ACT.

REDEMPTION (DROIT DE REMERE.)

Title to land — Sale — Right of redemption —Effect as to third parties—Pledge—Delivery and possession of thing sold.

See PLEDGE, 8.

AND see MORTGAGE — SALE, S3-94 — SCIRE FACIAS.

REFEREE.

Agreement respecting lands — Boundaries — Referee's decision — Bona fide — Arbitration—Arts. 941-945 and 1341 et seq. C. C. P.
See ARBITRATIONS, 18.

AND see PRACTICE AND PROCEDURE, 123-127.

REFERENCE.

1. Master's report—Exceeding authority.] —The decision of the Supreme Court of Nova Scotia (19 N. S. Rep. 341) confirming the report of a master on a reference, was reversed on the ground that the master had exceeded his authority and reported on matters not referred to him. *Doull v. McIlreith*, xiv., 739.

2. Opinions on constitutional matters—54 & 55 Vict. c. 25—Legislative jurisdiction.

See CONSTITUTIONAL LAW, 22.

3. Master's report—Assessment of damages —Joint tort feors—Severance of damages—Reasons for report.

See PRACTICE AND PROCEDURE, 124.

4. Reference to master — Vendor and Purchaser Act—Admission of evidence—Appeal from certificate—Final judgment—Appeal to Supreme Court of Canada.

See APPEAL, 199.

AND see PRACTICE AND PROCEDURE, 123-127.

REFERRED CASES.

"Judicial District Act," 1879 (B. C.)— "Better Administration of Justice Act," 1878 (B. C.)—42 Vict. c. 12 (1879), (B. C.)

See CONSTITUTIONAL LAW, 1.

REGISTRY LAWS.

1. ONTARIO, 1-9.

2. QUEBEC, 10-22.

3. NOVA SCOTIA, 23-27.

4. NEW BRUNSWICK, 28.

5. BRITISH COLUMBIA, 29-30.

6. NORTH-WEST TERRITORIES, 31-33.

7. TRADE MARKS, 34.

See, also, COPYRIGHT — PATENT OF INVENTION—SHIPS AND SHIPPING—TITLE TO LANDS—TRADE MARKS.

1. ONTARIO.

1. Equitable title — Registered deed—Constructive notice — Actual notice — Parol agreement.]—The 81st section, R. S. O. (1877) c. 111, does not apply to a case where the party registering an instrument affecting lands has notice of an equitable lien, charge or interest in or upon the lands, even although it may have been created by parol agreement. Judgment appealed from (9 Ont. App. R. 429), affirmed. *Rose v. Peterkin*, xiii., 677.

2. *Trespass — Damages — Easement — Equitable interest—Registration of by-law — Notice—Registry Act.*—R. S. O. (1877) c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests.—If the owner of land gives permission to the municipality to construct a drain through it, the municipality, after the work has been done, has an interest in the land to which the registry laws apply whether the agreement conveys the property, creates an easement or is a mere license which has become irrevocable, and if there has been no by-law authorizing the land to be taken such interest is, under the said section, ineffectual as against a registered deed executed for value without notice. *Ross v. Hunter* (7 Can. S. C. R. 289) distinguished.—Judgment appealed from (21 Ont. App. R. 395) affirmed. *City of Toronto v. Jarvis*, xxv., 237.

3. *Mortgage — Agreement to charge lands — Statute of frauds—Registry.*—The owner of an equity of redemption in mortgaged lands, called the Christopher farm, signed an agreement which his solicitor wrote on one of his letter forms under the printed words "Dear Sir," his own name being at the bottom on the left side and he made an affidavit, as subscribing witness, to have it registered. In an action arising out of this agreement it was contended that the solicitor was not a subscribing witness, but only the person to whom the letter was addressed. *Held*, affirming the judgment appealed from (22 Ont. App. R. 175), that the solicitor signed the agreement as a witness and the registration was, therefore, regular, but if not, as the document was upon the registry a subsequent purchaser had actual notice by which he was bound notwithstanding the informality in the proof of execution, which did not make the registration a nullity.—*Held*, per Taschereau, J., that the agreement did not require attestation and if the solicitor was not a witness it should have been indorsed with a certificate by a County Court Judge as required by R. S. O. (1887) c. 114, s. 45, and as it had been registered the court would presume that such certificate had been obtained. *Rooker v. Hoofstetter*, xxvi., 41.

4. *Priority — Postponement of mortgage — Failure to register agreement — Assignee in good faith without notice.*

See MORTGAGE, 41.

5. 44 Vict. c. 24, s. 28 (Ont.)—*Registration of by-law—Defects cured.*

See RAILWAYS, 89.

6. *Subsequent mortgage — Priority — Bar of dower — Release of annuity—Surplus proceeds of mortgage sale.*

See MORTGAGE, 58.

7. *Chattel mortgage—55 Vict. c. 26 (O.)—Agreement not to register — Void mortgage—Possession by creditor.*

See CHATTEL MORTGAGE, 21.

8. *Public highway — Registered plan—Dedication — User — Construction of statute—Retrospective statutes — Estoppel—46 Vict. (O.) c. 18.*

See HIGHWAYS, 2.

9. *Agreement charging lands — Statute of Frauds — Registration — Proof of execution.*
See NOTICE, 4.

2. QUEBEC.

10. *Deed of gift inter vivos—Registration—Subsequent deed—Arts. 806, 1592 C. C.]—Where the character of an unregistered donation of lands was subsequently changed by a registered deed shewing that the intention was to transfer lands as a *dation en paiement*, the conveyance cannot be set aside for want of registration of the original deed of gift *inter vivos*. Judgment appealed from (M. L. R. 6 Q. B. 316) affirmed. *Lacoste v. Wilson*, xx., 218.*

11. *Title to land — Life estate — Substitution—Privileges and hypothecs — Preferred claim — Prior incumbrances.] — Held*, per Taschereau, J., that art. 2172 of the Civil Code of Lower Canada, as interpreted by the statute, 29 Vict. c. 25, applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate. *Vadeboncoeur v. City of Montreal*, xxix., 9.

12. *Railway—Expropriation of land—Title to land—Tenants in common—Propriétaires par indivis — Construction of agreement — Misdescription—Plans and books of reference — Satisfaction of condition as to indemnity — Estoppel—R. S. Q. arts. 5163, 5164—Art. 1590 C. C.]—The provisions of the Civil Code of Lower Canada respecting registration of real rights have no application to proceedings in matters of the expropriation of lands for railway purposes under the provisions of the revised statutes of Quebec. *Quebec, Montmorency & Charlevoix Ry. Co. v. Gibsons; Gibsons v. Quebec, Montmorency & Charlevoix Ry. Co.*, xxix., 340.*

13. *Title to land — Substitution — Acceptance by institute—Parent and child—Rights of children not yet born—Revocation of deed—Prescription — Bona fides—Recital in deed—Presumption against purchaser—Arts. 930, 2191, 2193, 2202, 2207, 2251, 2253 C. C.]—As good faith is required for the ten years' prescription under the Civil Code, that prescription cannot be invoked against a substitution which has been duly registered, such registration being sufficient to constitute any third party who might subsequently purchase from the institute a holder in bad faith.—Judgment appealed from (Q. R. 5 Q. B. 490) reversed. *Meloche v. Simpson*, xxix., 375.*

[Leave to appeal to Privy Council refused.]

14. *Interdiction — Marriage laws — Dower — Sheriff's sale — Warranty — Succession—Renunciation — Interdiction.]—The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed and must also contain a description sufficient to identify the lands sought to be affected.—A sale by the sheriff under execution against a debtor in possession of an immoveable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of art. 2116 of the Civil Code. *Rousseau v. Burland*, xxxii., 541.*

AND see RENUNCIATION.

15. *Marriage covenant — Universal community — Don mutuel — Registry laws — Arts. 807, 819, 1411 C. C.*—*Construction of contract.*—A marriage contract contained the following clause:—"Les futurs époux se sont faits et se font par ces présentes au survivant d'eux ce acceptant, donation viagère, mutuelle, égale et reciproque de tous les biens meubles et immeubles acquêts, conquêtes, propres et autres biens généralement quelconques qui se trouveront être et appartenir au premier mourant au jour de son décès, de quelque nature qu'ils soient, et a quelque lieu qu'ils soient situés, pour par le dit survivant en jouir en usufruit sa vie durant, à sa caution juratoire et gardant viduité." It was admitted that the only thing affected consisted of property belonging to the community. *Held*, affirming the judgment appealed from, that the donation was one within the provisions of art. 1411 C. C. and, as such, did not require registration, as the clause is divisible and the stipulation in question as to universal community merely a simple marriage covenant and not subject to the rules and formalities applicable to gifts. *Huot v. Bienvenu*, xxxiii., 370.

16. *Sheriff's sale of lands—Seizure super non domino et non possidente—Art. 632 C. C. P.—Arts. 2090, 2091 C. C.—Registration of deed.*—Arts. 2090 and 2091 C. C. refer to a valid seizure and sale and cannot be invoked against the registration of a deed of retrocession. *Dufresne v. Dixon*, xvi., 596.

See *SHERIFF*, 6.

17. *Adverse possession of land—Acquisitive prescription — Priority of title — Constructive notice.*—A purchaser of land is charged with notice of a prior registered conveyance. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

See *TITLE TO LAND*, 8.

18. *Pledge of railway property — Fraudulent preference—Priority.*

See *LIEN*, 7.

19. *Sale by sheriff — Sheriff's deed — Registration of—Absolute nullity.*

See *SALE*, 68..

20. *Title to land — Entail — Life estate — Fiduciary substitution — Privileges and hypotheses — Mortgage by institute — Preferred claim — Prior incumbrancer — Vis major — Practice — Sheriff's sale — Sheriff's deed — Chose jugée — Parties — Estoppel — Deed poll—Improvements on substituted property.*

See *SUBSTITUTION*, 6.

21. *Scire facias — Title to land — Annulment of letters patent — Tender on taking action — Sale of pledge — Vente à réméré — Concealment of material facts—Arts. 1274-1279 R. S. Q.—Registration — Transfer of Crown lands—Art. 1007 C. P. Q.—Art. 1553 C. C.*

See *CROWN*, 93.

22. *Registered deed — Description of lands — Cadastral plans and descriptions—Notice—Adverse possession—Bona fides—Prescription.*

See *TITLE TO LAND*, 87

3. NOVA SCOTIA.

23. *Abstract of title — Visible incumbrance—Notice—R. S. N. S. (4 ser.), c. 79, ss. 9, 19 — Trespass — Easement — Party wall — Deed — Conveyance.*—The action was for trespass by R. against H., for erecting a wall over and upon the south wall or cornice of appellant's building, piercing holes, &c. H. pleaded special leave and license, for valuable consideration paid by him, and an equitable rejoinder that plaintiff and those through whom he claimed had notice of this easement at the time of their conveyances. In 1859, C., who then owned R.'s property, granted by deed to H., privileges of piercing the wall, carrying stovepipes into the flues, and erecting a wall above. R. purchased in 1872 from the Bank of N. S., which acquired from one F., to whom C. had conveyed. All the conveyances were for valuable consideration, and registered, but the deed from C. to H. was not recorded until 1871, and in examining the title no search was made under C.'s name after registry of the deed to F., in 1862, and, therefore, the deed creating the easement passed observation. There was evidence, when attention was called to it, that H. had no separate wall, and the wall above appellant's building could be seen from across the street. *Held*, reversing the judgment appealed from (2 Russ. & Geld. 44), that the continuance of illegal burdens on R.'s property since the fee had been acquired by him were, in law, fresh and distinct trespasses against him. 2. That the deed creating the easement was an instrument requiring registration under the provisions of R. S. N. S. (4 ser.) c. 79, ss. 9 & 10, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and that from the date of the registration of the conveyance to F. the easement became void at law against F. and all those claiming title through him. 3. That to defeat a registered deed there must be actual notice or fraud and that there was no fraud or actual notice in this case to disentitle R., to insist in equity on his legal priority acquired under the statute.—*Per Gwynne, J.*, dissenting. That upon the pleadings as they stood on the record, the question of the Registry Act did not arise; that as the incumbrance complained of had been legally created in 1859, its mere continuance did not constitute a trespass, and that the action as framed should not be sustained. *Ross v. Hunter*, vii., 289.

24. *R. S. N. S. (5 ser.) c. 84, s. 21—Registered judgment — Priority — Mortgage — Rectification of mistake.*—By R. S. N. S. (5 ser.) c. 84, s. 21, a registered judgment binds the lands of the judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment.—A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgageor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before foreclosure, judgment was registered against the mortgageor and two years afterwards, execution was issued and an attempt made to levy on the five-sixths of the land not included in the mortgage. In a suit for rectification and injunction to restrain the judgment creditor from so levying, *Held*, affirming the judgment appealed from (92 N. S. Ren. 140), *Strong*

and Patterson, JJ., dissenting, that an agreement to give a mortgage of the five-sixths of the said land was void as against the judgment. *Grindley v. Blaikie* (19 N. S. Rep. 27) approved and followed. *Müller v. Duggan*, xxi., 33.

25. *Mortgage—Mining machinery—Registration—Fixtures—Interpretation of terms—Bill of sale—Personal chattels—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of sale)—55 Vict. (N. S.) c. 1, s. 143 (The Mines Act).*—The “fixtures” included in the meaning of the expression “Personal Chattels” by the tenth section of the Nova Scotia “Bills of Sale Act,” are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the “delivery” referred to in the same clause means only such delivery as can be made without a trespass or a tortious act. —An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia “Bills of Sale Act” (R. S. N. S. (5 ser.) c. 92), and there is now no distinction in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee.—Judgment appealed from affirmed. *Warner v. Don*, xxvi., 388.

26. *Lease for lives—Renewal—New life—Evidence—Benefit of Registry Act—Purchaser—Notice—R. S. N. S. 5th ser. c. 84.*

See LEASE, 31.

27. *Assignment for benefit of creditors—R. S. N. S. (5th ser.) c. 92—Chattel mortgage—Statute of Elizabeth.*

See CHATTEL MORTGAGE, 13.

4. NEW BRUNSWICK.

28. *Registered deed—Priority over earlier grantee—Postponement—Notice.*—To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable.—Judgment appealed from (33 N. B. Rep. 310) affirmed. *New Brunswick Ry. Co. v. Kelly*, xxvi., 341.

5. BRITISH COLUMBIA.

29. *Registration of tax deed—Certificate of title—Priority over earlier certificate—R. S. B. C. c. 111.*—Section 13 of the British Columbia Land Registry Act (R. S. B. C. c. 111) provides that a person claiming ownership in fee of land may apply for registration thereof and the registrar, on being satisfied after examination of the title deeds, that a *prima facie* case is established shall register the title in the “Register of Absolute Fees.” Section 19, which authorizes the registrar to issue a certificate of title to the person so registering, contains this provision: “Every certificate of title shall be received as *prima facie* evidence in all courts of justice in the province, of the particulars therein set forth.” And by s.

23 “the registered owner of an absolute fee shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he may possess.” . . . *Held*, affirming the judgment appealed from (7 B. C. Rep. 12 *sub nom. Kirk v. Kirkland*), that a certificate of title issued on registration of a deed from the assessor of taxes issued to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with. *Johnson v. Kirk*, xxx., 344.

30. *Legacy—Notice—Mortgage—Charge on lands—Priority.*

See EXECUTORS AND ADMINISTRATORS, 4.

6. NORTH-WEST TERRITORIES.

31. *Real Property Act—Registration—Execution—Unregistered transfers—Equitable rights—Sales under execution.*—The provisions of s. 94 of the Territories Real Property Act (R. S. C. c. 51), as amended by 51 Vict. c. 20 (D.), do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor and do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor.—If the sheriff sells, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers.—Judgment appealed from, affirmed. *Jellett v. Wilkie; Jellett v. Scottish Ontario and Manitoba Land Co.; Jellett v. Powell; Jellett v. Erratt*, xxvi., 282.

32. *Misconduct—Breach of duty—Established jurisprudence—Territories Real Property Act—Unregistered transfers—Charging lands—Levy under execution—Indemnity to sheriff—Tort.*—Neither a solicitor nor a sheriff is a tortfeasor, as against a transferee whose transfer is unregistered, by registering, in the discharge of their respective duties, an execution against the lands of the judgment debtor.—The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution. *Taylor v. Robertson*, xxxi., 615.

33. *Renewal of chattel mortgage—N. W. Ter. Ord. No. 5 of 1881—Computation of time.*

See CHATTEL MORTGAGE, 4.

7. TRADE MARKS.

34. *Of trade mark—Rectification.*

See TRADE MARK, 5.

RELEASE.

1. *Agreement to compound with creditor—Execution of deed—Ratification—Estoppel.*

See DEBTOR AND CREDITOR, 5.

2. *Partnership—Settled accounts — Release—Setting aside releases and opening accounts.*

See ACCOUNT, 5.

3. *Mortgage — Assignment of lease — Discharge—Abandonment of security.*

See MORTGAGE, 53.

4. *Partnership — Insolvent firm — Assignment for benefit of creditors—Composition—Discharge of debt—Release of debtor.*

See DEBTOR AND CREDITOR, 7.

RELIGION.

Will—Condition of legacy—Religious liberty—Restriction as to marriage — Education—Exclusion from succession—Public policy.

See PUBLIC POLICY, 1.

REMAINDER.

1. *Will—Usufruct — Subsequent devise in fee—Conveyance of lands by usufructuary—Sale by sheriff—Rights purged—Estoppel.*

See SHERIFF, 8.

2. *Survival of tenant for life—Possession—Owner in fee—Statute of Limitations.*

See TITLE TO LAND, 57.

3. *Construction of statute—Estates tail—Will—Executory devise over—"Dying without issue" — "Lawful heirs" — "Heirs of the body"—Estate in remainder expectant—Statutory title — Title by will — Conveyance by tenant in tail.*

See WILL, 19.

RENTES FONCIERES.

R. S. C. c. 135, s. 29 (b)—Annual rents—Ground rents — Jurisdiction.] — The words "annual rents," in R. S. C. c. 135, s. 29 (b), mean "ground rents" (rentes foncières) and not an annuity or like charge. Rodier v. Lapicre, xxi., 65.

RENUNCIATION.

Interdiction—Marriage laws—Dower—Registry laws—Sheriff's sale—Warranty—Succession — Donation.] — Per Taschereau, J. Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which such vendor has given warranty. Rousseau v. Burland, xxxii., 541.

REPAIRS.

See LANDLORD AND TENANT—LEASE—SUBSTITUTION.

REPETITION.

1. *Bank stock — Substituted property — Trust — Registration of substitution—Arts. 931, 938, 939 C. C.—Pledge by trustee—Redemption—Condictio indebiti — Arts. 1047, 1048 C. C.]—The curator to the substitution of W. P. paid respondents \$8,632, to redeem 34 shares of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P., one of the grévés and manager of the estate, had pledged to respondents for advances made to him personally. Appellants, representing the substitution, demanded the money which they allege H. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of W. P., and there was no inventory to shew they formed part of the estate, and no acte d'emploi or remploi to shew that they were acquired with the assets of the estate. Held, per Ritchie, C.J., and Fournier and Taschereau, JJ., affirming the judgment appealed from, and the judgment of the trial court (16 Q. L. R. 193), that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover.—Per Strong and Fournier, JJ. That bank stock cannot be held as regards third parties in good faith to form part of substituted property on the ground that it has been purchased with the moneys belonging to the substitution without an act of investment in the name of the substitution and a due registration thereof. Patterson, J., dissented. Petry v. Caisse d'Economie de N. D. de Québec, xix., 713.*

2. *Action—Condictio indebiti — Répétition de l'indu—Evidence—Fictitious claims—Misrepresentation — Onus probandi — Railway subsidies — Insolvent company — Payment of claims by the Crown—Transfer by payee—Art. 1090 C. C.—54 Vict. c. 88 (Que.).*

See ACTION, 14.

3. *Overcharge of sheriff's fees—Counterclaim—Set-off.*

See SHERIFF, 13.

4. *Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Presumption of good faith—Arts. 1047, 1049 C. C.*

See CUSTOMS DUTIES, 5.

REPLEVIN.

1. *Replevin—Equitable title—Principal and agent—Advances to agent to buy goods—Trust goods mixed with those of agent.]—Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin. Carter v. Long & Bisby, xxvi., 430.*

2. *Confusion of chattels—Unmarked logs—Trespass—Possession.*

See ACTION, 130.

3. *Possession of goods—Vesting of property — Seizure — Justification by sheriff — Pleading.*

See SHERIFF, 9.

4. *Debtor and creditor—Agreement—Conditional license to take possession of goods—Creditor's opinion of debtor's incapacity, bona fides of—Replevin—Conversion.*

See DEBTOR AND CREDITOR, 50.

5. *Canada Temperance Act—Search warrant—Magistrate's jurisdiction—Constable—Justification of ministerial officer—Goods in custodia legis—Estoppel—Res judicata—Judgment inter partes.*

See CANADA TEMPERANCE ACT, 6.

6. *Of confiscated gambling instruments, moneys, &c.—Criminal code, s. 575—"The Canada Evidence Act, 1893"—Rules of evidence—Impeachment of forfeiture—Constable.*

See CRIMINAL LAW, 16.

7. *Trust goods—Advances to buy goods—Equitable title.*

See ACTION, 132.

AND see REVENDICATION.

REPORT.

Preference—Master exceeding authority.

See REFERENCE, 1.

REPRESENTATION.

Partition per stirpes or per capita—Usufruct—Accretion between heirs.

See SUBSTITUTION, 5.

AND see HOUSE OF COMMONS.

REPRISE D'INSTANCE.

1. *Final judgment—Res judicata—Jurisdiction to hear appeal.*

See APPEAL, 181.

2. *Parties on appeal—Practice—Proceeding in name of deceased party—Amendment—Discretionary order—Interference on appeal.*

See APPEAL, 139—PRACTICE AND PROCEDURE, 25.

REQUETE CIVILE.

1. *Judgment by default—Stay of proceedings—Disavowal of attorney—Long delay—Waiver—Estoppel—Remedy—Practice.]—On 26th Nov., 1880, an application was made in chambers for an order directing the registrar not to settle the minutes of judgment rendered by the court on the 10th June, 1880, (see OPPOSITION 3, col. 1010, ante), and not to tax the costs, and to restrain the plaintiffs from entering said judgment and taxing said costs, the object of the appellant being to stay the execution of such judgment to allow him to disavow the attorney who appeared for him in the court below, and to proceed against the judgment against him by requête civile. Held, per Taschereau, J., refusing the application, that as to the disavowal, it was too late for*

the defendant to take such a proceeding, the attorney having appeared on the 26th Oct. 1866, and the defendant having been aware of it on the 29th April, 1874, when he filed his first opposition in the cause. That the judgment of the Supreme Court must, under the S. C. Act, s. 46, be entered and sent to the court below before the defendant could have recourse to a proceeding by requête civile. The requête civile does not stay the execution as a matter of course, an order of the court or judge being necessary, and the defendant would have to apply to the Superior Court or a judge thereof for such an order. Held, also, that a judge in chambers should not grant an order staying the execution of a judgment of the court, especially when the appellant has had ample opportunity of making his application to the full court. Dawson v. Macdonald, Cass. Dig. (2 ed.) 587, 688.

2. *Petition in revocation of judgment—Concealment of evidence—Jurisdiction—C. P. Q. art. 1177—R. S. C. c. 135, s. 67.]—Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (requête civile) for revocation of its judgment on the ground that the opposite party succeeded by the fraudulent concealment of evidence. Durocher v. Durocher, xxvii., 634.*

3. *Appeal—Question of local practice—Inspection for proof and hearing—Peremptory list—Notice—Surprise—Artifice—Arts. 234, 235, 505, C. C. P. (old text)—R. of P. (S. C.) L. V.]—Under a local practice prevailing in the Superior Court, in the District of Montreal, the plaintiffs obtained an order from a judge fixing a day peremptorily for the adduction of evidence and hearing on the merits of a case by precedence over other cases previously inscribed on the roll and without notice to the defendants. The defendants did not appear when the case was taken up for proof and hearing and judgment by default was entered in favour of the plaintiffs. The defendant filed a requête civile asking for the revocation of the judgment to which the plaintiffs demurred. On appeal to the Supreme Court of Canada against the judgment maintaining the demurrer and dismissing the requête with costs:—Held, reversing the decision of the Court of Queen's Bench, that the order was improperly made for want of notice to the adverse party as required by the Rules of Practice of the Superior Court, and that the defendant was entitled to have the judgment revoked upon requête civile. Eastern Townships Bank v. Swan, xxix., 193.*

4. *Discovery of new evidence—Revocation of judgment—Nullity.*

See SHERIFF, 10.

RESALE FOR FALSE BIDDING.

Sheriff's deed—Registration of absolute nullity—Arts. 688 & 690 et seq. C. C. P.—Folle enchère.]—A sheriff's deed which had issued illegally must be treated as an absolute nullity, notwithstanding registration, and it is not necessary to have it formally declared null before proceeding to a re-sale for false bidding. Lambe v. Armstrong, xxvii., 309.

See SALE, 68.

RESILIATION.

Acte de résiliation—Signification of transfer—Condition precedent to right of action.

See SIGNIFICATION, 1.

RES JUDICATA.

1. *Bank shares—Seizure—Intervention—Res judicata—Art. 1241, C. C.*—A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the corpus of said shares nor as to the dividends of other shares claimed under a different title. *Muir v. Carter; Holmes v. Carter*, xvi., 473.

2. *Judgment in former suit—Estoppel as against Crown.*—*Semble, per Gwynne, J.* There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca v. Atty.-Gen. of Canada*, xvii., 612.

3. *Judgment by default—Disavowal of attorney—Execution—Opposition—Revocation of judgment—Stay of proceedings.*—After decisions against him in the matters set out under OPPOSITION, 3, and REQUÊTE CIVILE, 1, appellant took regular proceedings in disavowal against the attorney, who had appeared for him without authority before the Superior Court at Three Rivers, served upon the attorney and the other parties in the case on 14th Dec., 1880. Nevertheless, a new writ of execution was issued, on 15th Dec., 1880. On 30th Dec., 1880, appellant filed an opposition, and petition to stay the proceedings pending decision on the disavowal.—The *moyens* of the opposition and petition were: (1) That the appellant had disavowed the attorney, who had appeared for him, and was prepared to maintain the disavowal; (2) That the disavowal had been served upon all the parties in the case; (3) That the 15th Dec., 1880, an action in revocation of the original judgment in this cause had been issued.—Appellant also stated reasons founded upon facts which had only come to his knowledge since his first opposition which had given rise to the decisions in the matters above mentioned.—The conclusions were that all the proceedings had and made in virtue of the writ, and all proceedings in the cause be stayed according to law until the decision of the proceedings had and taken by the said opponent in the present cause, as well on the disavowal filed therein as on the action of revocation of the judgment.—Issue was joined on these several proceedings and the appellant and respondent consented by written agreement that the issues should be decided upon a common proof.—On the disavowal, the disavowed attorney filed an appearance, and the respondent also appeared by attorneys. The pleas of the disavowed attorney, with exhibits, were filed, and a petition for a *Commission Rogatoire* was presented by the plaintiff in disavowal, to examine a witness absent from Three Rivers. The decision on the petition was

suspended until a decision on a demurrer by the disavowed attorney. That demurrer was not decided, and the respondent in the meantime pressed the production of the proof on the opposition.—The Superior Court at Three Rivers dismissed this opposition on 2nd Oct., 1882, on the ground that there was *res judicata*, and this judgment was affirmed by the Queen's Bench, on the same ground, Tessier, J., dissenting. *Held*, reversing the judgment appealed from (Ritchie, C.J., and Strong, J., dissenting), that there was no *res judicata*, and that all proceedings in the cause and on the writ of *pluries venditioni exponas de bonis* mentioned in the opposition should be stayed until the decision of the proceedings in disavowal and of the action in revocation of judgment.—Appeal allowed with costs. *Dawson v. Macdonald*, Cass. Dig. (2 ed.) 587, (2b).

4. *Sheriff—Trespass—Sale of goods by insolvent—Bona fides—Judgment of inferior tribunal—Estoppel—Bar to action—Fraudulent preferences—Pleading.*—K. was a trader and in insolvent circumstances when he sold the whole of his stock in trade to D. At the time of this sale D. was aware that two of D.'s creditors had recovered judgments against him. The sheriff afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith, and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court and the judgment was affirmed by the Supreme Court of British Columbia, *en banc*.—In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict which was, however, set aside by the court, *en banc*, a majority of the judges holding that the County Court judgment was a complete bar to the action.—On appeal to the Supreme Court of Canada, *Held*, reversing the judgment of the Supreme Court of British Columbia, that as the evidence shewed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. *Taschereau, J.*, dissented. *Davies v. McMillan*, 1st May, 1893.

5. *Information of intrusion—Subsequent action—Beneficial interest in land.*—In proceedings on an information of intrusion exhibited by the Attorney-General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that province. *The Queen v. Farwell* (14 Can. S. C. R. 392). The appellant having registered his grant and taken

steps to procure an indefeasible title from the Registrar of Titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct the appellant to execute to the Crown in right of Canada a surrender or conveyance of the said lands. *Held*, that the judgment in intrusion was conclusive against the appellant as to the title. *The Queen v. Farwell* (14 Can. S. C. R. 392), and *Attorney-General of British Columbia v. Attorney-General of Canada* (14 App. Cas. 295), commented on and distinguished. *Farwell v. The Queen*, xxii., 553.

See CONSTITUTIONAL LAW, 23; CROWN, 77, and MINES AND MINERALS, 2.

6. *Different causes of action — Statute of Frauds.*—S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest of his, M.'s interest in a gold mine, but failed to recover as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged, but admitted that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold S. brought another action for payment of such share of the proceeds. *Held*, reversing the decision of the Supreme Court of Nova Scotia (24 N. S. Rep. 526), Fournier and Taschereau, J.J., dissenting, that S. was not estopped by the first judgment against him from bringing another action. *Held*, also, that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds. *Stuart v. Mott*, xxiii., 384.

7. *Bar to action — Foreign judgment — Estoppel — Judgment obtained after action begun.*—R. S. N. S. (5 ser.) c. 104, s. 12, s.-s. 7; orders 24 and 70, rule 2; order 35, rule 58.]—A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada. Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393) distinguished.—The combined effect of the orders 24 and 70, rule 2, and s. 12, s.-s. 7 of c. 104, R. S. N. S. (5 ser.) will permit this to be done in Nova Scotia. *Law v. Hansen*, xxv., 69.

8. *Title to land—Action en bornage—Surveyor's report — Acquiescence in judgment—Chose jugée.*—In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review on the grounds that the report gave B. more land than he claimed and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements shewed that the line indicated was not

in the line of the old fence and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the court, was final as to the location of the fence, and that the judgment had been properly executed. The Court of Queen's Bench reversed this judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence. *Held*, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them not only that the division line between the properties must be located on the line of the old fence, but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point. *Mercier v. Barrette*, xxv., 94.

9. *Contract — Public work — Final certificate of engineer — Previous decision — Necessity to follow.*—The Intercolonial Railway Act provided that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the commissioners, that the work was completed to his satisfaction. Before the suppliant's work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors. *Held*, per Taschereau, Sedgewick and King, J.J., that as the court in *The Queen v. McGreevy* (18 Can. S. C. R. 371), had under precisely the same state of facts, held that the contractor could not recover, that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed. *Held*, per Gwynne, J., that independently of *McGreevy v. The Queen*, the contractor could not recover for want of the final certificate. *Held*, per Strong, C.J., that as in *McGreevy v. The Queen*, a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the court, and on the merits the contractors were entitled to judgment. *Ross et al. v. The Queen*, xxv., 564.

See CONTRACT, 96.

10. *Canada Temperance Act—Search warrant — Magistrate's jurisdiction — Constable — Jurisdiction of officer — Goods in custodia legis—Replevin—Estoppel — Judgment inter partes.*—A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. Taschereau, J., dissenting.—The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.—A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. Taschereau, J., dissenting. *Sleeth v. Hurlbert*, xxv., 620.

11. *Nova Scotia Probate Act—R. S. N. S. (5 ser.) c. 100; 51 Vict. (N.S.) c. 26—Executors and administrators—License to sell lands—Estoppel.*—An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license, but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon. *Held*, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion. *Held*, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action. *Clarke v. Phinney*, xxv., 633.

12. *Debtor and creditor—Security realized by creditor—Appropriation of proceeds—Res judicata.*—Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded. *Cooper v. Molsons Bank*, xxvi., 611.

13. *Municipal corporation—Highway—Private way—Widening streets—Local improvement—Special assessment.*—Prior to the proceedings which gave rise to the action, the City of Montreal determined to widen Stanley Street between Sherbrooke and St. Catherine Streets, and passed a by-law to provide for the expropriation of sufficient land, back of the original line of the street, to carry out the intended widening. In the assessment roll prepared to meet the cost of this widening a rate was set upon all property on the street, not only between St. Catherine and Sherbrooke Streets, but northward to the extreme northerly limit of Stanley Street on the confines of Mount Royal Park. W. attacked this assessment roll, claiming that his property, on the upper part of Stanley Street, should not be assessed for the widening in question as the said upper part of Stanley Street was a private way. The Superior Court gave judgment in favour of W.'s contentions, and quashed the assessment roll. Further expropriations to carry out the proposed widening between St. Catherine and Sherbrooke Streets, were then proceeded with, and assessment rolls prepared by which the whole cost of these expropriations was thrown upon the proprietors between St. Catherine and Sherbrooke Streets, no part being rated against W. or other proprietors on the upper part of Stanley Street. Objections were thereupon filed to set aside these assessment rolls on the ground that the assessments were augmented by improperly releasing the property on the upper part of Stanley Street from any portion of the assessment, and W. was called into the case to defend his interests.—The Superior Court held, 1st. That the former judgment in the action between W. and the City of Montreal was *res judicata* and that the upper portion of Stanley Street was a

private way and therefore exempt from assessment; and 2nd. Even if that point had not been settled by the former judgment, that the petitioners had failed to prove that the street was not a private way.—This judgment was affirmed by the Court of Queen's Bench (Q. B. 6 Q. B. 107), and upon further appeal:—The Supreme Court of Canada affirmed the decision of the Court of Queen's Bench, and dismissed the appeal with costs. *Stevenson v. City of Montreal*, and *White, Mis-en-cause*, xxvii., 593.

14. *Petitory action—Encroachment—Constructions under mistake of title—Good faith—Common error—Bornage—Arts. 412, 413, 429, et seq., 1047, 1241 C. C.—Indemnity—Demolition of works.*—An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.—Where, as the result of a mutual error respecting the division line, a proprietor had in good faith and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.—In an action for revendication under the circumstances above mentioned, the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata*, against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different. *Delorme v. Cusson*, xxviii., 66.

15. *Company—Forfeiture of charter—Estoppel—Compliance with statute—Action—Res judicata.*—In an action against a river improvement company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, &c., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that the works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters, contrary to the provisions of the Timber Slide Companies Act, and could not exact tolls in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands, whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the commissioner in fixing the schedule of tolls. *Held*, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent and were *res judicata*. *Held*, further,

that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited. *Hardy Lumber Co. v. Pickerel River Improvement Co.*, xxix., 211.

16. *Res judicata*—*Rectification*—*Damages*.]—In an action relating to the construction of a deed the plaintiff claimed the benefit of a reservation contained in a prior agreement but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein. *Held*, that the subject matter of the second action was not *res judicata* by the previous judgment.—In an action for rectification of a contract the plaintiff may be awarded damages. *Carroll v. Erie Co. Natural Gas and Fuel Co.*, xxix., 591.

[Leave to appeal to Privy Council refused.]

17. *Purchase of insolvent estate—Refusal to complete—Action by curator—Completion of purchase after judgment—Subsequent action for special damages—Res judicata—Practice*.]—A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery. *Held*, that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec courts and the right to recover them was not *res judicata* by the judgment in that action. *Hyde v. Lindsay*, xxix., 595.

18. *Treaties with Indians—Contingent annuities—B. N. A. Act (1867) s. 112—Debt of Province of Canada—Res judicata*.]—The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently should be taken into account and included in the debt of the late Province of Canada mentioned in the 112th section of the British North America Act, 1867. *Held*, affirming the decision of the arbitrators, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of *The Attorney-General of Ontario (1897) A. C. 199*, and that the payments so made by the Dominion were recoverable from the provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec and Dominion of Canada; Arbitration. In re Indian Claims*, xxx., 151.

19. *Right of action—Pleading—Intervention—Notice—Pledge*.]—The plea of *res judicata* is good against a party who has been in
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any way represented in a former suit deciding the same matter in controversy. *Dingwall v. McBean*, xxx., 441.

20. *Assessment and taxes—Appeal from assessment—Judgment confirming—Payment under protest*.]—J., having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. The matter was thus left in abeyance. In 1897 he was again assessed under the same circumstances, and took the same course with the exception that he appealed to the Supreme Court of Canada from the judgment refusing a certiorari, and that court held the assessment void and ordered the writ to issue for quashing. (See 30 Can. S. C. R. 122.) J. then brought an action for repayment of the amount paid for the assessment in 1896. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was *res judicata* against J., and he could not recover the amount so paid. *Jones v. City of St. John*, xxxi., 320.

See ASSESSMENT AND TAXES, 28.

20a. *Arbitration—Compensation—Estoppel—Laches*.

See RIDEAU CANAL LANDS, 1.

21. *Final judgment partly interlocutory—Reference to experts—Voluntary execution in part—Waiver of right to appeal*.

See APPEAL, 162.

22. *Forfeiture of patent—Decision of commissioner*.

See PATENT OF INVENTION, 1.

23. *Sale à réméré—Prior action—Dismissal—Expiration of term for redemption—Misc en demeure*.

See SALE, 83.

24. *Licitation—Island of Anticosti Co.—Constitutionality of incorporation—Vendor and vendee*.

See ESTOPPEL, 62.

25. *Judgment on demurrer—Acquiescence—Notice*.

See RAILWAYS, 3.

26. *Withdrawal of part of demand under reserve of rights—Art. 451 C. C. P.—Subsequent action for amount reserved*.

See PRACTICE AND PROCEDURE, 66.

27. *Estoppel against the Crown—Setting aside letters patent—Crown lands error—Improvidence*.

See TITLE TO LAND, 130.

28. *Special submission to amiables compositeurs—Directions as to inquiry—Finality—Art. 1346 C. C. P.*

See ARBITRATIONS, 52.

29. *Parties to suit—Demurrer—Acquiescence in judgment*.

See PRACTICE AND PROCEDURE, 4.

30. *Controverted election—Reservation in judgment on preliminary objections—Failure to appeal.*

See ELECTION LAW, 95.

31. *Final judgment—Reprise d'instance.*

See APPEAL, 181.

32. *Judgment ordering account—Trustee—Administration by agent—Acquiescence.*

See TUTORSHIP, 2.

33. *Covenant by mortgagor—Personal action—Sale of mortgaged lands—Hypothecary action—Res inter alios acta.*

See SALE, 108.

34. *Opposition—Revocation of judgment—Fraud—Requête civile.*

See SHERIFF, 10.

35. *Court of Probate—Jurisdiction—Accounts of executors and trustees.*

See TRUSTS, 14.

36. *Judgment against firm—Liability of reputed partner—Action on judgment—Agreement against liability.*

See PARTNERSHIP, 40.

37. *Title to land—Entail—Life estate—Fiduciary substitution—Privileges and hypothecs—Mortgage by institute—Preferred claim—Prior incumbrancer—Vis major—Registry laws—Practice—Sheriff's sale—Chose jugée—Parties—Estoppel—Deed poll—Improvements on substituted property—Grosses réparations—Art. 2172 C. C.—29 Vict. c. 26 (Can.).*

See SUBSTITUTION, 6.

38. *Vis major—Construction of 16 Vict. c. 25 & 77—Mortgage of substituted lands—Estoppel—Judicial authorization.*

See TITLE TO LAND, 35.

39. *Title to land—Legal warranty—Description—Plan of subdivision—Change in street line—Accession—Troubles de droit—Eviction—Issues on appeal—Parties.*

See APPEAL, 397.

40. *Assessment of damages—Reservation of future recourse—Expropriation of leased premises—Right of action.*

See ACTION, 139.

RESPONSIBILITY.

See CONTRACT—EMPLOYER'S LIABILITY—MASTER AND SERVANT—NEGLIGENCE—PRINCIPAL AND AGENT—SURETYSHIP.

RETAINER.

1. *Instructions—Duty of Attorney—Registration of judgment.*

See SOLICITOR, 3.

2. *Counsel fee—Refresher—Right of action—Lex loci.*

See COUNSEL.

RETRAIT SUCCESSORAL.

Rights of succession—Sale by co-heir—Sale by curator before partition—Art. 710 C. C.—Prescription.—When a co-heir has assigned his share in a succession before partition any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment and such claim is imprescriptible so long as the partition has not taken place.—A sale by a curator of the assets of an insolvent, even though authorized by a judge, which includes an undivided share of a succession of which there has been no partition does not deprive the other co-heirs of their right to exercise by direct action against the purchaser thereof the *retrait successoral* of such undivided hereditary rights.—The heir exercising the *retrait successoral* is only bound to reimburse the price paid by the original purchaser, and not bound in his action to tender the moneys paid by the purchaser. *Baater v. Phillips*, xxiii, 317.

RETRAXIT.

Withdrawal of part of claim—Reserve of rights—Notice—Res judicata—Art. 451 C. C. P.—Subsequent action—Lis pendens—New evidence on appeal.—The bank, in an action against G., filed a withdrawal of part of the demand in open court, reserving the right to institute a subsequent action for the amount so withdrawn. The court granted *acte* on this *retraxit*, and gave judgment for the balance, which was not appealed from. In a subsequent action for the amount so reserved: *Held*, reversing the judgment appealed from (16 R. L. 663), Fournier, J., dissenting, that art. 451 C. C. P., applied to withdrawals made out of court, and cannot affect the validity of a withdrawal made in open court and with its permission.—2. That as to the part of the claim so withdrawn, there was no *lis pendens* at the time of the second action, and it was then too late to question the validity of the *retraxit* upon which the court had acted, and rendered a judgment in the first action, which was final and conclusive.—Neither was there *chose jugée* as to the amount reserved, as no adjudication was made thereon.—A document not proved at the trial but introduced for the first time on appeal cannot be invoked or made part of the case in appeal to the Supreme Court. *Montreal L. & M. Co. v. Fauteux* (3 Can. S. C. R. 433), and *Lionais v. Molsons Bank* (10 Can. S. C. R. 527) followed. *Exchange Bank of Canada v. Gilman*, xvii., 108.

REVENDEICATION.

1. *Right of action—Trustee of bonds pledged—Suit by interested person—Action to recover back pledged collateral.*

See PRINCIPAL AND AGENT, 19.

2. *Of moneys seized in gambling house—Rules of evidence—Impeachment of judgment declaring forfeiture.*

See CRIMINAL LAW, 16.

AND see REPLEVIN.

REVENUE LAWS.

Revenue—Customs duties—Imported goods—Importation into Canada—Tariff Act—Construction—Retrospective legislation—R. S. C. c. 32—56 & 57 Vict. c. 33 (D.)—58 & 59 Vict. c. 23 (D.).

See STATUTES, 3.

AND see DUTIES.

REVERSION.

1. *Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease.*

See LEASE, 5.

2. *Mortgage—Leasehold estate—Assignment of equity of redemption—Acquisition of reversion by assignee—Priority—Merger.*

See MORTGAGE, 65.

3. *Rideau Canal—Eminent domain—Expropriation—Lands not used for public purposes—Re-vesting Act.*

See RIDEAU CANAL LANDS, 1, 2.

REVIEW, COURT OF.

See COURT OF REVIEW.

REVIVOR.

See REPRISÉ D'INSTANCE.

REVOCATION OF JUDGMENT.

See OPPOSITION—REQUÊTE CIVILE.

RIDEAU CANAL LANDS.

1. *Pleading—Statute of Limitations—Maintenance—Agent of the Crown—Public works—Purchase in conflict with public use—Rideau Canal Act—Trustee—Compensation—Lands taken for canal purposes—Arbitration—Estoppel—Res judicata—Laches.*—Under the Rideau Canal Act, 8 Geo. IV. c. 1, By, employed to superintend the work set out 110 acres, part of 600 acres theretofore granted to one G. McQ., as necessary for making and completing the canal, but only 20 acres were actually necessary and used for canal purposes. G. McQ. died intestate, leaving A. McQ., her husband, and W. McQ., her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, A. McQ. released to W. McQ. all his interest in said lands, and on the 6th February, 1832, W. McQ. granted to By all the lands previously granted to his mother. By died 1st February, 1836.—Under 6 Wm. IV. c. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.—By 7 Vict. c. 11 (Can.), the Rideau Canal and its lands and works were vested in the principal officers of H. M. Ordnance in Great Britain, and s. 29 enacted:

“Provided always, and be it enacted, that all land taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same was taken.—9 Vict. c. 42 (Can.), recited that the foregoing proviso had given rise to doubt as to its true construction, and enacted that it should be construed to apply to all the land at Bytown set out and taken from S., under 8 Geo. IV. c. 1, except portions actually used for the canal, and provision was made for payment of compensation to S. for the land retained for canal purposes, and for re-vesting in him and his grantees the portions taken, but not required for such purposes.—By the 19 & 20 Vict. c. 45, the Ordnance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the B. N. A. Act, 1867, they vested in Her Majesty for the use of the Dominion of Canada.—The suppliants, legal representatives of By, brought a petition of right, to have Her Majesty declared a trustee for them of all said lands not actually used for the purposes of the canal, and praying that such lands might be restored to them, and the rents and profits paid, and as to parts sold the value thereof with rents and profits prior to sale.—The Attorney-General contended that no interest in the lands set out by By passed to W. McQ., but the claim for compensation or damages for taking said lands was personal estate of G. McQ., and passed to her personal representative; that the deeds of the 31st January, and 6th February, 1832, passed no estate or interest, the title and possession of the lands being in His Majesty; that the deeds were void under 32 Hy. VIII. c. 9; that (par. 9) By was incapable, by reason of his position, of acquiring any beneficial interest in said lands as against His Majesty; that (pars. 10, 11, 12 and 13), By took proceedings under 8 Geo. IV. c. 1, to obtain compensation for the lands in question, but the arbitrators, and a jury, decided that he was not entitled to compensation by reason of enhancement of value of his other land and advantages accrued by the building of the canal; that this award and verdict were a bar to suppliant's claim; that the proviso of 9 Vict. c. 42, was confined to S. and did not extend to the lands in question; that pars. 16, 17, 18 and 19) by virtue of 2 Vict. c. 19, and a proclamation in pursuance thereof, all claims for damages which might have been brought under 8 Geo. IV. c. 1, by owners of lands taken for the canal, including claims of the said G. McQ., By, or their respective representatives, were, on and after the 1st April, 1841, forever barred; that the suppliants were barred by their own laches; and that they were barred by the Statute of Limitations.—On a special case stated for the opinion of the court, *Held*, by Richards, C.J., sitting as a judge of the Exchequer Court of Canada: 1. The Statute of Limitations was properly pleadable under s. 7 of the Petition of Right Act of 1876.—2. W. McQ. took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown, under 8 Geo. IV. c. 1, ss. 1 & 3, and her right was converted into a claim for compensation under the 4th section.—3. This right of compensation or damages, if asserted under Geo. IV. c. 1, s. 4, would go to G. McQ.'s personal representatives, but if the land was obtained by surrender under the 2nd section of the statute, then the heir-at-law of G. McQ. would be

the person entitled to receive the damages and execute the surrender.—4. The deeds of the 31st January, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dispute, except so far as the same may be considered as a surrender to the Crown under the 2nd section of the Rideau Canal Act.—5. The 9th paragraph of the defence is a sufficient answer in law to the petition.—6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statements therein to be true.—7. The proviso of 9 Vict. c. 42, s. 29, was confined in effect to the lands of S. only.—8. If the claim is to be made by G. McQ.'s personal representatives under the 4th section of the Rideau Canal Act (and any claim by her could only be under that section) the Act referred to in the 16th, 17th, 18th and 19th paragraphs of the defence apply to this case and would bar all claims to be made under the Rideau Canal Act.—As to the claims made by the heirs of By, they have no claims under any of the statutes.—9. If the Ordinance Vesting Act vested the 110 acres in question in the heirs of By, the court was not prepared to say that their claim had been barred by laches on the statement set out in the petition. But the statute had not that effect, nor had By or his legal representatives ever had for his or their own use and benefit any title to these 110 acres. *Tylee v. The Queen*, vii., 651.

2. *Expropriation of lands — Eminent domain—Ordinance lands—Laying out and ascertaining—Rights of the Crown—Reversions under statute—User by Crown—Public work—Construction of deed—Title to lands—Es-toppel—Trust—Fiduciary agents—Limitation of actions—Petition of Right Act—Unlawful conveyance—Trust estate—Maintenance—Vesting in Crown for use of Canada—Appeal failing on equal division—Costs.*—Under 8 Geo. IV. c. 1, "Rideau Canal Act." Col. By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts part of 600 acres or thereabouts theretofore granted to G. McQ. as necessary for making and completing said canal, but only some 20 acres were actually used for canal purposes. G. McQ. died intestate, leaving A. McQ., her husband, and W. McQ., her eldest son and heir-at-law, her surviving. After her death, on 31st January, 1832, A. McQ. released to W. McQ. all his interest in said lands, and on 6th February, 1832, W. McQ. conveyed the whole of the lands originally granted to G. McQ. to By in fee for £1,200. The appellant, heir-at-law of W. McQ., by petition of right sought to recover from the Crown 90 acres of the land originally taken by By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the Crown, and an indemnity for the value of such portions of these 90 acres as had been sold by the Crown.—By 6 Wm. IV. c. 16, persons who acquired title to lands used for purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.—By the Ordinance Vesting Act, 7 Vict. c. 2, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by s. 29 it was enacted: "Provided always, and be it enacted that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act

for the use of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

—By 9 Vict. c. 42, an Act of 7th Vict. c. 11, was explained, and it was recited that the foregoing proviso had given rise to doubts as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 Geo. IV. c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for re-vesting in him and his grantees the portions of lands taken, but not required for such purposes.—By 19 and 20 Vict. c. 45, the Ordinance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the B. N. A. Act (1867), they became vested in Her Majesty for the use of the Dominion of Canada.—The appellant, the heir-at-law of William McQueen, by her petition of right sought to recover from the Crown 90 acres of the land originally taken by Colonel By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the Crown and an indemnity for the value of such portions of these 90 acres as had been sold by the Crown.—The case was heard in the first instance by Gwynne, J., in the Court of Exchequer, who held: 1. Under the statute of 8 Geo. IV., the original owner and his heirs did not become divested of their estate in the land until the expiration of the period given by the Act for the officer in charge to enter into a voluntary agreement with such owner. Nor was there any conversion of realty into personalty effected by the Act until after the expiration of said period. By the deed by W. McQ. of 6th February, 1832, all his estate in the 110 acres as well as in the residue of the 600 acres, passed and became extinguished, such deed operating as a contract or agreement made with Col. By as agent of His Majesty within the provisions of the Act, and so vesting the 110 acres absolutely in His late Majesty, his heirs and successors.—2. Such deed was not avoided by the statute, 32 Hy. VIII. c. 9, Col. By being in possession as the servant and on behalf of His Majesty and taking the deed from W. McQ., while out of possession, the statute having been passed to make void all deeds executed to the prejudice of persons in possession, under the circumstances stated in the Act.—3. There was no reversion or re-vesting of any portion of the land taken by reason of its ceasing to be used for canal purposes. When land required for a particular purpose is ascertained and determined by the persons provided by the Legislature for that purpose, and the estate of the former owner of the land has been by like authority divested out of him and vested in the Crown, or in some person or body authorized by the Legislature to hold the expropriated lands for the public purpose, if the estate of which the former owner is so divested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him by virtue of which he can at any subsequent time claim upon any principle of the common law to have any portion of the land of which he was so divested to be re-vested in him by reason of its ceasing to be used for the purpose for which it was expropriated.—4. Assuming that G. McQ. had by operation of the Act become divested of her estate in the land in her lifetime, and that her right had become converted into one merely of a right

to compensation which, upon her death, passed as personally, the non-payment of any demand which her personal representative might have had could not be made the basis or support of a demand at the suit of the heir-at-law of W. McQ. to have re-vested in him any portion of the lands described in the deed of 6th February, 1832, after the execution of that deed by him, whether effectual or not for passing the estate, which it professed to pass.—5. The proviso in 7 Vict. c. 11, s. 29, as explained by 9th Vict. c. 42, was limited in its application to the lands which were originally the property of Sparks, and not conveyed or surrendered by voluntary grant executed by him, and for which no compensation or consideration had been given to him.—6. Her Majesty could not be placed in the position of trustee of the lands in question unless by the express provisions of an Act of Parliament to which she would be a consenting party. (16 Can. S. C. R. 1; 1 Ex. C. R. 366).—On appeal to the Supreme Court it was *Held*.—*Per Ritchie, C.J.*: By the deed of 6th February, 1832, the title to the lands passed out of W. McQ.; but assuming it did not, he was estopped by his own act and could not have disputed the validity and general effect of his own deed, nor could the suppliant who claims under him.—2. *Per Ritchie, C.J.*, Strong and Gwynne, J.J. The suppliant is debarred from recovering by the Statute of Limitations, which the Crown has a right to set up in defence under the 7th section of the Petition of Right Act of 1876.—3. *Per Strong, J.* Independently of this section, the Crown, having acquired the lands from persons in favour of whom the statute had begun to run before the possession was transferred to the Crown, the body incorporated under the title of "The Principal Officers of Ordnance," would be entitled to the benefit of the statute.—4. *Per Strong, J.* The Act 9 Vict. c. 42, had not the effect of restricting the operation of the re-vesting clause of 7 Vict. c. 11, to the lands of Nicholas Sparks, and was passed to clear up doubts as to the case of Nicholas Sparks, and not to deprive other parties originally coming within 7 Vict. c. 11, s. 29, of the benefit of that enactment.—5. *Per Strong, J.* A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under s. 29. Where it is within the power of a party having a claim against the Crown of such a nature as the present to resort to a petition of right, a mandamus will not lie, and a mandamus will never under any circumstances be granted where direct relief is sought against the Crown.—6. *Per Strong, J.*: By the express terms of the 3rd section of 8 Geo. IV. c. 1, the title to lands taken for the purposes of the canal vested absolutely in the Crown so soon as the same were, pursuant to the Act, set out and ascertained as necessary for the purposes of the canal, and all that G. McQ. could have been entitled to at her death was the compensation provided by the Act to be ascertained in the manner therein prescribed, and this right to receive and recover the money at which this compensation should be assessed vested, on her death, in her personal representative as forming part of her personal estate. Therefore, as regards the 110 acres nothing passed by the deed of 6th February, 1832. And, up to the passing of 7 Vict. c. 11, no compensation had ever been paid by the Crown, nor was there any decision as to compensation binding on the representative of G. McQ.—7. *Per Strong, J.* The proviso in s. 29 of 7 Vict. c. 11, applied to the 90 acres not used for the purposes

of the canal, and had the effect of re-vesting the original estate in W. McQ., as the heir-at-law of his mother, subject to the effect upon his title of the deed of 6th February, 1832. But, if it had the effect of re-vesting the land in the personal representative, the suppliant is not such personal representative and would therefore fail.—8. *Per Strong, J.* This deed did not work any legal estoppel in favour of By which would be fed by the statute vesting the legal estate in W. McQ., the covenants for title by themselves not creating any estoppel. But if a vendor, having no title to an estate, undertakes to sell and convey it for valuable consideration, his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards acquire, even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, or his heir-at-law, will be compelled to convey to such purchaser accordingly. In other words, the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. Therefore, if the suppliant were granted the relief asked, the land and money recovered by her would in equity belong to the heirs of By.—Although nothing passed under the deed of the 6th February, 1832, yet the suppliant could not withhold from the heirs or representative of By anything she might recover from the Crown under 7 Vict. c. 11, s. 29, but the heirs or representatives of By would in turn become constructive trustees for the Crown of what they might so recover by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.—9. *Per Strong, J.* The deed 6th February, 1832, being in equity constructively a contract by W. McQ. to sell and convey any interest in the land which he or his heirs might afterwards acquire, there is nothing in the statute 32 Hy. VIII. c. 9, or in the rules of the common law avoiding contracts savoring of maintenance, conflicting with this use of the deed.—10. *Per Fournier and Henry, J.J.* The mere setting out and ascertaining the lands was not sufficient to vest the lands in His Majesty, and G. McQ. having died without having made any contract with By, the property went to W. McQ. her heir-at-law.—11. *Per Fournier, Henry, and Taschereau, J.J.* The deed of 6th February, 1832, made before the passing of 7 Vict. c. 11, s. 29, and five years after the Crown had been in possession of the property in question, conveyed no interest in such property either to By personally or as trustee for the Crown, and the title therefore remained in the heirs of G. McQ. The proviso in 7 Vict. c. 11, s. 29, was not limited by 9 Vict. c. 42, to the lands of Nicholas Sparks, and the appellant is entitled to invoke the benefit of it. The 90 acres now used for the purposes of the canal did not by 19 Vict. c. 54, become vested in Her Majesty, nor were they transferred by the B. N. A. Act, 1867, to the exclusive control of the Dominion Parliament. The words "adjuncts of the canal," in the first schedule of the B. N. A. Act, could not apply to those things necessarily required and used for the working of the canal. The Crown was not entitled to set up the Statute of Limitations as a defence by virtue of section 7 of the Petition of Right Act, 1876, that section not having any retroactive effect.—There could be no estoppel as against W. McQ. by virtue

of the deed of 6th February, 1832, in the face of the proviso in 7 Vict. c. 11. *McQueen v. The Queen*, xvi., 1.

[NOTE.—The court being equally divided in opinion the appeal was dismissed without costs. Leave to appeal was refused by the Privy Council.]

RIFLE RANGES.

1. *Government rifle ranges — Militia class firing*—50 & 51 Vict. c. 16, s. 16 c. (D.).—*R. S. C. c. 41, ss. 10, 69.*—A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of s. 16c of the Exchequer Court Act. Judgment appealed from (6 Ex. C. R. 425) affirmed. *Larose v. The King*, xxxi., 206.

2. *Expropriation of lands*—Adjacent lands injuriously affected — Damages for use of rifle range — Mode of assessment—Valuation roll—Present uses — Prospective value—Evidence.] — The judgments appealed from (see 8 Ex. C. R. 163) decided, in effect, that as the lands taken for use as part of a rifle range, at the time of expropriation, had a prospective value for residential and other uses beyond that which then attached to them as lands in use for agricultural and other similar purposes, such prospective values should be taken into consideration in assessing what would be sufficient and just compensation to be paid upon the expropriation of the lands for such public uses as would, in various ways, affect the lands injuriously and diminish the prospective values.—In making the assessment of such compensation, the court below consulted the municipal assessment rolls, not as a determining consideration, but as affording some assistance at arriving at a fair valuation of the lands expropriated. The Supreme Court of Canada affirmed the judgment appealed from. *The Turnbull Real Estate Co. v. The King; Corkery et al. v. The King; DeBury et al. v. The King*, 6th October, 1903; xxxiii., 677.

RIGHT OF WAY.

See EASEMENT — RAILWAYS — RIPARIAN RIGHTS — SERVITUDE — TITLE TO LAND — TRAMWAY — USER.

RIOT.

Anticipated disturbance—Aid to civil power—Form of requisition—Payment of troops—Suit by administrator.—[The Act. 31 Vict. c. 40, s. 27 (D.), as amended by 36 Vict. c. 46 and 42 Vict. c. 35, requires that a requisition calling out the militia in aid of the civil power to assist in suppressing a riot, shall be signed by three magistrates, of whom the warden or other head officer of the municipality shall be one; and that it shall express on its face "the actual occurrence of a riot, disturbance or emergency, or the anticipation thereof, requiring such service."—*Held*, that a requisition in the following form is sufficient:—"Charles W. Hill, Esq., Captain No. 5 Company, Cape Breton Militia: Sir,—We, in compliance with c. 46, s. 27, Dominion Acts of 1873, it having been represented to us that a disturbance having occurred and is still anticipated at Lin-

gan beyond the power of the civil power to suppress. You are therefore hereby ordered to proceed with your militia company immediately to Langan, with their arms and ammunition, to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed. A. J. McDonald, Warden; R. McDonald, J.P.; J. McNarish, J.P.; Angus McNeil, J.P."—The statute also provides that the municipality shall pay all expenses of the service of the militia when so called out, and in case of refusal that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses. *Held*, Strong, J., dissenting, that where the commanding officer died pending such action the proceedings could be continued by his personal representative. Judgment appealed from (19 N. S. Rep. 260) reversed. *Crewe-Read v. County of Cape Breton*, xiv., 8.

RIPARIAN RIGHTS.

1. *Navigable river — Access — Riparian owner—Railway — Obstruction — Damages—Remedy by action*—43 & 43 Vict. c. 43, s. 7, s.-ss. 3 & 5 (Que.)—A riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for obstruction and interruption of access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property.—Judgment appealed from (24 L. C. Jur. 133) reversed, Taschereau, J., dissenting.—That the railway company, in the present case, not having complied with the provisions of 43 & 44 Vict. (Que.) c. 43, s. 7, s.-ss. 3 & 5, the owner has a remedy by action. *Pion v. North Shore Ry. Co.*, xiv., 677.

[Affirmed by the Privy Council, 14 App. Cas. 612. See *Bigouette v. North Shore Ry. Co.* (17 Can. S. O. R. 363) under EXPROPRIATION OF LANDS, 21.]

2. *Flooding lands—Possession — Construction of dam—Servitude—Arts. 503, 549, 2193 C. C.—C. S. L. C. c. 51—Improvement of watercourses.*—Where a proprietor, for the purpose of improving the value of a water power, has built a dam over a watercourse running through his property and has not constructed any mill or manufactory in connection with the dam, he cannot, in an action of damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify, under the provisions of C. S. L. C. c. 51. Nor can he acquire by prescription a right to maintain the dam in question; nor claim title by possession to the land overflowed without proving the requirements of art. 2193, C. C. *Jones v. Fisher*, xvii., 515.

See RIVERS AND STREAMS, 6.

3. *Description in grant—Foreshores of navigable waters.*—A grant of land bounded by navigable waters does not extend *ad medium filum* as in the case of non-navigable streams. *Benthel v. Scotten*, xxiv., 367.

Compare Nos. 4 and 5 *infra*.

4. *Canadian waters — Property in beds—Public harbours — Erections in navigable water—Interference with navigation — Right of fishing—Power to grant riparian proprie-*

tors—Great lakes and navigable rivers—Operation of Magna Charta — Provincial legislation—R. S. O. (1887) c. 24, s. 47—55 Vict. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. arts. 1375 to 1378.] — Riparian proprietors before confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson v. The Queen* (6 Can. S. C. R. 52) followed.—The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers.—*Per Gwynne, J.* The Revised Statutes of Ontario, c. 24, s. 47, is *ultra vires* so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation.—The Act of 1892 and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. *In re Jurisdiction over Provincial Fisheries*, xxvi., 444.

See No. 3, *ante*, and No. 5, *infra*. See, also [1898] A. C. 700.

5. *Railways—Location of permanent way—Fencing—Laying out of boundaries—Construction of deed—Estoppel by conduct—Words of limitation—Registry laws—Notice of prior title—Possession—Acquisitive prescription—Tenant by sufrance—Arts. 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 ('C. C.—Art. 77 C. P. Q.—14 & 15 Vict. c. 51—25 Vict. c. 61, s. 15—Findings of fact—Assessment of damages—Emphyteutic lease—Domaine direct—Domaine utile—Alienation—Right of action—Adding parties.]—A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines, but the railway fencing was placed inside the stakes above the water-line, although the company could not have the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and the bed of the stream *ad medium filum* and, after the registration of the deed to the company, sold the rest of his property including water rights, mills and dams constructed in the stream to the defendant's *auteur*, describing the property sold as "including that part of the river which is not included in the right of way, &c." The plaintiffs never operated their line of railway but, immediately on its completion, under powers conferred by their charter, and the Railway Act, 14 & 15 Vict. c. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas: (1) That the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) that the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by permitting P. to retain possession of the strip of land in question and the river *ad medium filum*; (3) that by ten years' possession as owner in good faith under translatory title the defendant had acquired ownership by the prescription of ten years and (4) that, by thirty years' adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of*

land and riparian rights in question. On appeal the Supreme Court *Held*: 1. That the description in the deed to the railway company included, *ex jure nature*, the river *ad medium filum aquæ* as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance. 2. That the possession of the strip of land and the waters and bed of the river *ad medium filum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under art. 2251 C. C., but merely an occupation as tenant by sufrance upon which no such prescription could be based. 3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed. 4. That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years' prescription, and further, that he was charged with notice of the prior conveyance through the registration of the deed to the company. 5. That the acquisitive prescription of thirty years under art. 2242 C. C., could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property which he had failed to deliver *animo domini* nor in good faith.—The judgment appealed from was reversed on the questions of law as summarized, *Davies, J., dubitante*, but the findings, on conflicting testimony in respect of damages, made by the trial judge were not disturbed on the appeal.—On the question raised as to the right of action to recover the lands and for damages caused by the permanent way, it was *Held*, affirming the judgment appealed from, that the lease to the companies which held and operated the railway amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs' rights in respect of the railway, reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of *action au pétitoire* as owners of the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees.—*Semble*, that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

Compare Nos. 3 and 4, *ante*.

6. *Regulation of fisheries—31 Vict. c. 60 (D.)—Licenses—Ungranted lands in New Brunswick—Navigable streams.*

See FISHERIES, 2, 3, 5.

7. *Access to navigable stream—Obstruction by railway—Damages—Expropriation of beach.*

See EXPROPRIATION OF LANDS, 21.

S. B. C. Land Ordinance, 1865—Exclusive use of stream—Unoccupied water—Application for grant—Notice.

See WATERCOURSES, 1.

9. Building dams—Penning back waters—Improvement of watercourses—Art. 5535 R. S. Q.—Arbitration—Condition precedent—Assessment of damages.

See RIVERS AND STREAMS, 6.

10. Negligence—Vis major—Driving timber—Servitude—Watercourses—Floatable rivers—Statutory duty—53 Vict. c. 37 (Que.)

See RIVERS AND STREAMS, 7.

AND see TITLE TO LAND.

RIVERS AND STREAMS.

1. River improvements—Public waterways—R. S. O. (1877) c. 115, s. 1.—Non-floatable streams—Private property—Driving logs.]—

By decree in chancery, the respondents were restrained from driving logs through, or otherwise interfering with a stream, where it passed through the lands of the appellant, and which portion was artificially improved by him so as to float sawlogs, but was found by the judge at the trial not to have been navigable or floatable for sawlogs or other timber, rafts and crafts, when in a state of nature. The Court of Appeal reversed this decree, on the ground that C. S. U. C. c. 48, s. 15, re-enacted by R. S. O. (1877) c. 115, s. 1, made all streams, whether naturally or artificially floatable, public waterways. *Held*, reversing the Court of Appeal for Ontario and restoring the decree, that the trial judge, having determined upon the evidence that the stream at the *locus in quo*, when in a state of nature, was not floatable without the aid of artificial improvements, and such finding being supported by the evidence, the appellant had, at common law, the exclusive right to use his property as he pleased, and to prevent respondent from using, as a highway, the stream in question where it flowed through appellant's private property. *Held*, also (approving of *Boal v. Dickson*, 13 U. C. C. P. 337), that the statute (C. S. U. C. c. 48, s. 15), re-enacted by the R. S. O. 1877 c. 115, s. 1, which enacts that it shall be lawful for all persons to float sawlogs and other timber, rafts and crafts down all streams in Upper Canada, during the spring, summer and autumn freshets, &c., extends only to such streams as would, in their natural state, without improvements, during freshets, permit sawlogs, timber, &c., to be floated down them, and that the portions of the stream in question, where it passes through the appellant's land, were not within the said statute. *McLaren v. Caldwell*, viii., 435.

[The Privy Council reversed this decision and restored the judgment of the Court of Appeal, 9 App. Cases 392.]

2. Impeding navigation—Obstructions—Repairing bridge—Powers of company—Negligence—43 Vict. c. 61 (D.)—44 Vict. c. 51 (D.)]—The plaintiff alleged that he was lawfully floating a raft of oak logs down the Red River, which is navigable; and defendants unlawfully placed piles and obstructions in the bed of the river so that the raft struck the obstructions, and the logs were carried away, destroyed and sunk.—The defendants denied

that they placed said piles and obstructions in the bed of the river; alleged that the raft was not the plaintiff's, and also that they were a body corporate, empowered by Acts of Parliament (43 Vict. c. 61, and 44 Vict. c. 51), to maintain a bridge across the Red River; that in pursuance of said Acts they erected a bridge, and it became necessary, for the purpose of maintaining the bridge, to place the piles in the bed of said river, at and under the bridge; that they lawfully placed them there for that purpose, and not otherwise; that they used the utmost care and diligence not to interfere with free navigation; that the piles and obstructions did not interfere with free navigation, and that the damages complained of happened through the appellant's own negligence. The bridge having been injured by ice in the spring of 1882, it became necessary to repair it. The piles complained of were placed in the space where the plaintiff's raft struck, for the purpose of being used in the repairing of the bridge and rebuilding the permanent structure after its injury.—The bridge was constructed with a swing or draw, and two spaces of between eighty and ninety feet were left, one upon each side of the swing pier, as required by the Acts of incorporation. These spaces were open at the time of the injury complained of, no piles having ever been placed in them.—A verdict found for plaintiff was set aside and a nonsuit ordered to be entered. *Held*, affirming the Court of Queen's Bench for Manitoba, that the defendants had not exceeded, nor been guilty of negligence, in carrying out the powers conferred upon them by their charter, and were therefore not liable. *Rolston v. Red River Bridge Co.*, 12th May, 1885; Cass. Dig. (2 ed.) 564.

*3. Company—Forfeiture of charter—Estoppel—Compliance with statute—Action—Res judicata.]—*In an action against the Pickering River Improvement Co. for re-payment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, &c., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that their works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters, contrary to the provisions of the Timber Slide Company's Act, and could not exact tolls in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Company's Act, and to be acted upon by the commissioner in fixing the schedule of tolls. *Held*, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment, and were *res judicata*. *Held*, further, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited. — By R. S. O.

(1887) c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers, unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situated, or by the Commissioner of Public Works. —*Semble*, The non-completion of the works within two years would not *ipso facto*, forfeit the charter, but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared. *Hardy Lumber Co. v. Pickering River Improvement Co.*, xxix., 211.

4. *Estoppel* — *Acquiescement* — *Floatable waters*—*Water power*—*River improvements*—*Joint user*—*Servitude*—*Arts.* 400, 549, 550, 551 and 1213 C. C.]—Where a riparian owner of lands on a lower level had been permitted by the plaintiffs, for a number of years, to take water power necessary to operate his mill through a flume he had constructed along the river bank partly upon the plaintiffs' land connecting with the plaintiffs' mill-race, subject to the contribution of half the expense of keeping their mill-race and dam in repair, and these facts had been recognized in deeds and written agreements to which the plaintiffs and their *auteurs* had been parties, the plaintiffs could no longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill-race and a portion of the flume had been constructed. *City of Quebec v. North Shore Ry. Co.* (27 Can. S. C. R. 102), and *La Commune de Berthier v. Denis* (27 Can. S. C. R. 147) referred to. *Lafrance v. Lafontaine*, xxx., 20.

5. *Navigable waters*—*Cutting ice*—*Trespass on water lots*.]—An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice-houses, and for that purpose may cut a channel through private water lots through which to float the ice.—Judgment appealed from (26 Ont. App. R. 411) reversed, and that of *MacMahon, J.*, at the trial (29 O. R. 247) restored, *Strong, C.J.* and *Taschereau, J.*, dissenting. *Lake Simcoe Ice and Cold Storage Co. v. McDonald*, xxxi., 130.

6. *Deed of lands*—*Riparian rights*—*Building dams*—*Penning back waters*—*Warranty*—*Improvement of watercourses*—*Art.* 5535 R. S. Q.—*Arbitration* — *Condition precedent*—*New grounds taken on appeal*—*Assessment of damages*—*Inference by appellate court*.]—A deed conveying a portion of the vendor's lands bordering on a stream granted the privilege of constructing dams, &c., therein, with the proviso that, in case of damages being caused through the construction of any such works, the vendor or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators and that the purchasers should pay the amount awarded. *Held*, that, under the deed, the purchasers were liable, not only for the damages caused by the flooding of lands, but also for all other damages occasioned by the building of dams and other works in the stream by them; and, that the provisions of art. 5535 R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused. *Held*, also, that an objection as to arbitration and award being a condition pre-

cedent to an action for such damages which had been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Supreme Court. On cross-appeal the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence. *Hamelin v. Bannerman*, xxxi., 554.

See RIPARIAN RIGHTS, 2.

7. *Negligence*—*Vis major*—*Driving timber*—*Servitude*—*Watercourses*—*Floatable rivers*—*Statutory duty*—53 Vict. c. 37 (Que.)—*Riparian rights*.]—The Rouge River, in the Province of Quebec, is floatable but not navigable, and is used by lumbermen for bringing down sawlogs to booms in which the logs are collected at the mouth of the river and distributed among the owners. The plaintiff constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The River Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back to the jam and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally, *Held*, affirming the judgment appealed from, the Chief Justice and *Sedgewick, J.*, dissenting, that, irrespectively of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused. *Held*, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right but an easement which must be enjoyed with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses. *Ward v. Township of Grenville*, xxxii., 510.

8. *Public work* — *Navigation of River St. Lawrence*—*Negligence*—*Repair of channel*—*Parliamentary appropriation*—*Discretion as to expenditure*.] — Action for damages to S.S. "Arabia" sustained by striking an obstruction in the River St. Lawrence ship channel which had been deepened by the Department of Public Works and subsequently swept once. The suppliants contended that the Crown was obliged to keep the channel clear and that failure to do so amounted to negligence. The judgment appealed from (7 Ex. C. R. 150), held that the channel was not a public work after the work of deepening was completed and, even if it was, no negligence had been proved to make the Crown liable under s. 16 (c) of the Exchequer Court Act (1887). It also decided that the department charged with the repair and maintenance of the work with

money voted by Parliament for that purpose was not obliged to expend the appropriation, as such matters were within the discretion of the Governor-in-Council and Minister, who were responsible only to Parliament in respect thereof. The Supreme Court affirmed the judgment appealed from. *Hamburg American Packet Co. v. The King*, xxxiii., 252.

[Leave to appeal to Privy Council granted, July, 1903.]

9. *Railways—Construction of deed—Location of permanent way — Laying out boundaries — Fencing—Riparian rights—Notice of prior title — Registry laws—Possession—Acquisitive prescription.*—In the conveyance of lands for the permanent way the deed described lands sold to the railway company as bounded by an unnavigable stream, as "selected and laid out" for the railway. Stakes were planted to shew the side lines, but the railway fences were placed inside the stakes above the water's edge and the vendor was allowed to remain in possession of the strip of land between the fence and the middle of the bed of the stream. The deed was duly registered and, subsequently, the vendor sold the rest of his property, including water rights, mills and dams constructed in the stream, to defendant's *auteur* described as "including that part of the river which is not included in the right of way, &c." *Held*, 1. That the description in the deed included, *ex jure natura*, the river *ad medium filum aquæ*, and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them. 2. That the failure of the vendor to deliver the full quantity of land sold by him to the company and their abstention from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the property conveyed so as to exclude the strip outside the fences or the bed of the stream as *medium filum*, and 3. That such possession by the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

10. *Fishery licenses—Navigable streams—31 Vict. c. 60 (D.)*—On January 1st, 1874, the Minister of Marine and Fisheries under s. 2, c. 60, 31 Vict., executed to the suppliant a lease of fishery, whereby Her Majesty leased for 9 years a portion of the South-west Miramichi River, N. B., for fly-fishing for salmon therein, the *locus in quo* being thus described in the special case:—"Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places, on the bars, very shallow."—Some persons who had conveyances of a portion of the river, and claimed the exclusive right of fishing in such portion, interrupted suppliant in the enjoyment of his fishing under the lease, and put him to expenses in endeavouring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease.—The Supreme Court of New Brunswick decided ad-

versely to his exclusive right to fish in virtue of the lease, and he filed a petition of right, and claimed compensation for loss of fishing privileges and expenses incurred. The Exchequer Court held, *inter alia*, that an exclusive right of fishing existed in the persons who held the conveyances, and that the minister consequently had no power to grant a lease or license under s. 2 of the Fisheries Act of the portion of the river in question, and in answer to the question, "Where the lands (above tide water) through which the said water passes are ungranted, could the Minister of M. and F. lawfully issue a lease of that portion of the river?" *Held*, that the minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river. — On an appeal on the main question, whether or not an exclusive right of fishing did so exist; *Held*, affirming the judgment of the Exchequer Court, 1. That the general power of regulating and protecting the fisheries under the B. N. A. Act, 1867, s. 91, is in the Parliament of Canada, but that the license granted by the minister of the *locus in quo* was void, because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.—2. That although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down, and a right of passage up and down, wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing nor with the right of the owners of property opposite their respective lands *ad medium filum aquæ*. — 3. That the rights of fishing in a river, such as in that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such license. — *Per Ritchie, C.J.*, and Strong, Fournier and Henry, J.J., reversing the judgment of the Exchequer Court on the question submitted, that the ungranted lands in the Province of New Brunswick, being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal. *The Queen v. Robertson*, vi., 52.

11. *Tidal and navigable waters — Boom company — Impeding navigation—45 Vict. c. 100 (N.B.)*—Although a Provincial Legislature may incorporate a boom company, it can not give it power to obstruct a tidal navigable river, and therefore the Act 45 Vict. c. 100 (N.B.), so far as it authorized erecting booms and other works in the Queddy River, obstructing its navigation, was *ultra vires* of the New Brunswick Legislature. *Queddy River Driving Boom Co. v. Davidson*, x., 222.

12. *Interference with navigation—Trespass—Water lots—Easement—Prescription—Public waters — Constitutional law — Title to alveus—Dedication of public lands—Presump-*

tion—User—Obstruction to navigation—Public nuisance—Balance of convenience.]—The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion. *Dixon v. Snetsinger* (23 U. C. C. P. 235) discussed.—By 23 Vict. c. 2, s. 35 (Can.), power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.—The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.—If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.—An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes.—It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree. Judgment appealed from (5 Ex. C. R. 30) affirmed. *The Queen v. Moss*, xxvi., 322.

13. *Municipal boundary — Legislative jurisdiction—Railway bridge*—43 & 44 Vict. c. 62 (Que.)—As to whether the clause in the Act of incorporation of the town extending the limits to the middle of the Richelieu, a navigable river, is *intra vires* of the Legislature of Quebec, the holding of the court below that it was *intra vires* was affirmed. *Central Vermont Ry. Co. v. Town of St. Johns*, xiv., 288.

[This judgment was affirmed by the Privy Council, 14 App. Cas. 590.]

14. *Construction of deed — Description of lands in grant — Fisheries of navigable waters.*]—A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend *ad medium flum* as in the case of a non-navigable river. Judgment appealed from (21 Ont. App. R. 569) reversed. *Barthel v. Scotten*, xxiv., 367.

See DEED, 25.

15. *Riparian owners—Fishery officer—Trespass*—31 Vict. c. 60 (D.)

See FISHERIES, 3.

16. *Riparian rights — Boundaries — Diversion of water.*

See TITLE TO LAND, 129.

17. *Improvements — Dams—Booming logs —Arbitration—Action for damages*—C. S. L. C. c. 51.

See PRESCRIPTION, 28.

18. *Obstructing navigation — Throwing sawdust in stream—Assessment of damages.*

See DAMAGES, 61.

ROAD COMPANY.

Special charter — Repairs — Collection of tolls—Injunction.

See TOLLS, 3.

AND see QUEBEC TURNPIKE TRUSTS.

ROADS.

See HIGHWAYS.

ROYALTIES.

Mining law — Dominion Lands Act—Publication of regulations—Renewal of license—Payment of royalties—Voluntary payment—R. S. C. c. 5½, ss. 90, 91.

See CONSTITUTIONAL LAW, 32.

RULE OF THE ROAD.

Shipping — Collision with anchor—Negligent mooring—Damages.

See NEGLIGENCE, 38.

AND see NAVIGATION, 4.

See ADMIRALTY LAW — NAVIGATION — SHIPPING.

RULES AND REGULATIONS.

See MINES AND MINERALS—PRACTICE, &c.

SAISIE GAGERIE.

Action within competence of Circuit Court —Superior Court—Question raised by pleadings—Title to land —Jurisdiction of Supreme Court.]—In an action in the Superior Court for arrears of rent with *saisie gagerie*, defendant pleaded that he had held the premises since the expiration of his lease under verbal agreement for sale. The Court of Queen's Bench, reversing the Court of Review, held that the action ought to have been instituted in the Circuit Court. *Held*, that as the case was originally instituted in the Superior Court and upon the face of the proceedings the right to possession of and property in real estate was involved, an appeal would lie, Strong, J., dissenting. *Blachford v. McBain*, xix., 42.

See, also, 20 Can. S. C. R. 269.

SALE.

1. SALE OF BONDS, STOCK, SECURITIES, &c., 1-5.

2. SALE OF GOODS, 6-51.

(a) *Breach of Contract*, 6-11.

(b) *Delivery and Possession*, 12-23.

(c) *Evidence*, 24-31.

(d) *Fraud*, 32.

(e) *Remedy of Unpaid Vendor*, 33-37.

(f) *Other Cases*, 38-51.

3. SALE OF LAND, 52-130.

(a) *Description and boundaries*, 52-58.

(b) *Evidence*, 59-65.

(c) *Executions*, 66-74.

(d) *Fraud*, 75-78.

(e) *Mistake*, 79-82.

(f) *Redemption; Droit de Réméré*, 83-85.

(g) *Rescission*, 86-94.

(h) *Specific Performance*, 95-98.

(i) *Tax Sales*, 99-102.

(j) *Warranty*, 103-105.

(k) *Other Cases*, 106-130.

4. SALE OF SHIP, 131.

1. SALE OF BONDS, STOCK, SECURITIES, &C.

1. *Execution of judgment—Sale en bloc — Railway shares—Arts. 595, 599 C. C. P.*

See EXECUTION, 2.

2. *Shares held "in trust"—Purchase of miners' stock for valuable consideration—Notice—Account.*

See TRUSTS, 7.

3. *Sale of securities — Hypothecation of bonds — Collateral mortgage — Purchase by mortgage—Trust.*

See PLEDGE, 6.

4. *Sale of bonds — Trustees and administrators—Fraudulent conversion — Past due bonds — Negotiable security — Commercial paper — Debentures transferable by delivery — Equity of previous holders — Estoppel — Brokers and factors — Pledge — Implied notice — Innocent holder for value — Principal and agent.*

See PLEDGE, 7.

5. *Succession duties — Exempted property — Provincial bonds—Sale under will—Taxation of proceeds of sale.*

See DUTIES.

2. SALE OF GOODS.

(a) Breach of Contract.

6. *Sale of lumber—Acceptance of part — Right to reject remainder.]—T. contracted for the purchase from D. of 200,000 feet of lumber of a certain size and quality, which D. agreed to furnish. No place was named for the delivery of the lumber, and it was shipped from the mills where it was sawed to T., at Hamilton. T. accepted a number of carloads at Hamilton, but rejected some because a portion of the lumber in each of them was not, as he alleged, of the size and quality contracted for. Held, affirming the judgment appealed from (12 Ont. App. R. 659), Fournier and Henry, J.J., dissenting, that T., under the circumstances of the case, had no right to reject the lumber, his only remedy for the deficiency being to obtain a reduction of the price or damages for non-delivery according to the contract. Thomson v. Dymont, xiii., 303.*

7. *Contract to deliver goods — Particular chattel—Representation.]—McD. bought at auction, through an agent, a billiard table described in the auctioneer's advertisement as "a full size 6 pocket English billiard table made by Thurston," &c., and wrote to M., makers of billiard tables in Toronto, describing his table and asking terms of exchanging it for a new one of another style. On receiving the information asked, McD. wrote that he could not accept the terms offered. M. afterwards wrote: "Toronto, Oct. 2nd, 1886.—D. C. McDougall, Esq., Agent, Halifax Banking Co., Antigonish.—Dear Sir,—Your laconic reply to our letter of 24th instant to hand. We would drop the matter if it was not for the inquiry which we have just received from a private party in the far North-West who would like to purchase a good second-hand English table. We would therefore kindly ask you to make us your offer for the proposed exchange, and if we can possibly do*

it we will accept it. Give us as near a description as you can of your table, maker's name is essential, but as you have nothing with it but the billiard outfit (no life and pyramid balls and boards) you should not make your price too high, or a deal will be impossible. Awaiting your kind reply, we remain yours truly, Samuel May & Co."—To which McD. answered:—"I may just say I never saw our table yet, but am informed it is a very nice one, made by 'Thurston' and very little the worse of wear, being in the private family of Sir Edward Kenny in his country residence near Halifax. This gentleman who purchased the table for us writes thus: 'I got the three billiard balls and marker, and 19 cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear.' The table is 6x12, and for particulars we would refer you to Jerry E. Kenny, Esq., or F. D. Clark, auctioneer, Halifax.—Yours truly, D. C. McDougall."—M. then wrote accepting the offer and adding, "We trust that the English table is fully as represented; and if you are satisfied, you may ship it at once, with billiard balls, markers, 19 cues, cloth and what else there may be. In the meantime we will get up a 4½x9 Eclipse Combination table in best style, and with outfits for pool, carom and pin pool games. Awaiting your early reply, we remain, dear sir, yours truly, Samuel May & Co."—The table shipped by McD. on reaching Toronto was found to be an American made table with English cushions and worth only from \$15 to \$25. M. brought action for the original price of the new table. *Held*, affirming the judgment appealed from (Supreme Court N. S.), that McD. agreed to deliver to M. an English built table made by Thurston as described in his letter, and having failed to deliver such a table he was liable to pay the full price of the one obtained from M. *May v. McDougall*, xviii., 700.

8. *Sale by sample—Inspection—Place of delivery.]—Where goods are sold by sample the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase. Trent Valley Woollen Mfg. Co. v. Oelrichs, xxiii., 682.*

9. *Sale of goods — Breach of warranty — Special damages — Action for price subsequent to recovery — Evidence as to inferiority of goods delivered — Consequential damages.*

See EVIDENCE, 2.

10. *Contract for deals—Place of delivery—Warranty as to quality — Acceptance — Arts. 1073, 1473, 1507 C. C.*

See CONTRACT, 16.

11. *Contract by correspondence—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Condition precedent—Right of action.*

See CONTRACT, 217.

(b) Delivery and Possession.

12. *Open and notorious sale—Actual and continued change of possession—R. S. O.*

(1877) c. 119, s. 5—*Hiring of former owner as clerk.*—The purchaser of the stock of a trader, where the change of ownership is open and notorious, may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may be "an actual and continued change of possession," as required by R. S. O. (1877) c. 119, s. 5. *Ontario Bank v. Wilcox* (43 U. C. Q. B. 460) distinguished. *Kinloch v. Scribner*, xiv., 77.

13. *Consignment — Delivery of goods—Non-acceptance by vendee—Return of goods to vendor—Rescission of contract.*—H. doing business at Halifax, N. S., was accustomed to sell hides to J. L. of Pictou. Their usual course of business was for H. to ship a lot of goods consigned to J. L., and send a note for the price according to his own estimate of weight, &c., subject to rebate if there was any deficiency. On 14th July, 1884, a shipment was made by H. in the usual course and a note given by J. L., which H. discounted. The goods came to Pictou Landing and remained there until 5th August, when J. L. sent his lighterman for some other goods and he finding the goods shipped by H., brought them up in his lighter. The next day J. L. was informed of their arrival, and stored them in the warehouse of D. L. where he had other goods, with instructions to keep them for the parties who had sent them. The same day he sent a telegram to H. as follows: "In trouble. Have stored hides. Appoint some one to take care of them." H. immediately came to Pictou and having learned what was done, expressed himself satisfied. He asked if he would take them away, but was assured by J. L. that they were all right and left them in the warehouse. On 6th August a levy was made, under execution of the bank against J. L., on all his property that the sheriff could find, but the goods in question were not included in the levy. On the 12th August, J. L. gave the bank a bill of sale of all his hides in the warehouse of D. L. and the bank indemnified D. L. and took possession under such bill of sale of the hides so shipped by H. and stored in said warehouse. In a suit by H. against the bank and D. L. for wrongful detention: *Held*, affirming the judgment appealed from, that the contract of sale between J. L. and H. was rescinded by the action of J. L. on refusing to take possession of the goods when they arrived at his place of business and handing them over to D. L. with directions to hold them for the consignor, and in notifying the consignor who acquiesced and adopted the act of J. L., whereby the property in and possession of the goods became re-vested in H. and there was, consequently, no title to the goods in J. L. on 12th August when the bill of sale was made to the bank. *Pictou Bank v. Harvey*, xiv., 617.

14. *Lumber in yard — Delivery—Part of large parcel.*—Defendant had over 4,000,000 feet of lumber in a yard in Rockland, Ont., and sold 1,500,000 through an agent to L. of Montreal on six months' credit, ratifying the sale by a letter to the owners of the yard as follows: "Montreal 12th January, 1887.—Messrs. W. C. Edwards & Co., Rockland, Ont.—Gentlemen,—You will please ratify Mr. Lemay's order for one million feet 3 mill culls 8-13 feet and 493,590 feet 3 mill culls 14-16 feet sold to Mr. William Little, f. o. b. of barges, with option to draw them

from the piles, if he wants some during winter.—Yours truly, (Sd.) N. Hurteau et Frère."—A few days after the sale the agent gave an order on the owners of the yard for delivery of the lumber to L., which order was accepted by the owners. L. had given a six months' note for the price of the lumber and just before it matured he asked defendant to renew, which he refused, and on L. saying that he could not pay, defendant replied that he must keep his lumber, whereupon he was informed by L. of his agreement with plaintiff made about a month after the purchase from defendant by which he pledged to plaintiff the warehouse receipt for the lumber as collateral security for advances to him by plaintiff. On the trial of an interpleader issue to determine the title to this lumber it was shewn by the evidence that the quantity sold to L. had never been separated from defendant's lot in the yard and that defendant had always kept it insured, considering it his until paid for. *Held*, affirming the Court of Appeal, Strong and Gwynne, J.J., dissenting, that the property in the lumber never passed out of the defendant. *Ross v. Hurteau*, xviii., 713.

[The Privy Council refused leave to appeal.]

15. *Goods sold by weight — Contract — Delivery — Damage before weighing—Possession by vendor—Deposit—Arts. 1063, 1064, 1235, 1474, 1710, 1802 C. C.*—*Held*, per Ritchie, C.J., Strong and Fournier, J.J., affirming the judgment appealed from (M.L.R. 6 Q.B. 222), that where goods and merchandise are sold by weight the contract of sale is not perfect, and the property in the goods remains in the vendor and they are at his risk until they are weighed, or until the buyer is in default to have them weighed; and this is so, even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction. *Held*, also, per Ritchie, C.J., Fournier and Taschereau, J.J., that where goods are sold by weight, and the property remains in the possession of the vendor, the vendor becomes in law a depository, and if the goods while in his possession are damaged through his fault and negligence he cannot bring action for their value.—*Per* Patterson, J., *dubitante*, whether there was sufficient evidence of acceptance in this case to dispense with the writing necessary under para. 4, art. 1235 C. C. to effect a perfect contract of sale. *Ross v. Hannan*, xix., 227.

16. *Contract of sale—Goods not specified—Intention to pass property—Appropriation.*—T., a brick-maker, sold by sample 50,000 bricks out of a kiln containing 100,000 to the plaintiff, who paid the contract price, and hauled away about 16,000. The balance remained in the kiln in T.'s yard, and were never in any way separated from the rest of the kiln, or appropriated to the plaintiff. The defendant (the sheriff) subsequently sold them under an execution at the suit of W. against T. Plaintiff brought trover against the defendant, claiming property in 34,000 of the bricks. *Held*, reversing the judgment appealed from (4 Pugs. & Bur. 234), that the sale was one by sample; the bricks sold were not specifically ascertained, and there was no evidence from which it could be inferred that it was the intention of the parties the property in the bricks should pass before delivery.—*Appeal allowed with costs.* *Temple v. Close*, Cass. Dig. (2 ed.) 765.

17. *Construction of contract — Agreement to secure advances — Sale of goods — Pledge — Delivery of possession — Arts. 434, 1025, 1026, 1027, 1472, 1474, 1492, 1994 c. C. C. — Bailment to manufacturer.*—K. B. made an agreement with T. for the purchase of the output of his sawmill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled and piled on the wharf should be paid for at prices stated; that the seller should pay the purchasers \$1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent.; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advances being made on the culler's certificates shewing receipt of logs not exceeding \$25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be their property, and should be stamped with their name, and that all advances should bear interest at the rate of 7 per cent. Before the river drive commenced the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging \$32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which was buried in snow and ice, were not stamped, but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller under which all moveable property in his possession was seized, including a quantity of the logs in question, lying along the river drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured, at the seller's mill. *Held*, (Taschereau, J., taking no part in the judgment upon the merits), that the contract so made between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards into which part of them had been manufactured. *King v. Dupuis, dit Gilbert*, xxviii., 388.

18. *Contract — Agreement to supply goods — Property in goods supplied — Execution — Seizure.*—By an agreement between H., of the one part, and W. and wife of the other, the latter were to provide and furnish a store and H. to supply stock and replenish same when necessary; W. was to devote his whole time to the business; W. and wife were to make monthly returns of sales and cash balances, quarterly returns and stock, &c., on hand and to remit weekly proceeds of sale with certain deductions. H. had a right at any time to examine the books and have an account of the stock, &c., the net profits were to be shared between the parties; the agreement could be determined at any time by H.

or by W. and wife on a month's notice. *Held*, that the goods supplied by H. under this agreement as the stock of the business were not sold to W. and wife, but remained the property of H. until sold in the ordinary course; such goods, therefore, were not liable to seizure under execution against H. at the suit of a creditor. *Ames-Holden Co. v. Hatfield*, xxix., 95.

19. *Contract — Sale of lumber — Inspection.*—A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor, Ont.), "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final." *Held*, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on the parties. *Thomson v. Matheson*, xxx., 357.

20. *Delivery — Bill of lading — Condition of prepayment — Principal and agent — Vesting of ownership.*

See CONTRACT, 210.

21. *Fish sold in storage — Part delivery — Lien for unpaid price — Consignment against supplies advanced.*

See BAILMENT.

22. *Goods sold by agent — Undisclosed principal — Right of action — Deficient delivery — Option to accept bill of lading or re-weigh — Estoppel — Tender and payment into court.*

See ACTION, 128.

23. *Delivery of goods sold — "At" shed — "Into" shed or grounds adjacent.*

See CONTRACT, 216.

(c) Evidence.

24. *Statute of Frauds — Memorandum in writing — Repudiating contract by.*—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. *Martin v. Haubner*, xxvi., 142.

25. *Contract — Sale of goods by sample — Objections to invoice — Reasonable time — Acquiescence — Evidence.*—If a merchant receives an invoice and retains it for a considerable time without any objection, there is a presumption against him that the price stated in the invoice was that agreed upon.—Judgment of the Court of Queen's Bench, that the evidence was sufficient to rebut the presumption, reversed. Gwynne J., dissenting, and holding that the appeal depended on mere matters of fact as to which an appellate court should not interfere. *Kearney v. Letellier*, xxvii., 1.

26. *Contract — Evidence to vary written instrument — Admission of evidence.*—The Su-

preme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 21) which in effect held, under the special circumstances of the case, involving dealings with two companies connected in business and having almost similar names, that it was not inconsistent with a written agreement with the plaintiff to prove that defendant supposed he was dealing with another party with whom he had made other arrangements in respect to payment for goods purchased. *Wilson et al. v. Windsor Foundry Co.*, xxxi., 381.

27. *Parol agreement — Memo. in writing — Delivery of goods — Statute of Frauds.*

See EVIDENCE, 82.

28. *Incomplete contract — Sale of deals — New trial.*

See CONTRACT, 129.

29. *Sale of goods by agent — Commission — Agent.*

See PRINCIPAL AND AGENT, 52.

30. *Contract by correspondence — Acceptance — Mailing — Delivery of goods sold — Domicile — Indication of place of payment.*

See CONTRACT, 134.

31. *Sale of monument by sample — Evidence of contract — Findings on contradictory evidence — Reversal on appeal — Practice.*

See EVIDENCE, 65.

(d) Fraud.

32. *Fraudulent scheme — Inadequate security — Simulated hypothec — Suit for price.* — Special counts in declaration, alleging that goods were sold to defendants on representation that the latter were the holders for value of a certain obligation and hypothec in their favour by R. for \$3,000, payable by yearly instalments of \$1,000, with interest; that such obligation represented the balance due defendants from R. on the purchase of real estate sold to R., on which he had paid \$300 at time of purchase, and that R. was a man of means and had other property. The plaintiff sold goods to defendants to the amount of \$2,000, and accepted as payment the first two instalments of said obligation, which were duly assigned to him, the defendant R. being present at time of assignment, but afterwards accepted the transfer. The declaration then alleged that the representations by defendants were false and fraudulent; that the transfer of property to R. and the obligation were fraudulently made to enable defendants to use it to obtain credit; that R. never paid anything on account for the purchase, or entered into possession, but defendants kept possession and collected the rents of the property; that R. was, not a man of means, but was a pauper and not carrying on any trade or business which the defendants knew, and that he was simply a *prête-nom* for defendants. The declaration also contained the common counts. The plaintiff demanded the price of the goods from defendants, and prayed that the obligation be set aside as regards the plaintiff, and that it be declared that R. was the agent (*prête-nom*) of the defendants, and that defendants be condemned to pay the sum of \$2,000, with interest and costs. — The defence was that the allegations were false; that

the transactions with R. were *bonâ fide* the sale an actual one; that the instalment of said obligation were accepted by plaintiff in payment of the goods after due inquiry and that even if the allegations were true plaintiff could not maintain his present action. — The Superior Court gave judgment for plaintiff, finding that the property was worth much less than \$2,000; that R. never anything on the land or entered into possession; and that the deed to and obligation for R. were simulated and fraudulent. Judgment was confirmed by the Court Queen's Bench, Justices Monk and Cross. — *Held*, affirming the judgment appealed from, that the evidence shewed a fraudulent scheme on the part of the defendants to obtain the goods of the plaintiff and to claim him out of the price by inducing him to accept an inadequate security; and that under the circumstances the plaintiff was entitled to recover for such price. Henry, J., dissent. — *Per Taschereau, J.* The court should reverse the findings on a question of fact the two courts below, except under very unusual circumstances. *Hays v. Gordon* (L. 4 P. C. 337); *Gray v. Turnbull* (L. R. 2 L. 53); *Bell v. Corporation of Quebec* (App. Cas. 94); *Smith v. St. Lawrence* (R. 5 P. C. 308). He agreed, however, with the courts below on the facts. — Appeal dismissed with costs. *Black v. Walker*, C. Dig. (2 ed.) 768.

(e) Remedy of Unpaid Vendor.

33. *Title to goods — Consignment subject to payment — Breach of condition — Purchase for value.* — Plaintiff consigned crude oil to A., a refiner, on express agreement that no property in the oil should pass until made certain payments. Without making payments A. sold to defendants, without knowledge of plaintiff. *Held*, affirming the Court of Appeal for Ontario (29 Gr. 300), that though defendants were purchasers for value from A., believing that he was owner, plaintiff, under his agreement, having retained the property in the oil, and not having done anything to estop him from maintaining right of ownership, was entitled to recover from the purchaser the price of the oil. *Fristal v. McDonald*, ix., 12.

34. *Goods consigned for sale — Bill of lading — Assignment — Property in goods — Stoppage in transitu — Replevin.* — H., of St. Denis, P. E. I., carried on the business of lobs packing, sending his goods for sale on commission to a consignee at Halifax N. S., who supplied him with tin plates, &c. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef *via* Pictou and Intercolonial Railway, addressed to him the bill of lading providing that the goods were to be delivered at Pictou, to the freight agent of the Intercolonial Railway or his assigns, the freight to be payable in Halifax. The consignee, being on the verge of insolvency, indorsed the bill of lading to McDonald to secure accommodation acceptances. McDonald drew on the consignee for the value of the consignment, but the draft was not accepted, and he directed the agent of the Intercolonial Railway not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent at Halifax to hold them. McDonald applied to the agent

at Halifax for the goods, and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent:—*Held*, affirming the judgment appealed from, Henry, J., dissenting, that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them. *Held*, also, that whether or not a legal title to the goods passed to McM., the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them. *McDonald v. McPherson*, xii., 416.

35. *Conditional sale of goods — Suspensive condition—Moveables incorporated with freehold—Immoveables by destination—Hypothecary charges—Arts. 375 et seq. C. C.*—A suspensive condition in an agreement for the sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor, is a valid condition. *Banque d'Hochelaga v. Waterous Engine Works Co.*, xxvii., 406.

36. *Materials for railway—Immoveables by destination—Receiver in possession—Unpaid vendor.*

See LIEN, 3.

37. *Sale of machinery — Resolatory condition—Immoveables by destination—Moveables incorporated with the freehold — Severance from realty—Hypothecary creditor—Unpaid vendor.*

See CONTRACT, 66.

(f) Other Cases.

38. *Goods sold and delivered—Credit—Direction to jury—Withdrawal of evidence from jury—New trial.*—In an action against McK. & M. for goods sold and delivered, plaintiff had sold the goods to defendants and on their credit, and his evidence was corroborated by defendant McK. The goods were charged in plaintiff's books to C. McK. & Co. (defendant McK. being a member of both firms), and credited the same way in C. McK. & Co.'s books, notes of C. McK. & Co. were taken in payment, and it was claimed that the sale of the goods was to C. McK. & Co.—The trial judge called the attention of the jury to the state of the entries in the books of plaintiff and of C. McK. & Co., and to the taking of the notes, and to all the evidence relied on by the defence, and left it entirely to the jury to say as to whom credit was given for the goods. *Held*, affirming the judgment appealed from (27 N. B. Rep. 42), Strong and Patterson, J.J., dissenting, that the case was properly left to the jury and a new trial was refused. *Miller v. Stephenson*, xvi., 722.

39. *Trover — Conversion of vessel — Joint owners—Marine insurance — Abandonment—Salvage.*—A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest. *Rourke v. Union Ins. Co.*, xxi., 344.

40. *Mortgaged goods—Sale under powers—Chattel mortgage—Mortgagee in possession—Negligence—Wilful default—"Slaughter sale"—Practice—Assignment for benefit of creditors—Revocation of.*—A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives but also for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor.—An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it.—Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.—Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124, and the assignor was notified of such refusal and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner. *Rennie v. Block*, xxvi., 356.

41. *Mandate — Partnership — Agency — Factor—Pledge—Lien—Notice—Right of action—Intervention — Arts. 1739, 1740, 1742, 1775 C. C.*—A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods notwithstanding notice that the contract was with an agent only.—Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt and he cannot claim any lien upon the goods themselves nor on the price received for them. *Dingwall v. McBean*, xxx., 441.

42. *Goods sold by agent in his own name—Contra account—Compensation.*

See SET-OFF, 1.

43. *Droit de rémère—Insurable interest of vendor.*

See INSURANCE, FIRE, 80.

44. *Agent of foreign company—Use of seal—Seizure under attachment—Conversion.*

See SHERIFF, 1.

45. *Mortgaged goods — Proviso restricting sale — Stock in trade — Ordinary course of trade—Seizure—Justification.*

See CHATTEL MORTGAGE, 10.

46. *Goods sold in one lot—Lump price—Contract by agent of independent firms—Eccess of authority—Ratification.*

See PRINCIPAL AND AGENT, 4.

47. *Cheese factory supply agreement — Transfer of personal rights—Arts. 1510, 1517, 1518 C. C.—Warranty—Eviction—Restitution—Prête-nom.*

See ACTION, 134.

48. *Person to whom credit was given—Assignment in trust—Power of attorney by trustee—Authority of attorney to use principal's name—Evidence.*

See DEBTOR AND CREDITOR, 46.

49. *Sale of timber—Delivery—Time of payment—Premature action—Vendor and purchaser.*

See CONTRACT, 212.

50. *Curator—Purchase of trust estate—Art. 1484 C. C.*

See ACTION, 132.

51. *Contract—Shipping receipt—Carriers—Liability limited by special conditions—Negligence—Connecting lines of transportation—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.*

See CARRIERS, 2.

3. SALE OF LAND.

(a) Description and Boundaries.

52. *Unsurveyed lands—Unknown quantity—Sold by the acre—Contract—"More or less"—Will—Executors—Breach of trust—Specific performance.]—Executors were authorized by will to sell such portion of the real estate as they in their discretion should think necessary to pay off a mortgage and such debts as the personal estate would not discharge. They offered for sale at auction a lot described as "sixty acres (more or less) section 78, Loch End Farm, Victoria District," and giving the boundaries on three sides. The lot was unsurveyed and offered for sale by the acre, an upset price of \$35 being fixed. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchaser.—S. purchased the lot for \$36 per acre and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity, alleging that only some \$2,000 was required to pay the debts of the estate, and refused to execute a deed of the 117 acres tendered to S. In a suit by S. for specific performance of the contract for sale of the whole lot. *Held*, reversing the judgment appealed from and restoring that of the judge on the hearing (2 B. C. Rep. 67), Gwynne, J., dissenting, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity. *See v. McLean*, xiv., 632.*

53. *Lots sold by plan—Closing lanes on sale plan—Easement—Estoppel—Acceptance of lease according to altered plan.*

See TITLE TO LAND, 33.

54. *Sale of timber limits—Errors and omissions—Statement of account—Res judicata—Deed—Evidence.*

See No. 108, *infra*.

55. *Sale of land—Building restrictions—Construction of covenant—Description—Street boundaries.*

See CONTRACT, 15.

56. *Sale of land—Description in deed—Extent—Terminal point—Number of rods.*

See DEED, 24.

s. c. d.—41

57. *Lands sold en bloc—Metes and bounds—Description—Cadastral plans—Possession—Notice of adverse title—Husband and wife—Authorization.*

See TITLE TO LAND, 87.

58. *Mistake in designation of lands—Principal and agent.*

See MISTAKE, 7.

(b) Evidence.

59. *Land sold by auction—Vendor not closed at sale—Subsequent correspondence—Contract—Statute of Frauds.*

See VENDOR AND PURCHASER, 3.

60. *Sale of mortgaged lands—Agreement—Statute of Frauds—Specific performance.*

See No. 95, *infra*.

61. *Conditions—Notice to purchasers—Error in mortgage—Rectification—Estoppel.*

See VENDOR AND PURCHASER, 19.

62. *Sale of timber limits—Mortgage—Take—Registration—Description—Written document.*

See No. 108, *infra*.

63. *Agreement for sale—Fraud—Misrepresentation—Rescission.*

See CONTRACT, 119.

64. *Deed—Delivery—Retention by grantor—Presumption—Rebuttal.*

See EVIDENCE, 178.

65. *Sale of leased premises—Parol agreement—Misrepresentation—Statute of Frauds.*

See No. 110, *infra*.

(c) Executions.

66. *Purchase of land—Voluntary payment—Lien—Application of proceeds—Interpleader—Lands taken or sold under execution.]—Where the purchaser of land voluntarily paid to the sheriff the amount of an execution in his hands in a *bona fide* belief that it was a charge upon the land.—*Held*, affirming the judgment appealed from (2 Man. R. 257), that a party having a lien on lands could not, under the Interpleader Act, claim the money so paid to the sheriff against the execution creditor, even where he had relinquished his title to the land to enable the owner to carry out the said sale, and to receive a portion of the purchase money. *See*, *Semble*, that as the lands were neither "taken or sold under execution," the case was within the Interpleader Act. *Federal Bank of Canada v. Canadian Bank of Commerce*, xiii., 384.*

67. *Lands sold in execution—Adjudication—Joint purchasers—Security to sheriff—Interpleader—Lands taken or sold under execution.]—*Sale à la fin enchère*—Art. 688, 691, 694, 760 C. C. P.]—Judicial sale, on 10th July, 1875, appealed. S., respondent, L., and C. became joint purchasers of land for \$2,500.—On 28th Aug. 1875, the sheriff returned the writ stating that he had levied a net sum of \$2,352.90, with*

had been paid to him by a bond as required by law, and that he held that sum subject to the order of the court. This pretended bond was in reality a "bon" in the following terms: "Good to S. D. sheriff, for \$2,299.65, for value received, payable to his order. This bon serves as security in the matter No. 225 B. *et al. v. Côté*. Three Rivers, 2nd August, 1875," and signed by the three purchasers, S., C. and L.—On the return distributions were made and L., the respondent, collocated for \$1,876.76 and \$259.93.—The appellant, McG., being a judgment creditor of S., the other appellant, intervened in the case to exercise the rights of his debtor.—On 5th March, 1883, L. served the judgments of distribution on appellant S., and on the representatives of C., deceased; and on 20th of same month petitioned for an order to re-sell the property so purchased by himself jointly with the other "*adjudicataires*" for false bidding, and McG. appeared on the petition.—These proceedings being summary, no written answers were put in, and on 16th June following, the Superior Court ordered the re-sale for false bidding upon the purchasers, S. and C. alone; and this judgment was affirmed by the Queen's Bench, at Quebec, on 7th May, 1884, modifying, however, the judgment by ordering the re-sale to be made upon the three "*adjudicataires*;" Monk and Ramsay, J.J., dissenting.—The question was, whether or not L. could demand re-sale of a property of which he was a co-purchaser for false bidding, he himself being one of the "*adjudicataires*" in default, who had retained the purchase money by giving their joint "bon," instead of furnishing the sheriff with the sureties required by law. *Held, per Strong, Henry and Taschereau, J.J.* (Ritchie, C.J., and Fournier, J., dissenting), reversing the judgment appealed from, that the respondent was not entitled to demand a re-sale. The bon was not a surety contemplated by art. 688 C. C. P. and the three purchasers having made with the sheriff an agreement not contemplated by law, should be compelled to govern themselves according to that agreement, and the respondent's only course was by direct action against his co-debtors to recover from them their share. — *Per Taschereau, J.* The obligation contracted by S., C. and L. in becoming joint purchasers at a judicial sale was a joint and several obligation, and it follows that their "bon" bound them jointly and severally also. Under such an obligation they were responsible only towards each other for one-third of the purchase money, and each for the whole to the sheriff. By the judgments below, appellant S. found himself individually compelled to pay the full amount of the price of sale to respondent, to prevent the re-sale of the property (arts. 694, 760 C. C. P.); while, if there was any default, respondent was equally in default with his co-*adjudicataires*, and there could be no doubt a private agreement had been come to between the three purchasers which respondent sought to repudiate. — *Per Ritchie, C.J., dissenting.* McG. could be in no better position than his debtor, and to allow him to get a third of this property as the property of S. without payment by himself or S. of $\frac{1}{3}$ of the price which he was bound to pay, seems so unreasonable and unjust that it would be necessary to be satisfied beyond all doubt that the law was clear and unquestionable on the point before sanctioning what appears such manifest injustice.—*Per Fournier, J., dissenting.* The question whether there being three joint purchasers who have all made default in paying the price of their adjudication, one of them can, as hypothecary credi-

tor mentioned in the certificate of registration and as a collocated creditor unpaid, proceed to a sale *à la folle enchère* of the land sold to the three purchasers, is very clearly settled by art. 691 C. C. P.—The only right appellant had was to exercise the rights of S., his debtor, and if appellant wished to avail himself of those rights, he should fulfil the obligation of his debtor by paying his share of the adjudication. He was seeking to have a third of the land adjudged to S. without paying the third of the price of adjudication which S. was bound to pay. — Appeal allowed with costs. *McGreavy v. Leduc*, Cass. Dig. (2 ed.) 801.

68. *Sale of lands by sheriff—Folle enchère—Re-sale for false bidding, arts. 690 et seq. C. C. P.—Art. 688 C. C. P.—Privileges and hypothecs—Sheriff's deed—Registration of—Absolute nullity.*—Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchère* it was ordered that the property described in the *procès verbal* of seizure should be re-sold, no reference being made to the part withdrawn. On appeal the Court of Queen's Bench reversed the order on the ground that it directed a re-sale of property which had not been sold and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for re-sale, or prior to the proceedings for *folle enchère*. *Held*, that the sheriff's deed having been issued properly and without authority should be treated as an absolute nullity notwithstanding that it had been registered and appeared upon its face to have been regularly issued, and it was not necessary to have it annulled before taking proceedings for *folle enchère*. *Lambe v. Armstrong*, xxvii., 309.

69. *Description of subdivided lots—Lands seized in execution—Separate lots put up en bloc—Device to obstruct purchasers—Arts. 638, 714 C. C. P.—Procès verbal of seizure.*

See SHERIFF, 2, 3.

70. *Seizure of lands super non domino et non possidente—Registration of deed.*

See SHERIFF, 6.

71. *Sheriff's sale of land—Bond for price—Nullity—Fraud—Opposition.*

See SHERIFF, 10.

72. *Title to land—Sheriff's sale—Vacating sale—Refund of price—Exposure to eviction—Actio conductio indebiti—Substitution—Prior incumbrance—Discharge by sheriff's sale—Petition to vacate sheriff's sale.*

See SUBSTITUTION, 9.

73. *Levy under execution—Charging lands—Territories Real Property Act—Tort—Indemnity to sheriff.*

See SHERIFF, 13.

74. *Interdiction—Marriage laws—Authorization by interdicted husband—Dower—Registry laws—Sheriff's sale—Warranty—Succession—Renunciation—Donation.*

See TITLE TO LAND, 111.

(d) *Fraud.*

75. *Title to land—Vendor and purchaser—Deed of sale—Rescission—False representa-*

tions—Fraud—Joint liability of parties who received consideration.]—May filed a bill to set aside a sale of land, described in the deed to him as block No. 55, containing 52 lots according to plan registered, alleging conspiracy and false and fraudulent misrepresentations effected under the following circumstances:—McL. and McA. were interested in a contract for the purchase of 3 blocks of land containing 52 lots each, and McL. with McA.'s consent and sanction came to Toronto to sell the land. In Toronto G. met McL., and agreed to find purchasers, G. to get any money over \$100 per lot. G. solicited May to purchase, stating that he had secured the lots for a very short time at \$150 per lot, but that right was contingent upon his taking all the lots contained in 3 blocks offered, and representing that one block faced McPhillips street. May said he would purchase, provided G. and he were co-partners or joint investors in the 3 blocks. An agreement was signed to that effect, but it was ultimately agreed that May should pay for and take the conveyance to himself of block 33 at \$150 per lot. G. filled up a conveyance which had been signed in blank by McL. of lot 35 from McA. to May, and induced him to accept it without further inquiry by producing and delivering a guarantee from McL., that he had a power of attorney from McA., and that the plan was registered and title perfect. May paid \$5,200 cash and gave a mortgage for \$2,500. G. got \$2,500 of this money. May subsequently ascertained that the block in question did not front on McPhillips street, and that G. and D. were not joint investors with him, and that statements in the guarantee were false. May prayed that the sale be set aside, the portion of the purchase money already paid be re-paid to him, and that the mortgage given to secure payment of the remainder be cancelled. *Held*, reversing the Court of Queen's Bench for Manitoba, that the false and fraudulent representations made by G. and McL., entitled May to the relief prayed for against McA., McL. and G. jointly and severally. *May v. McArthur*, 20 O. L. J. 248; 4 C. L. T. 336; Cass. Dig. (2 ed.) 779.

76. *Simulated sale of lands—Conveyance in fraud of creditors generally—Insolvency.*

See FRAUDULENT PREFERENCE, 4.

77. *Agreement for sale—Misrepresentation—Rescission—Evidence.*

See CONTRACT, 119.

78. *Sale of leased premises—Parol agreement—Evidence—Misrepresentation.*

See 110, *infra*.

(e) Mistake.

79. *Sale of timber limits—Mortgage—Errors and omissions in account—Written instrument—Evidence.*

See No. 108, *infra*.

80. *Rescission of contract—Common error—Failure of consideration.*

See No. 88, *infra*.

81. *Agreement for sale—Mutual error—Reservation of minerals—Specific performance.*

See No. 89, *infra*.

82. *Debtor and creditor—Payment—Accord and satisfaction—Sale of land—Mistake in designation of property—Principal and agent.*

See MISTAKE, 7.

(f) Redemption; Droit de Réméré.

83. *Right of redemption—Sale à réméré—Notice—Mise en demeure—Res judicata.*]—*Held*, affirming the judgment appealed from, (M. L. R. 3 Q. B. 124), where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished a completed house in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the house, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.—There was no *chose jugée* between the parties by the dismissal of a prior action on the ground that the time to exercise the right of redemption had not arrived, and the conditions stipulated had not been complied with. *Leger v. Fournier*, xiv., 314.

84. *Title to land—Right of redemption—Effect as to third parties—Pledge—Delivery and possession of thing sold.*]—Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited, and S. took possession of the property, which was subsequently seized under an execution issued by V., a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed. *Held*, reversing the judgment of the Court of Queen's Bench, that as it was shewn that the parties were acting in good faith, and that they intended the contract to be, as it purported to be, *une vente à réméré*, it was valid as such, not only between themselves but also as respected third persons. *Salvas v. Lassal*, xxvii., 68.

[Followed in *The Queen v. Montminy* (29 Can. S. C. R. 68).]

See SCIRE FACIAS, 2.

85. *Sale or pledge—Vente à réméré—Concealment—Registration—Transfer of Crown lands.*

See SCIRE FACIAS, 2.

(g) Rescission.

86. *Title to lands—Donation in form of sale—Gifts in contemplation of death—Mortal illness of donor—Presumption of nullity—Validating circumstances—Dation en paiement—Arts. 762, 989 C. C.*]—During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee and the con-

sideration acknowledged by the deed was never paid. *Held*, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to shew that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid. *Valade v. Lalonde*, xxvii., 551.

87. *Vendor and purchaser—Sale of leased premises—Termination of lease—Damages—Art. 1663 C. C.*—The Court of Queen's Bench for Lower Canada (Q. R. 7 Q. B. 293), reversed the decision of the trial court and held: That the purchaser of real estate to be delivered forthwith could not require the vendor to eject the tenants, the existence of leases being no impediment to immediate delivery of the premises sold, and every sale being subject to existing leases up to the time of the expiration of the current term, and further, that if the purchaser refused to carry out the agreement for sale on the ground of the existence of such leases, he could not have the sale set aside (*resciliée*), with damages against the vendor.—On appeal the Supreme Court of Canada affirmed the judgment appealed from for the reasons stated in the Court of Queen's Bench and dismissed the appeal with costs. *Alley v. Canada Life Assurance Co.*, 14th June, 1898, xxviii., 608.

88. *Contract—Rescission—Innocent misrepresentation—Common error—Sale of land—Failure of consideration.*—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud. *Cole v. Pope*, xxix., 291.

89. *Sale of land—Agreement for sale—Mutual mistake—Reservation of minerals—Specific performance.*—The E. & N. Railway Company executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him, which he refused to accept, as it reserved the minerals on the land while the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals. *Held*, reversing the judgment of the Supreme Court of British Columbia (6 B. C. Rep. 228), Taschereau, J., dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance. *Hobbs v. Esquimalt and Nanaimo Ry. Co.*, xxix., 450.

[Leave to appeal to the Privy Council was granted (33 Can. Gaz. 393), but subsequently, on compromise between the parties, the appeal was dismissed for want of prosecution.]

90. *Boundary of lands—Misrepresentation—Deceit—Rescission of contract—Evidence—Notice—Inquiry.*

See TITLE TO LAND, 2.

91. *Sale of land—Representation as to boundaries—Description—Executed contract—Deficiency—Fraud—Compensation.*

See VENDOR AND PURCHASER, 21.

92. *Contract for sale of land—Misrepresentation—Fraud—Rescission—Evidence.*

See CONTRACT, 119.

93. *Title to land—Sale by auction—Agreement as to title—Breach—Rescission of contract.*

See VENDOR AND PURCHASER, 22.

94. *Sale of land—Error—Rescission of contract.*

See VENDOR AND PURCHASER, 24.

(h) Specific Performance.

95. *Mortgaged lands—Agreement in writing—Statute of Frauds—Matters for future arrangement—Equity of redemption—Specific performance.*—L. signed a document by which he agreed to sell lands to W. for \$42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the incumbrances thereon." With this exception the papers were, in substance, the same, and each contained at the end this clause: "terms and deeds, &c., to be arranged by the 1st of May next."—On the day that these papers were signed L., on request of W.'s solicitor, to have the terms of sale put in writing, added to the one signed by him the following: "Terms, \$500 cash this day, \$500 on delivery of the deed of the Parker property, \$800 with interest every three months until the \$6,500 are paid, when the deed of the entire property will be executed."—The property mentioned in these documents was, with other property of L., mortgaged for \$36,000. W. paid two sums of \$500 and demanded a deed of the Parker property, which was refused.—In an action against L. for specific performance of the above agreement, the defendant set up a verbal agreement that before a deed was given the other property of L. was to be released from the mortgage, and also pleaded the Statute of Frauds. *Held*, affirming the judgment of the Supreme Court (N. S.), Patterson, J., doubting, that there was no completed agreement in writing to satisfy the Statute of Frauds.—*Per Ritchie, C.J.*, the agreement only provides for payment of \$6,500, leaving the greater part of the purchase money unprovided for. If W. was to assume the mortgage it was necessary to provide for the release of L.'s other property and for matters in relation to the leasehold property.—*Per Strong, J.*, the agreement was for sale of an equity of redemption only and as questions would arise in future as to release of L.'s other property from the mortgage and his indemnity from personal liability to the mortgagee, which should have formed part of the preliminary agreement, specific performance could not be decreed. *Williston v. Lawson*, xix., 673.

96. *Vendor and purchaser—Principal and agent—Sale of land—Authority to agent—*

Price of sale.—M., owner of an undivided three quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place, "Sell if possible, writing particulars; will give you good commission." C. agreed to purchase it for \$600 and the solicitor telegraphed M., "Will you sell three-quarter interest sixty-seven acre parcel, Korah, for six hundred, half cash, balance year? Wire stating commission." M. replied, "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor, "Telegram received. I will accept \$600, \$300 cash and \$300 with interest at one year. This payment I may say must be a marked cheque at par for \$300, minus your commission \$15, and balance \$300 secured." The property was incumbered to the extent of over \$300 and the solicitor deducted this amount from the purchase money and sent M. the balance which she refused to accept. He also took a conveyance to himself from the former owner paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell: *Held*, affirming the judgment of the Court of Appeal, that the only authority the solicitor had from M. was to sell her interest for \$585 net and the attempted sale for a less sum was of no effect. *Held*, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. *Clergue v. Murray*, xxxii., 450.

[Leave for an appeal to the Privy Council was refused, July, 1903. In the judgment refusing leave to appeal, *Prince v. Gagnon* (8 App. Cas. 103) was referred to.]

97. *Offer to sell lands—Conditional acceptance—Completion of title—Specific performance.*

See CONTRACT, 126.

98. *Agreement for sale — Mutual error — Reservation of minerals.*

See No. 89, ante.

(i) Tax Sales.

99. *Land tax sales—32 Vict. c. 36, s. 155 (0.)—Arrears of taxes—Nullity.*—Where there was no evidence that land sold for arrears of taxes had been properly assessed, or that taxes duly assessed were in arrear at the time of such sale, the sale of the land is invalid. Strong and Gwynne, JJ., dissenting. Strong, J., holding that section 155 of c. 36 of 32 Vict. (Ont.) applied to cases where any taxes were in arrear at the date of the sale.—*Per* Fournier, Henry, and Gwynne, JJ. Where it appears that no portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by s. 155 of 32 Vict. c. 36 (Ont.). *McKay v. Cryslar*, iii., 436.

100. *Land tax sale—Warrant and list of lands—32 Vict. c. 36 (Ont.)—R. S. O. (1877) c. 180 — Surrendered Indian lands — Crown grant—Exemptions.*

See ASSESSMENT AND TAXES, 37.

101. *Land tax sales—Irregular proceedings—Halifax Assessment Act, 1883 — Notice — Production of statement — Healing clauses.*

See ASSESSMENT AND TAXES, 59.

102. *Mortgage—Sale of mortgaged land for taxes—Purchase by mortgagor — Action to foreclose—Pleading.*

See MORTGAGE, 35.

(j) Warranty.

103. *Transfer of timber limits—Warranty—Eviction—Arts. 1515, 1518 C. C.—Damages—Assessment by experts—Case remitted to court below.*—The respondents ceded and transferred "with warranty against all troubles generally whatsoever" to the appellants, two limits containing 50 square miles. "Not to interfere with limits granted or to be renewed in view of regulations." The limits were subsequently found to interfere with prior grants made to one H. *Held*, that the respondents having guaranteed the appellants against all troubles whatsoever, and at the time of such warranty the limits sold having become, through negligence of respondent's auteurs, the property of H., the appellants were entitled to recover the proportionate value of the limits from which they had been evicted, and damages to be estimated according to the increased value of the limits at the time of eviction, and also the cost of all improvements, but, as the evidence as to proportionate value and damages was not satisfactory, it was ordered that the record should be sent back to the court of first instance, and that the amount should be there determined upon a report to be made by experts to that court on the value of the same at the time of eviction.—*Per* Strong and Gwynne, JJ., dissenting. That the only reasonable construction which could be put upon the words "with warranty against all troubles generally whatsoever" in the deed, must be to limit their application to protecting the assignee of the licenses against all claims to the licenses themselves, as the instruments conveying the limits therein described, and not as a guarantee that the assignee of the licenses should enjoy the limits therein described, notwithstanding that it should appear that they were interfered with by a prior license. But, assuming a different construction to be correct, there was not sufficient evidence of a breach of the guarantee. *Dupuy v. Ducondu*, vi., 425.

[This decision was reversed by the Privy Council, 9 App. Cas. 150.]

104. *Land subject to charges—Warranty—Subsequent account stated—Promise to pay.*

See WARRANTY, 1.

105. *Title to land — Warranty — Special agreement—Knowledge of cause of eviction—Art. 1512 C. C.—Damages.*

See TITLE TO LAND, 124.

(k) Other Cases.

106. *Mortgaged lands—Absolute sale—Sale of equity of redemption — Consideration in deed—Illiterate grantor—Equitable relief.*—B. sold to C. land mortgaged to a loan society, the consideration stated in the deed at \$1,400, and \$104 being paid to B. Afterwards C. paid \$1,081 and obtained a discharge of the mortgage. B. sued to recover the difference between the amount paid the society and the balance of the \$1,400, and testified that he

intended to sell the land for a fixed price; that he had been informed by W., father-in-law of C., that there would be about \$300 coming to him; that he had demurred to the acceptance of the sum offered, \$104, but was informed by C. and the lawyer's clerk, who drew the deed, that they had figured it out and that was all that would be due him after paying the mortgage; that he was incapable of figuring it himself and accepted it on this representation. C. claimed that the transaction was only a purchase by him of the equity of redemption, and that B. had accepted \$104 in full for the same. *Held*, reversing the judgment appealed from, Taschereau and Gwynne, JJ., dissenting, that the weight of evidence was in favour of the claim made by B., that the transaction was an absolute sale of the land for \$1,400; and independently of that, the deed itself would be sufficient evidence to support such claim in the absence of satisfactory proof of fraud or mistake. *Burgess v. Conway*, xiv., 90.

107. *Land speculation—Investment of trust funds—Condition precedent—Prescription—Art. 2262 C. C.—Transfer—Evidence—Prête-nom.*—H. agreed to invest trust funds of C. with M. in a land speculation, mentioning in the letter notifying M. of acceptance of his draft, the understanding H. had as to the share he was to get and adding: "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed and the conditions of the prospectus never carried out. T. J. C. transferred *sous seing privé* this claim to plaintiff who brought action for the draft. An objection was made that proof of the transfer had not been made. *Held*, affirming the judgment appealed from (M. L. R. 6 Q. B. 354), that the action being for the recovery of money entrusted to defendant for a special purpose, the prescription of two years did not apply. That the conditions upon which the money had been advanced were conditions precedent and not having been fulfilled, M. was bound to refund the money. That as the transfer of the claim to plaintiff had been admitted by M., plaintiff, even if considered as a *prête-nom*, had sufficient interest to bring the present action. *Moodie v. Jones*, xix., 266.

108. *Timber limits—Mortgage to vendor—Subsequent conveyance—Description of lands—Hypothecary action—Acknowledgment signed in error—Judgment against original purchaser—Res judicata—Registration—Variation of agreement by subsequent deed—Parol testimony to contradict deed—Bonus on transfer of timber limits—Statement of account—Errors and omissions.*—Appeal from judgment of the Queen's Bench, reversing the Superior Court, at Quebec, (8th July, 1882), in an hypothecary action by appellant against respondents. The Superior Court declared respondents' lands hypothecated in favour of appellant "for the capital, interest and costs mentioned in his declaration, amounting to the sum of \$5,250 currency, with interest from 7th July, 1880, at 8 % per annum, and costs of suit, and *fraix des pièces*," condemned respondents to surrender lands to be judicially sold upon the curator to be named to the surrender, to the end that appellant might be paid out of the proceeds, unless respondents, within 15 days of service of judgment, paid appellant the \$5,250 interest and costs.—By

memo. of sale, dated 31st July, and deposited with Clapham, N.P., on 10th September, 1872. D. sold to C. "all the limits belonging to the said D., on the Jacques-Cartier River, containing about 170 miles, together with all the square timber, logs and firewood made on the said river, 200 pieces of which are now at St. Sauveur, and also the property purchased from O'S., B. & W., with the islands, now belonging to the said D., for \$35,570 to be paid," as set out in the memorandum. It was further provided that a deed of sale should be prepared as soon as possible.—On 21st Nov., 1872, the formal deed from D. to C. was executed, the land conveyed being by it hypothecated in favour of the vendor for balance of price.—The deed mentioned the memo. and that the conveyance was made for and in consideration of . . . \$35,087.37, . . . on account and in part payment whereof the said D. acknowledged to have received at and before execution \$4,095, of which \$3,995 was employed in payment of wages to labouring men for work done and performed on part of the property sold due the vendor, previous to 31st July last past, and that the price and terms of payment in the memo. of sale had been changed in the present deed of sale made in pursuance thereof.—The W. property was not mentioned in this deed of 21st Nov., and one of the questions arising was, as to whether the deed was intended to vary the agreement of 31st July, 1872, so far as related to this property and the price thereof.—On 4th June, 1878, respondents purchased from C. part of the property he had acquired from D., and on 14th of the same month registered their deed of purchase.—In Feb., 1879, D. sued C. to recover \$5,000, balance alleged to be due, on the price specified in his deed. C. pleaded payment, and Stuart, J., dismissed his plea and entered judgment against him for the \$5,000, with interest at 8%, from 20th February, 1879, and costs.—Failing payment from D., in July, 1880, began the present action, to which respondents pleaded payment by C. and consequent extinction of the hypothec, and further that their purchase was made in good faith relying upon a receipt from D., which their vendor held. Stuart, J., before whom the case was heard, adhered to his previous decision.—The Queen's Bench (Taschereau and Baby, JJ., dissenting) reversed the Superior Court, and from that judgment this appeal was taken.—The principal points for decision were:—1. Had the judgment obtained by D. against C. the effect of *res judicata*?—2. On 2nd September, 1876, D. signed a statement of account, acknowledging that the purchase price then due by C. to him was \$1,442.33. Respondents contended that D. could not go behind this representation, their purchase being made subsequently to it; but appellant alleged that he had only signed the statement on condition that he was not to be bound by it, if incorrect, and that in any event it was not proved that it had ever been brought to the notice of respondents.—3. On 5th December, 1872, C. paid the Commissioner of Crown Lands, as the transfer bonus on the limits sold by D., \$1,344. It was necessary to decide whether D., the vendor, or C., the purchaser, was legally bound to pay this bonus, the agreement being silent as regarded it.—4. As to the property mentioned in the agreement of 31st July, 1872, as the W. property, the price was fixed by the agreement at \$1,350, but it did not then belong to D. After the agreement on 21st November, 1872, C. paid this amount to the owner, and contended that, although the prop-

erty was omitted from the deed of 21st November, 1872, the two documents should be read in connection with each other, and the omission did not relieve D. from the liability to carry out his promise of sale, or to be charged with the price when paid by C.—5. The notary who made the agreement of 31st July, and the deed of 21st November, 1872, testified: "I have no doubt in my own mind that this lot (W.) was included in the sale. It was not put in this intentionally to avoid a repetition of the deed, and Mr. Hall undertook to make the assignment direct to Mr. Connolly, on getting paid out of that purchase money, which was part of the sale." Appellant contended that this evidence could not be received to contradict or vary the terms of a valid instrument. *Held*, 1. Affirming the judgment of Casault, J., who decided the question on demurrer (7 Q. L. R. 43), and the judgment of the Queen's Bench sustaining Casault, J., that the judgment against C. was *res inter alios acta* as regarded the respondents and not binding on them.—2. That there was no evidence in the record to sustain the contention that the acknowledgment of account signed by D. was ever brought to the notice of respondents before they purchased, and therefore appellant might properly shew it had been signed in error.—3. Reversing the Court of Queen's Bench, that the bonus of \$1,344 paid to the Commissioner of Crown Lands, was a payment which the purchaser of the limits was legally bound to make, and which, therefore, could not be charged against D.—4. Reversing the Court of Queen's Bench, that appellant was not properly chargeable with the amount paid for the W. property, an entirely new contract having been substituted by the deed of 21st November, 1872, for the promise of sale of 31st July, 1872.—5. That the evidence of the notary could not be received to contradict the deed.—Appeal allowed with costs. Henry, J., dissenting. *Dubuc v. Kidston*, Cass. Dig. (2 ed.) 779.

109. *Purchase of lands—Superficial area—Deficiency—Delivery to agent—Pleading—Arts. 1501, 1502, C. C.—Temporary exception.*—To an action for balance of price of lands the company pleaded by temporary exception that out of 3,307 superficial feet sold to them, T. never delivered 710 feet, and that so long as the full quantity purchased was not delivered they were not bound to pay. T. replied that he delivered all the land sold to V., the agent of the company, with its assent and approbation, together with other land sold to V. at the same time. V. had purchased all the lands owned by T. in that locality but exacted two deeds of sale, one of 3,307 feet for the R. Co., and another of the balance of the property for himself. By the deed to V. his land was bounded by that previously sold to the company. V. took possession and the company fenced in what they required. *Held*, affirming the judgments appealed from, that T. having delivered to V., the agent of the company, with its assent and approbation, the whole of the land sold to them together with other lands sold to V. at the same time he was entitled to the balance of the purchase money.—*Per Taschereau, J.* All appellant could claim was a diminution of price, or cancellation of the sale under arts. 1501, 1502 C. C. and therefore their plea was bad. *North Shore Ry. Co. v. Trudel*, 24 C. L. J. 57; Cass. Dig. (2 ed.) 793.

110. *Lease—Provision for termination—Sale of premises—Parol agreement—Misrepresentation—Quiet enjoyment.*—A lease of premises used as a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises, if necessary, on six months' notice." *Held*, reversing the judgment of the Court of Appeal (26 Out. App. R. 78), and that of Rose, J., at the trial (29 O. R. 75), that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate. *Held*, further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment. *Lumbers v. Gold Medal Furniture Mfg. Co.*, xxx., 55.

111. *Sale of land—Conveyance absolute in form—Mortgage—Resulting trust—Notice to equitable owner—Estoppel—Inquiry.*—The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners. *Oland v. McNeil*, xxxii., 23.

112. *Title to land—Fraudulent conveyance—Principal and agent—Laches.*

See TRUSTS, 1.

113. *Droit de réméré—Insurable interest of vendor.*

See INSURANCE, FIRE, 80.

114. *Mortgage—Verbal agreement as to consideration—Subsequent deed—Misrepresentation.*

See VENDOR AND PURCHASER, 18.

115. *Agreement for sale of lands—Resolutive condition—Rescission—Mise en demeure—Arts. 1022, 1067, 1478, 1536, 1537, 1538, 1550 C. C.*

See CONTRACT, 4.

116. *Grant of land by specific description—Plan of subdivision—Boundaries—Riparian rights—Explanatory evidence—Unity of ownership—Use—Separate grants—Implied reservations—Apparent easement—Quasi easement.*

See EASEMENT, 6.

117. *Mortgaged premises—Leaschold—Renewed term—Decree for foreclosure—Power of sale—Deed after foreclosure.*

See MORTGAGE, 26.

118. *Deed absolute in form—Security for loan—Sale or mortgage—Purchaser for value without notice.*

See MORTGAGE, 34.

See REGISTRY LAWS, 1.

119. *Agreement for transfer of land—Vendor's lien—Notice.*

See LIEN, 2.

120. *Wife's separate estate—Sale with right of redemption—Security for husband's debts—Art. 1301, C. C.*

See HUSBAND AND WIFE, 3.

121. *Island of Anticosti—Licitation—Judgment—Vendor and vendee—Res judicata.*

See ESTOPPEL, 62.

122. *Mortgaged lands — Sale by agent — Authority to give credit—Inquiry—Payment.*

See PRINCIPAL AND AGENT, 5.

123. *Agreement to purchase land—Specific performance—Mortgage as part payment—Second mortgage—Negotiable instrument.*

See CONTRACT, 244.

124. *Land grévé de substitution—Sale of sand pits by institute—Damages—Revendication—Action by substitute—Bad faith—Evidence—Prescription—Art. 2268 C. C.*

See SUBSTITUTION, 4.

125. *Sale of land subject to mortgage—Indemnity of vendor—Special agreement—Purchaser trustee for third party.*

See MORTGAGE, 61.

126. *Contract for sale of land—Agreement to pay interest—Delay—Default of vendor.*

See VENDOR AND PURCHASER, 30.

127. *Scire facias—Title to land—Annulment of letters—Sale or pledge—Vente à réméré—Concealment of material facts—Arts. 1174-1279 R. S. Q.—Registration—Transfer of Crown lands—Art. 1007 C. P. Q.—Art. 1553, C. C.*

See CROWN, 93.

128. *Easement—Sale of land—Unity of possession—Severance—Continuous user.*

See EASEMENT, 19.

129. *Parol agreement for sale of leased premises—Termination of lease—Misrepresentation.*

See LEASE, 33.

130. *Construction of contract—Sale of mining claim — Breach of agreement—Re-conveyance—Enhanced value.*

See CONTRACT, 238.

4. SALE OF SHIP.

131. *Ships and shipping—Notice of abandonment—Sale of vessel by master—Necessity for sale — Marine insurance — Constructive total loss.*

See INSURANCE, MARINE, 44.

SALVAGE.

Rescue of stranded vessel—Special contract—Action by agent of owners—Parties.

See SHIPPING, 5.

SAVINGS BANK.

Loan by—Pledge of securities—Validity of pledge—R. S. C. c. 122, s. 20.

See DEBTOR AND CREDITOR, 49.

SAWLOGS IN STREAMS.

1. *"Sawlogs Driving Act" — R. S. 'O. (1887) c. 121—Arbitration action on award—River improvements—Detention of logs.*

See WATERCOURSES, 5.

2. *Negligence—Vis major — Driving timber—Servitude—Watercourses—Floatable rivers—Statutory duty—53 Vict. c. 37 (Que.)—Riparian rights.*

See RIVERS AND STREAMS, 1, 2, 3, 7.

SCHOOLS.

1. *Division of district—C. S. L. C. c. 15, ss. 31, 33—40 Vict. c. 22, s. 11 (Que.)—Construction of statute—33 Vict. c. 25, s. 7 (Que.)—Decision of superintendent—Mandamus.]—Under 40 Vict. c. 22, s. 11 (Que.), the Superintendent of Education, on an appeal to him from the decision of the School Commissioners of St. Valentin, ordered that the school district of the municipality should be divided into two districts with a school house in each.—The commissioners decreed the division, and a few days later, on a petition presented by ratepayers protesting against the division, passed another resolution, refusing to entertain the petition. Later on, without having taken any steps to execute the decision of the superintendent, they passed another resolution, declaring that the district should not be divided as ordered by the superintendent, but should be re-united into one.—Upon a peremptory writ of *mandamus* ordering the commissioners to execute the decision of the Superintendent of Education, the commissioners contended that they had acted on the decision by approving of it, and that as the law stood they had power and authority to re-unite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the superintendent. *Held*, reversing the Court of Queen's Bench, that the commissioners having acted under the authority conferred upon them by C. S. L. C. c. 15, ss. 31, 33, and an appeal having been made to the Superintendent of Education, his decision in the matter was final; see 40 Vict. c. 22, s. 11 (Que.); and could only be modified by the superintendent himself on an application made to him under 33 Vict. c. 25, s. 7 (Que.); and, therefore, the peremptory *mandamus* ordering the respondents to execute the superintendent's decision should issue. *Tremblay v. Commissaires d'Ecole de St. Valentin*, xii., 546.*

2. *Establishment of new school district—Jurisdiction of Superintendent of Education upon appeal—Statutory conditions—40 Vict. c. 22, s. 11 (Qué.)—R. S. O. arts. 1863, 1864, 2055.]—Upon application by appellant for *mandamus* to compel respondent to establish a new school district in the Parish of Ste. Victoire in accordance with the terms of a decision by the Superintendent of Education under 40 Vict. c. 22, s. 11 (Que.), respondents pleaded that the superintendent had no jurisdiction to make the order, the petition in appeal not having been approved of by three qualified school visitors. The decree of the superintendent alleged that the petition was approved by the inspector of schools, as well as by three visitors. *Held*, affirming the Court of Queen's Bench that the petition in appeal must have the approval of three visitors qualified for the municipality where the*

appeal to the superintendent originated, and as one of the three visitors who had signed the petition in appeal was parish priest of an adjoining parish, and not a qualified school visitor for the municipality of Ste. Victoire, the decision of the superintendent was null and void.—*Taschereau, J.*, dissented on the ground that as the decree of the superintendent stated that the inspector of schools was a visitor, it was *prima facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with. *Hus. v. School Commissioner of Ste. Victoire*, xix., 477.

3. *By-law—High school district—Townships detached.*—The appellant moved to quash a by-law of the County of Elgin, passed to detach certain townships from the high school districts to which they had been attached up to that time. The grounds upon which the by-law was attacked were that it was *ultra vires* of the county council; that the districts could only be changed by consent of the municipalities interested; and that it did not provide for the continued liability of the municipalities detached for debts previously incurred. The motion to quash was made before Mr. Justice Robertson, who dismissed it with costs, and his decision was affirmed by the Court of Appeal for Ontario (21 Ont. App. R. 585).—The Supreme Court of Canada affirmed the judgment of the court below, and dismissed the appeal with costs. *Wilson v. County of Elgin*, xxiv., 706.

4. *School trustees—Trespass by individual corporators—Suit by corporation against members*—*R. S. N. S. (4 ser.) c. 23.*

See ACTION, 170.

5. *Taxes—County tax—R. S. N. S. (4th ser.) c. 32, s. 52—Exemptions.*

See MANDAMUS, 1.

6. *Private school for girls—Educational establishment—41 Vict. c. 6, s. 26 (Que.)—Exemption from taxes.*

See ASSESSMENT AND TAXES, 39.

7. *Taxes in County of Halifax—Mandamus.*

See ASSESSMENT AND TAXES, 62.

8. *Denominational education—Manitoba Act—Legislative jurisdiction.*

See COMMERCIAL LAW, 69.

9. *Suit against trustees—Taxing costs—Locus standi of ratepayer.*

See APPEAL, 179.

10. *School corporation—Decision of Superintendent of Public Instruction—Appeal—Final judgment—Mandamus—Practice.*

See MANDAMUS, 3.

11. *Assessment and taxes—By-law—Exemption from municipal rates.*

See BY-LAW, 6.

SCHOOL FUND AND LANDS.

See CONSTITUTIONAL LAW, 7.

SCIRE FACIAS.

1. *Patent of invention—Combination of old elements—Want of novelty—Infringement of former patent—Damages.*—In order to recover damages for infringement of letters patent of invention, it is not necessary to have a subsequent patent, (under cover of which the infringement has been made) set aside by *scire facias*. *Collette v. Lussier*, xiii., 563.

2. *Title to land—Annulment of letters patent—Tender—Sale or pledge—Vente à réméré—Concealment of material fact—Arts. 1274, 1279 R. S. Q.—Registration—Transfer of Crown lands—Art. 1007 C. P. Q.—Art. 1553, C. C.*—A sale of land subject to the right of redemption (*vente à réméré*), transfers the title in the lands to the purchase in the same manner as a simple contract of sale. *Salvas v. Vassal* (27 Can. S. C. R. 68) followed. The locatée of certain Crown lands sold his rights therein to B., reserving the right to redeem the same within nine years, and subsequently sold the same rights to M., subject to the first deed. These deeds were both registered in their proper order in the registry office for the division and in the Crown lands office at Quebec. M. paid the balance of Crown dues remaining unpaid upon the land and made an application for letters patent of grant thereof in which no mention was made of the former sale by the original locatée. In an action by *scire facias* for the annulment of the letters patent granted to M.; *Held*, *Taschereau, J.*, dissenting, that the failure to mention the *vente à réméré* in the application for the letters patent was a misrepresentation and concealment which entitled the Crown to have the grant declared void and the letters patent annulled as having been issued by mistake and in ignorance of a material fact, notwithstanding the registration of the first deed in the Crown lands office. *Fonseca v. Attorney-General for Canada*, (17 Can. S. C. R. 612) referred to. *Held*, further, *Taschereau, J.*, dissenting, that it is not necessary that such an action should be preceded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent. *The Queen v. Montminy*, xxix., 484.

3. *Forfeiture of charter—Information by Attorney-General—Arts. 997 et seq. C. C. P.*—The company by its Act of incorporation was authorized to carry on business provided \$100,000 of its capital stock was subscribed, and 30% paid thereon, within six months after the passing of the Act. On information that only \$60,500 had been *bonâ fide* subscribed prior to commencing operations, the balance having been subscribed for by G. in trust, who subsequently surrendered a portion of it to the company, and that the 30% had not been truly and in fact paid thereon, the Attorney-General sought by proceedings in the Superior Court to have the company's charter set aside and declared forfeited.—*Held*, affirming the judgment appealed from, *Gwynne, J.*, dissenting, 1. That this being a Dominion statutory charter proceedings to set it aside were properly taken by the Attorney-General of Canada. 2. That such proceedings taken by the Attorney-General of Canada under arts. 997 et seq. C. C. P., in the form authorized by those articles, are sufficient and valid though erroneously designated in the pleadings as a *scire facias*. 3. That the *bonâ fide* subscription of \$100,000 within six months from the passing of the Act of incorporation, and

the payment of 30% thereon were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been *bonâ fide* and in fact complied with within such six months the Attorney General was entitled to have the charter declared forfeited. *Dominion Salvage and Wrecking Co. v. Attorney-General of Canada*, xxi., 72.

4. *Cancellation of letters patent—Crown lands—Error in grant—Adverse claim.*—The provisions of the Quebec statute respecting the sale and management of public lands (32 Vict. c. 11, R. S. Q. art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist. Judgment appealed from reversed, and judgment of the trial court (Q. R. 18 S. C. 520) restored. *The King v. Adams*, xxxi., 220.

"SCOTT ACT."

See CANADA TEMPERANCE ACT.

SEAL.

1. *Writ of execution—Signature of officer—Seal.*—In Nova Scotia writs of execution need not be signed by the prothonotary of the court. It is the seal of the court which gives validity to such writs, not the signature of the officer. *Archibald v. Hubley*, xviii., 116.

2. *Executed contract—Liability of corporations.*—An executed contract for purposes within its corporate powers and of which it receives benefit is binding upon a corporation although the contract was not executed under the corporate seal. *Bernardin v. North Dufferin*, xix., 581.

AND see COMPANY LAW, 28-31.

SEAL FISHING.

Imperial Act, 56 & 57 Vict. c. 23, ss. 1, 3 and 4—Order-in-council under—Judicial notice—Russian cruiser—War vessel—Presence within prohibited zone—Burden of proof.

See EVIDENCE, 162.

SEARCH WARRANT.

1. *Canada Temperance Act—Magistrate's jurisdiction—Constable—Justification of officer—Goods in custodia legis—Replevin—Estoppel—Res judicata.*—A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. *Taschereau, J.*, dissenting. — The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise. — A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the

goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. *Taschereau, J.*, dissenting. *Sleeth v. Hurlbert*, xxv., 620.

2. *Seizure of furs without warrant—Game laws—Jurisdiction of magistrate—R. S. Q. arts. 1405-1409—Writ of prohibition.*—Under art. 1405 read in connection with art. 1409 R. S. Q., a game-keeper is authorized to seize furs on view on board a schooner, without a search warrant, and to have them brought before a Justice of the Peace for examination. A writ of prohibition will not lie against a magistrate acting under arts. 1405-1409 R. S. Q., in examination of the furs so seized where he clearly has jurisdiction and the only complaint is irregularity in the seizure. *Company of Adventurers of England v. Joannette*, xxiii., 415.

SECONDES NOCES.

Edit de 1560—Arts. 279, 282, 283 C. de P.—Arts. 774, 1265, 1760 C. C.

See HUSBAND AND WIFE, 1.

SECOND OFFENCE.

Suit for joint penalties—"Quebec Pharmacy Act"—Subsequently charged offences—Unlicensed sale of drugs.

See STATUTES, 36.

SEIGNORIAL TENURE.

Title to lands—Deed of concession—Construction of deed—Words of limitation—Covenant by grantee—Charges running with the title—Servitude—Condition, si voluero—Prescriptive title—Edits et ordonnances (L. C.)—Municipal regulations—23 Vict (C.) c. 85.—In 1768 the Seigneur of Berthier granted an island called "l'Isle du Milieu," lying adjacent to the "Common of Berthier," to M., his heirs and assigns (*ses heirs et ayants cause*), in consideration of certain fixed annual payments and subject to the following stipulation:—"En outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la commune, sans aucun recours ni garantie à cet égard de la part du sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour sureté de quoi il a hypothéqué tous ses biens présents et à venir, et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre." *Held*, reversing the decision of the Court of Queen's Bench, Strong, C.J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'Isle du Milieu for the benefit of the "Common of Berthier."—That the servitude consisted in suffering inroads from the cattle of the common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence.—This servitude results not only from the terms of the seigniorial grant, but also from the circumstances and the conduct of the parties from a time immemorial.—That the two

lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other.—That the stipulation as contained in the original grant of 1768 was not merely facultative.—That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements. *Commune de Berthier v. Denis*, xxvii., 147.

SEIZIN.

Possessory action — Vacant lands — Boundary marks—Delivery of possession.

See EVIDENCE, 172.

AND see TITLE TO LANDS.

SEPARATE ESTATE.

Constitutional law — Marital rights—Married woman—Separate estate—Jurisdiction of North-West Territories Legislature — Statute—Interpretation of—40 Vict. c. 7, s. 3 and amendments — R. S. C. c. 50—N.-W. Ter. Ord. No. 16 of 1889.

See MARRIED WOMAN, 3.

SEPARATION DE CORPS.

Supreme Court Act — Jurisdiction—Money demand.

See APPEAL, 90.

SERVICE OF PROCESS.

1. Election petition — Copy left at office with partner of respondent — R. S. C. c. 9, s. 11—Art. 57 C. C. P.

See ELECTION LAW, 112.

2. Service of judgment — Party absent from jurisdiction—Estoppel.

See PRACTICE AND PROCEDURE, 131, 132.

3. Service of election petition — Certified copy—Bailiff's return — Cross-examination — Production of copy.

See ELECTION LAW, 117.

4. False return of service of summons — Judgment by default — Opposition to judgment — Arts. 16, 89 et seq., 483, 489 C. C. P.

See ACTION, 164.

AND see ELECTION LAW, 112-122—PRACTICE AND PROCEDURE, 131-134, and SIGNIFICATION.

SERVITUDE.

1. Changing condition of servient premises—Confessoria servitutis—Demolition of works—Access to drain—Art. 557 C. C.—Damages.]—In 1843 plaintiffs obtained the right of draining their property through an alley left

open between two houses on another lot. In 1880 defendants built a barn covering the alley under which the drain was constructed and used it to store hay, &c, the flooring being loose and the barn resting on wooden posts. In 1881, the drain needing repairs, plaintiffs brought an action *confessoire* against defendants as proprietors of the servient land, praying declaration of right to the servitude constituted by the deed of 1843, the demolition of such portion of the barn as diminished and inconvenienced the use of the drain, and claiming damages. Defendants pleaded that there was no change of condition of the servient land contrary to law. *Held*, Gwynne, J., dissenting, that by the building of the barn in question, the plaintiffs' means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment appealed from (M. L. R. 2 Q. B. 139), ordering the demolition as prayed for in order to allow plaintiffs to repair the drain as easily as they might have done in 1843, when it was not covered, and to pay \$50 damages, should be affirmed.—*Per* Gwynne, J., that all plaintiffs were entitled to was a declaration of the right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion might require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature. *Wheeler v. Black*, xiv., 242.

2. Alteration in premises—Right of passage subject to charges—Aggravation—Art. 558 C. C.]—On the 26th March, 1853, L. granted to C. "a right of passage through the lot of land of the said vendor fronting the public road as well on foot as with carriage," and to the charge to the said purchaser "of keeping the gates of the said passage shut."—In 1882 McM., having acquired the dominant land, built a coal oil refinery and warehouses thereon. In the course of his trade he had several heavy carts making three or four trips a day through this passage, leaving the gates open, and in addition to his own carts most of the coal oil dealers of the City of Montreal, wholesale and retail; were supplied upon coming there with their own carts. At the time of the grant the land was used as agricultural land. *Held*, affirming the judgment appealed from (M. L. R. 1 Q. B. 376), Henry, J., dissenting, that the passages could not be used for the purposes of a coal oil refinery and trade, which aggravated the servitude and rendered it more onerous to the servient land than it was when the servitude was established. *McMillan v. Hedge*, xiv., 736.

3. Action — Real or apparent servitude — Registration—44 & 45 Vict. c. 16, ss. 5 and 6 (Que.)—Art. 1508 C. C.—Procedure matters in appeal.]—By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 360 in the Parish of Ste. Marguerite de Blairfindie, District of Iberville, reserved for himself, as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent Ferdais as assignee of the owner of lot 370 continued to enjoy the use of the said carriage road, which was sufficiently indicated by an open road, until 1887, when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from McD., intervenant, without any mention of any servitude, and the original title deed creating

the servitude was not registered within the time prescribed by 44 & 45 Vict. (Que.) c. 16, ss. 5 and 6. In an action *confessoire* brought by F. against C. the latter filed a dilatory exception to enable him to call McD. in warranty, and McD. having intervened pleaded to the action. C. never pleaded to the merits of the action. The judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada:—*Held*, affirming the judgment of the court below, that the deed created an apparent servitude, (which need not be registered), and that there was sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot No. 370 to maintain his action *confessoire*. *Held*, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure. *Macdonald v. Ferdaix*, xxii., 260.

See APPEAL, 88.

4. *Title to lands — Seigniorial tenure—Deed of concession — Construction of deed—Words of limitation — Covenant by grantee—Charges running with the title—Condition, si voluero —Prescriptive title — Edits & ordonnances (L. C.) — Municipal regulations—23 Vict. (Can.) c. 85.*—In 1786 the Seigneur of Berthier granted an island called "l'Île du Milieu" lying adjacent to the "Common of Berthier," to M., his heirs and assigns (*ses heirs et ayants cause*), in consideration of certain fixed annual payments and subject to the following stipulation: "En outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la commune, sans aucun recours ni garantie à cet égard de la part du sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour surêté de quoi il a hypothéqué tous ses biens présents et à venir, et spécialement la dite île qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre." *Held*, reversing the decision of the Court of Queen's Bench, Strong, C.J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'Île du Milieu for the benefit of the "Common of Berthier."—That the servitude consisted in suffering inroads from the cattle of the common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence.—This servitude results not only from the terms of the seigniorial grant, but also from the circumstances and the conduct of the parties from a time immemorial.—That the two lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other.—That the stipulation as contained in the original grant of 1768 was not merely facultative.—That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements. *Commune de Berthier v. Denis*, xxvii., 147.

See No. 7, *infra*.

5. *Construction of deed — Servitude — Roadway — User — Art. 549 C. C. — Action négatoire.*—In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way.—In an action (*négatoire*) to prohibit further use of way:—*Held*, affirming the decision of the Court of Queen's Bench, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance, and that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain. *Riou v. Riou*, xxviii., 53.

6. *Municipal corporation — Expropriation proceedings — Negligence — Interference with proprietary rights—Abandonment of proceedings—Damages — Servitudes established for public utility — Arts. 406, 407, 507, 1053 C. C.—Eminent domain.*—Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault v. Gauthier et al.* (28 Can. S. C. R. 241) referred to. The Chief Justice dissented. *Holleston v. City of Montreal*, xxix., 402.

7. *Estoppel — Acquiescement — Floatable waters—Water power — River improvements —Joint user—Arts. 400, 549, 550, 551 and 1213 C. C.*—Where a riparian owner of lands on a lower level had been permitted by the plaintiffs, for a number of years, to take water power necessary to operate his mill through a flume he had constructed along the river bank partly upon the plaintiffs' land connecting with the plaintiff's mill-race, subject to the contribution of half the expense of keeping their mill-race and dam in repair, and these facts had been recognized in deeds and written agreements to which the plaintiffs and their *auteurs* had been parties, the plaintiffs could no longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill-race and a portion of the flume had been con-

structed. *City of Quebec v. North Shore Railway Co.* (27 Can. S. O. R. 102), and *La Commune de Berthier v. Denis* (27 Can. S. C. R. 147), referred to. *Lafrance v. Lafontaine*, xxx., 20.

8. *Floatable rivers—Driving timber—Riparian rights—Negligence.*—The right of lumbermen to float timber down rivers and streams is not a paramount right but an easement which must be enjoyed with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses. *Ward v. Township of Grenville*, xxxii., 510.

9. *Possession annale—Right of way—Trespass.*

See ACTION, 125.

10. *Improvements in watercourse—Damming back waters—Flooding lands—Possession—Prescription.*

See RIPARIAN RIGHTS, 2.

11. *Real rights—Construction of drain—Matter in controversy—Jurisdiction.*

See APPEAL, 38.

12. *Necessary way—Implied grant—User—Obstruction of way—Prescription—Limitation of action—R. S. N. S. (5 ser.) c. 112.*

See LIMITATIONS OF ACTIONS, 4.

13. *Appeal—Jurisdiction—Servitude—Action confessorie—Execution of judgment therein—Localisation of right of way—Opposition to writ of possession—Matter in controversy—Title of land—Future rights.*

See TITLE TO LAND, 40.

14. *Farm crossings—Arts. 540, 544 C. C.—Jurisdiction of Provincial Legislature.*

See RAILWAYS, 43.

15. *Overhanging roof—Right of air, light and view—Evidence—Boundary line—Waiver.*

See TITLE TO LAND, 41.

AND see EASEMENT.

SET-OFF.

1. *Contra account—Sale of goods by agent as principal—Right of set-off.*—The B. M. Co. sued D. for goods sold and delivered. D. pleaded that the goods were sold to him by one A., whom he believed to be the principal, and that before he knew that the plaintiffs were the principals, A. had become indebted to him in the sum of \$400, which he was willing to set-off against the plaintiff's claim. The jury found a verdict for the defendant on this plea. *Held*, that as the purchase of the goods was made from A. in his own name and without notice of A. being merely an agent, the defendant could set-off the debt due to him from A. personally, in the same way as if A. had been the principal; and that the verdict should be sustained. *The Bowmanville Machine Co. v. Dempster*, ii., 21.

2. *Counter actions—Pleadings—Assignment of judgment—Right to set off judg-*

ment—Equitable assignment.]—G. and H. brought counter actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which was granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to L. all interest in the suit against H. and gave notice of such assignment in May, 1884.—In February, 1885, H. signed judgment against G. on confession. *Held*, reversing the judgment appealed from (25 N. B. Rep. 451), Strong, J., dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to L. *Greene v. Harris*, xvi., 714.

3. *Suit by firm of solicitors—Bill of costs—Mutual debts—Special services.*—In an action by a firm of attorneys for costs, defendants cannot set off a sum paid by one of them to one of the attorneys for special services to be rendered by him, there being no mutuality, and the payment not being for the general services covered by the retainer to the firm. *McDougall v. Cameron; Bickford v. Cameron*, xxi., 379.

4. *Pledge—Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Compensation and set-off—Restitution of thing pledged.*—Arts. 1966, 1969, 1971, 1972, 1975 C. C.—*Practice on appeal—Irregular procedure.*—C. on behalf of J. C. & Co., a firm of contractors of which he was a member, deposited a sum of money with the City of Montreal as a guarantee of the good faith of J. C. & Co. in tendering to supply gas for illuminating and other purposes to the city and the general public within the city limits at certain fixed rates, lower than those previously charged by companies supplying such gas in Montreal, and for the due fulfilment of the firm's contract entered into according to the tender. After the construction of some works and laying of pipes in the public streets, J. C. & Co. transferred their rights and privileges under the contract to another company and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit which was refused by the city council which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by J. C. & Co. of their contract. After the transfer, however, the companies supplying gas in the city reduced the rates to a price below that mentioned in the tender so far as the city supply was affected, although the rates charged to citizens were higher than the price mentioned in the contract. *Held*, that the deposit so made was a pledge subject to the provisions of the sixteenth title of the Civil Code of Lower Canada and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor and the debtor was entitled to its restitution although the obligation for which the security had been given had not been executed.—On a cross demand by the defendant for damages, to be set off in compensation against the plaintiff's claim; *Held*, that, as the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city; and that the breach of contract in respect to supplying the public did not give the corporation any right of action for damages suffered by

the citizens individually. *Held*, further, that prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set-off in compensation of the claim for the return of the deposit.—The court also decided that, following its usual practice, it would not, on the repeal, interfere with the action of the courts below in matters of mere procedure where no injustice appeared to have been suffered in consequence although there might be irregularities in the issues as joined which brought before the trial court a *demande* almost different for the matter actually in controversy. *Finnie v. City of Montreal*, xxxii., 335.

5. *Insolvent bank—Winding-up—Purchase of claim by contributory—Construction of statute—Retrospective legislation.*

See BANKS AND BANKING, 36.

6. *Expropriation for railway purposes—Estimating damages—Taking account of increased advantages—Prospective capabilities.*

See EXPROPRIATION OF LANDS, 22.

7. *Revocation of judgment—Declinatory exception—Cross-demand—Waiver.*

See PLEADING, 43.

8. *Suit for sheriff's fees—Counterclaim for overcharges—Signed bill of costs.*

See SHERIFF, 13.

SHARES AND SHAREHOLDERS.

1. *Joint stock company—Payment for shares—Equivalent for cash—Written contract.*—M. and C. each agreed to take shares in a joint stock company, paying a portion of the price in cash and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396), that as there was no agreement in writing for the payment of the difference by money's worth instead of cash under s. 27 of The Companies Act, M. & C. were liable to pay the balance of the price of the shares to the liquidator of the company. *Morris v. Union Bank; Union Bank v. Morris; Code v. Union Bank*, xxxi., 594.

2. *Allotment of stock below par—Transfer for value to purchaser in good faith and without notice—Liability towards creditors*—27 & 28 Vict. c. 23 (Can.).—Certain shares in a company incorporated by letters patent under 27 & 28 Vict. c. 23, were allotted, by resolution at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. below their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was allotted nine shares, which were subsequently assigned to the appellant for value as fully paid up. Appellant inquired of the secretary of the company, who also informed him that they were fully paid-up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share-book the amount mentioned was "shares, two, at \$300—\$600."—*Held*, (Rich-

ards, C.J., and Ritchie, J., dissenting), reversing the judgment of the Court of Appeal for Ontario (37 U. C. Q. B. 422; 1 Ont. App. R. 1), that a person purchasing shares in good faith, without notice, from an original shareholder under 27 & 28 Vict. c. 23, as shares fully paid up, is not liable to an execution creditor of the company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares. *McCracken v. McIntyre*, i., 479.

3. *Transfer—Banking Act—Resolution not binding on absent stockholder—Equitable plea.*—In an action against the appellant as shareholder, to recover a call of 10 per cent. on twenty-five shares held by him in a bank, he defended on equitable grounds, that before call or notice thereof he made, in good faith for valid consideration, a transfer of all the shares to a person authorized and qualified to receive the same, and he and the transferee of the shares did all things necessary for the valid and final transferring of the shares; but the plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And he prayed that the bank be compelled to complete and make the transfer valid and effectual, and enjoined from further prosecution of the suit.—The plaintiffs filed no replication to this plea, but at the trial before James, J., without a jury, attempted to justify the refusal upon the ground that at a special general meeting of the shareholders of the bank, it was resolved "that the bank should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect."—The defendant was not present when this resolution passed, and it appeared that the bank effected a loan of \$80,000 from the Bank of N. S. upon the security of one B., who, to secure himself, took bonds for lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares in 1877 to persons then in good standing, and powers of attorney, executed by defendant and the purchasers respectively, were sent to the manager of the bank, in whose favour they were drawn, to enable him to complete the transfer. The directors of the bank refused to permit the transfer, but the defendant was not notified of their refusal, nor did they make any claim against him for any indebtedness on his part to the bank; and it appeared also from the evidence that subsequently to the resolution, and prior to the sale of defendant's shares, a large number of other shares had been transferred in the books of the bank. In October, 1879, the bank became insolvent, and the Bank of N. S. obtained leave to intervene and carry on the action.—A verdict was found by the judge in favour of the appellant; but the Supreme Court (N. S.), James, J., dissenting, made absolute a rule *nisi* to set it aside.—*Held*, reversing the judgment appealed from (4 N. S. Rep. 146), that the resolution could not bind shareholders not present at the meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right under the Banking Act to transfer his shares, and to

have the transfer recorded in the books of the bank; and the plea was therefore a good equitable defence to the action.—*Per Strong and Gwynne, J.J.* It is doubtful whether the strict rules applied in England to equitable defences pleaded under the C. L. P. Act, could be adopted with reference to such pleas in Nova Scotia, where both legal and equitable remedies are administered by the same court and in the same form of procedure. *Smith v. Bank of Nova Scotia*, viii., 558.

4. *Principal and agent—Promoters of company—Agent to solicit subscriptions—False representations—Ratification—Benefit.*—Promoters of a company employed an agent to solicit subscriptions for stock and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters; *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 261) that the latter, having benefited by the sum paid by W., were liable to re-pay it though they did not authorize it and had no knowledge of the false representations of their agent. *Held, per Strong, C.J.*, that neither express authority to make the representations nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule *respondent superior* applies as in other cases of agency. *Milburn v. Wilson*, xxxi., 481.

5. *Company law—“The Companies Act, 1890” (B.C.) and amendment—Construction of statute—Memorandum of association—Conditions imposed by statute—Public policy—Preference stock—Election of directors.*—In the memorandum of association of a joint stock company formed under the provisions of the British Columbia “Companies Act, 1890,” and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors or trustees for the management of the business of the company, notwithstanding anything contained in the Act.—*Held*, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was *ultra vires* of the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of trustees and directors imposed by the Act as matters of public policy.—Judgment appealed from (9 B. C. Rep. 275) reversed. *Colonist Printing and Publishing Co. et al. v. Dunsmuir et al.*, xxxii., 679.

6. *Railway aid debentures—Subscription for shares—Breach of contract—Special damages—Assessment.*

See CONTRACT, 6.

AND see COMPANY LAW, 32-52—AND WINDING-UP ACT.

SHELLEY'S CASE.

Devise of life estate—Remainder to issue in fee.

See WILL, 14.

SHERIFF.

1. *Attachment—Conversion—Justification—Order of court—Holding goods in medio—Sale of goods—Use of corporate seal—Evidence.*—In an action by H. against a company domiciled in the United States, but doing business in Nova Scotia, a writ of attachment issued on 12th May, 1872, out of the Supreme Court under the Absent and Absconding Debtors Act R. S. N. S. (4 ser.) c. 97, directed to the sheriff of Cumberland, who seized certain chattels as belonging to the company. On 12th November an order was issued by the court, directing the sheriff to sell, and he did sell the chattels as being perishable. On the 11th December, 1874, H. discontinued his action. On the 30th May, 1876, B. brought action against the sheriff for the conversion of the chattels, claiming that the company had sold and conveyed the chattels to him by memorandum of sale, dated 5th July, 1867, “signed on behalf of the company,” by one “Hawley, agent,” with a seal affixed which, however, did not purport to be the seal of the company. The sheriff pleaded to the declaration, that he did not convert; that goods were not plaintiff's; not possessed; and special justification, setting forth the proceedings by H., and that he seized and sold the chattels as the goods of the company under the attachment and order. B. replied, setting up the discontinuance. Rejoinder denied the discontinuance and stated that it was not filed till after the sale. The sheriff also demurred, on the ground that, being bound to obey the order of the court, he could not be affected by the discontinuance.—At the trial B. recovered a verdict of \$500 damages. Rules *nisi* to set aside verdict and the demurrer were argued together. The Supreme Court refused to set aside the verdict and the demurrer was overruled. *Held*, reversing the judgment appealed from, Ritchie, J., dissenting, that the plea of justification was sufficient answer to the action; that the replication was bad, and that the verdict should be set aside and judgment for the defendant entered on the demurrer.—*Per Ritchie, J.*, dissenting. The seizure under the attachment, and not the sale, constituted conversion; there was sufficient evidence to shew that the chattels had been sold by the company to B., and under s. 15, c. 54, R. S. N. S. (4 ser.) such sale did not require to be under the corporate seal.—*Per Strong, J.* The sale, and not the seizure, was the conversion complained of, and to this the order of the court was a sufficient answer, and *semble*, that a mere taking goods under a *mesne* attachment to keep them *in medio* until the termination of the action is not a conversion.—*Per Henry, J.* The order for the sale would not have been a justification for the original levy of the goods, as well as for the sale, if they had been the property of the respondent, but the evidence failed to shew a sale by the company to the respondent. Such a sale would require to be under the corporate seal of the company, and did not come within the meaning of s. 15, c. 53, R. S. N. S. (4 ser.). *McLean v. Bradley*, ii., 535.

2. *Sale of land—Description of subdivided lots—Procès verbal of seizure—Art. 638 C. C. P.—42 & 43 Vict. c. 25 (Que.)*—It was not sufficient to describe land seized by the number of the official plan and book of reference in the *procès verbal* of seizure and the advertisement of the sheriff; under art. 638 C. C. P., it is necessary, in addition, to mention the

name of the street where the property is situated within a subdivided plot and fronts upon a designated street or road, and where this imperative formality has been disregarded, the sale is null and of no effect. *The Montreal Loan and Mortgage Co. v. Fauteaux*, iii., 411.

3. *Sale of land—Artifice to prevent bidding—Sale of separate lots en bloc—Rescission—Art. 714 C. C. P.]—Held, per Taschereau and Gwynne, J.J. (Strong, J., contra).* That the creditors or any interested persons may have a sheriff's sale set aside where it is shewn that persons were prevented from bidding on separate lots through a device or contrivance, of which the purchaser was aware, whereby lands were sold *en bloc* instead of by parcels. *Montreal Loan and Mortgage Co. v. Fauteaux*, iii., 411.

4. *Execution—Trove—Transfer by execution debtor—Misdirection.]—In an action of trove against a sheriff for conversion of personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were, denial of conversion, no property, possession or right of possession in plaintiff, and justification under the writ of execution. The judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shewn the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence." Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shewn title or right of possession to the goods in question, and therefore there was misdirection. *McLean v. Hannon*, iii., 706.*

Followed in *Crowe v. Adams* (21 Can. S. C. R. 342). See No. 7, *infra*.

5. *Execution of writ of attachment—Abandonment of seizure—Estoppel.]—A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the sheriff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ, that he had seized the goods. The sheriff subsequently seized the goods under execution of the creditors. In an action against the sheriff, Held, reversing the judgment of the Supreme Court of Nova Scotia, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it was, the sheriff was estopped by his return to the writ from raising the question.—Held, also, that the act of the plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment. *Duffus v. Creighton*, xiv., 740.*

6. *Sale of land—Petition en nullité de décret—Seizure super non domino et non possidente—Art. 632 C. C. P.—Registration—Arts. 2090, 2091 C. C.]—Respondent sold lands to C. which he, in 1879, retroceded. In July, 1884, the sheriff, at the instance of appellants, judgment creditors of C., seized and sold the lands to G., who paid the adjudication and obtained a sheriff's title. Respondent did not register*

her deed of retrocession until 3rd October, 1884, subsequent to the sale by the sheriff, but prior to registration of the sheriff's deed, and petitioned *en nullité en décret* that the seizure, sale, adjudication and sheriff's title be set aside and declared null as made *super non domino*. From the date of the deed of retrocession respondent had been assessed for the lot in question, paid taxes thereon, and it was in possession of her tenant at the time of the seizure. Held, affirming the judgment of the Court of Queen's Bench, that the seizure and sale having been made *super non domino et non possidente*, the sheriff's title was null.—*Per Taschereau, J. Arts. 2090, 2091 C. C.*, refer to a valid seizure and sale and cannot be invoked against the registration of the deed of retrocession. *Dufresne v. Dixon*, xvi., 596.

7. *Title to goods—Married woman—Execution against husband—Replevin—Justification by writ—R. S. N. S. (5 ser.) c. 74.]—Action against sheriff by a married woman for taking, under execution against her husband, goods claimed as her separate property under the Married Woman's Property Act. The sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names and that the wife's right to the goods seized was acquired from her husband after marriage. Held, reversing the Supreme Court (N. S.), that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without shewing the judgment (*McLean v. Hannon*, 3 Can. S. C. R. 706, followed), and that under the findings of the jury which were amply supported by the evidence, the goods seized could not be separate property under the Act and must be considered to belong to the husband, which is a complete answer to the action. *Crowe v. Adams*, xxi., 342.*

8. *Sale of lands—Real rights—Usufruct—Remainder—Release of incumbrances—Conveyance by usufructuary—Estoppel.]—A will devised lands to H. in usufruct during her life, then absolutely to J., but in case J. predeceased M. then to M. absolutely. The lands were sold under execution under a writ against a hypothecary debtor holding a conveyance from the usufructuary after J. was of full age. Held, affirming the judgment appealed from (Q. R. 1 Q. B. 197), that the will did not create a substitution and that, as J. was competent to protect his rights at the time of the sale by the sheriff it purged all real rights he had under the will and could not be impeached as having been made *super non domino et non possidente*. *Patton v. Morin* (16 L. C. R. 267) followed. *McGregor v. Canada Investment and Agency Co.*, xxi., 499.*

9. *Contract to cut lumber—Vesting of property—Writ of replevin—Sheriff's possession—Trespass—Pleading—Jus tertii—Justification by sheriff—Amendment, power of by Supreme Court of Canada.]—In November, 1874, A. entered into a written agreement with M. to get logs off land under M.'s control, the logs to be M.'s property as cut. In December following one Marooney agreed with A. to cut and haul logs for him from land specified in the agreement between A. and M., which logs were to be A.'s property at the landing, A. agreeing to furnish Marooney with supplies to get the logs; Marooney cut logs under this*

agreement and hauled them to the landing. In November, 1875, the logs not having been driven and A. not having furnished sufficient supplies, he and Marooney rescinded their agreement, Marooney giving his note to A. for the supplies delivered. The logs remained on the landing, and in February, 1876, they were seized as the property of A., who had become insolvent, under a writ of attachment, issued under the Insolvency Act of 1875. In May, 1876, Marooney sold the logs to plaintiff, who drove them to the boom where they were replevied by the assignee of A.'s estate. Plaintiff put in a claim, and the sheriff returned the writ of replevin, with such claim, to the attorney who issued the writ. No writ de *prop. prob.* having been issued, the sheriff kept possession of the logs, and plaintiff brought trespass against him for taking them.—The defendant pleaded 1. Not guilty; 2. Goods not the plaintiff's; 3. Goods the goods of the assignee of A., and defendant did acts complained of by license of such assignee; 4. Goods the goods of M., and defendant did acts complained of by license of M.; 5. Goods property of defendant.—A verdict was entered for plaintiff by consent for \$1,554, the value of all the logs, subject to be reduced to \$420.47, the value of logs not cut by Marooney, if the court should be of opinion that plaintiff not entitled to Marooney logs. The Supreme Court (N. E.) reduced the verdict to \$420.47. *Held, per Ritchie, C.J.* That the judgment appealed from should be affirmed on the following ground: It having been proved on the trial, without objection, and made part of the case, that the logs in question were seized by the defendant, as sheriff, under a writ of replevin, directing him to take the logs in question, the sheriff was justified in taking the logs thereunder, and that as against the plaintiff it was no wrongful taking or conversion. That this defence could be given in evidence under the pleadings in the cause, or, if it could not be so given, this being a strictly technical objection, and this defence having been put forward on the trial without objection, and no such technical point reserved on the trial, if necessary, the record should be amended.—*Per Strong and Gwynne, JJ.* The parties at the trial having rested their rights upon the question of title, viz.: were the logs the property of the plaintiff, or were they the property of Ellis, as assignee of A., or of M., and the plaintiff claiming title through Marooney, it was necessary for him to shew title in Marooney, which he had failed to do, and therefore he could not recover for the Marooney logs.—*Per Fournier and Henry, JJ.* The logs when taken were the property of the plaintiff, and he was therefore entitled to judgment on all the issues raised.—*Per Fournier, J.* The defendant might have justified under the writ, and the court might grant leave to add such a plea, but in that event the costs should be paid by defendant.—*Per Henry, J.* No effort having been made in the court below to add such a plea it was too late and contrary to precedent and justice now to admit it.—*Per Gwynne, J.* When the plaintiff fails to shew in evidence that he was in actual possession at the time of the taking, and is therefore driven to rest on the goodness of his title to the property, a defendant may, in rebuttal of the evidence of such title, set up a bare *jus tertii* without shewing he had any authority from the third person having such title. So a sheriff sued for taking the goods of the plaintiff may shew, under this issue, that the goods belonged to a third party against whom he took them in execution. The

several matters therefore alleged in the 3rd, 4th and 5th pleas were matters which could have been given in evidence under the issue joined upon the 2nd plea. As to the 5th plea, in view of the evidence it was quite inappropriate to such evidence, for the writ of replevin placed in the hands of the defendant as sheriff to be executed did not vest in the defendant any property in the goods, the taking of which was complained of, so as to enable him to justify the taking as his own property as is done in the 5th plea.—Appeal dismissed with costs. *Swim v. Sheriff*, Cass. Dig. (2 ed.) 142.

10. *Bond to sheriff in official capacity—Nullité absolue—Opposition—Revocation of judgment—Discovery of further evidence—Art. 581 C. C. P.—Dol personnel—Res judicata—Requête civile.*—Appellant, having purchased land burdened with mortgages beyond its value, an action was brought on one of these mortgages by the hypothecary creditor, upon which appellant made *délaissement*. Judgment was obtained and the property sold at sheriff's sale on 21st February, 1862, when the appellant became purchaser. — *Oppositions afin de conserver* were filed largely exceeding the amount of purchase money. Among these claims was one of the purchaser, for a large sum, upon the filing of which the sheriff took from him a small payment in cash and a bond for the balance, secured upon the property.—By final judgment of distribution, the largest claim, that of Gale, was awarded a fraction of the amount due thereon, being the residue of the purchase money after collocations made in favour of prior claims; while for the claim of purchaser, which was held to be the last, there was nothing left. The collocation in favour of Gale was not paid. — The sheriff having died, his heirs or legatees all in one form or another, renounced their legal rights to his estate, with the exception of the original plaintiff in this cause, one of his sons, who assigned the obligation, as an asset of his father's estate, to McD., a practising attorney, who brought action upon it against appellant, which was defended on the plea that the obligation was not a private or personal asset of the deceased sheriff, but a security for payment of hypothecary creditors collocated by the final judgment of distribution, in the above case that the then plaintiff, a practising attorney of the court where action was brought, could not become purchaser of a litigious right by the arts 1485, 1583 C. C.—McD. then re-assigned the obligation to plaintiff, and an action was commenced on his behalf.—The defendant's (present appellant's) pleas in defence were, practically, that there was *lis pendens*, because of the action already pending on the same obligation; that the record (which had been destroyed by the burning of the court house in Quebec) should be restored or at least an effort made to that effect, before any other proceeding could be taken; that the obligation was the sheriff's security for the balance of the price of the property, and did not represent a personal debt, and was sued upon as such, in fraud of the defendant and the true creditors of the debt it represented. Plaintiff denied that the previous action involved the same issue, or that the present action was for the security stated, or that the obligation represented the purchase money of the property.—On 24th April, 1875, respondent sued out a writ of execution against the appellant in pursuance of judgment on this issue.—On the 3rd May, 1875, the appellant filed an opposition in revocation of judgment (which is the sub-

ject of the present appeal), alleging—1. That since the rendering of the last mentioned judgment on the action itself, the representatives of Gale had claimed from the opposant (the appellant), the amount of their collocation, threatening to proceed at *folle enchère* to re-sale of opposant's property, and that the opposant thus found himself liable to pay twice the same amount. 2. That since the rendering of the judgment the opposant had discovered proof that the security mentioned in the return of the sheriff was one and the same with the notarial obligation on which the judgment was founded. 3. That since the judgment, the opposant had made discovery of an authentic part of the record, and that the production of the said document, being of a nature to affect the judgment sought to be executed, could be made under the art. 581 C. C. P. 4. That the judgment should be rescinded and revoked, having been rendered through the collusion and fraud of the respondent and others.—The missing document was the sheriff's schedule of the nature of sale, and an authentic copy of it certified by the prothonotary was found and produced. The opposant also produced with his opposition the sheriff's receipt for the obligation itself, which he alleged proved the obligation to be, as contended, the security taken by the sheriff in his official capacity for the payment of the balance of the purchase-money, which belonged to the hypothecary creditors. — On 14th May, 1875, a *tierce opposition* was filed by the representatives of the Gale estate, claiming the obligation above mentioned as a mere security for the amount of their collocation by the report of distribution and denying the right of the heirs Ogden to any part of the said obligation. —On 8th September, 1875, the original plaintiff having died, the present respondent, C. K. Ogden, came into the case as plaintiff *par reprise d'instance*.—On 11th May, 1877, respondent contested the opposition of the appellant. On 20th September, 1877, the opposition was dismissed on the ground that there was *res judicata* against appellant. — The Queen's Bench on 8th March, 1878, ordered, "that the proceedings on the opposition of the appellant shall be suspended until after the opposition of the representatives of Gale, filed in this cause, shall have been disposed of."—On 12th December, 1878, respondent contested the *tierce opposition* of the heirs Gale in obedience to this judgment. — On 13th April, 1879, the *tierce opposition* was maintained with regard to part of its conclusions which referred to the seizure of the real estate.—On 7th September, 1880, this last judgment on the *tierce opposition* was modified by the Queen's Bench. This judgment also admitted the rights of the heirs Gale, and ordered them to proceed within 4 months to re-sale at *folle enchère* of the land sold under the case of *délaissement*.—The appellant contended that he was not a party to this appeal, and he was thus condemned without hearing and without notice to submit to the re-sale of a property for which he had paid by an obligation, while the judgment of 10th June, 1874, condemning him to pay to the heirs of the sheriff personally the amount of said obligation, remained in full force.—The record having been sent back, the 4 months expired without, as the appellant alleged, any notice whatever having been given to him of the judgment, or of any other proceeding since the judgment on his appeal given in his favour on 8th March, 1878.—On 18th January, 1881, an inscription on the merits of the opposition of May, 1875, was served upon him. The inscription was discharged by the court.—On

17th March, 1881, a new inscription was made, and also discharged.—On 25th June, 1881, respondent moved the Superior Court, asking that the rights conferred on the heirs Gale by the judgment of the Queen's Bench to have the property of appellant re-sold at *folle enchère* within 4 months, be declared lapsed. Appellant was not notified of the motion, which was granted on 25th June, 1881.—A motion was then served upon appellant on 19th September, 1881, by plaintiff, *par reprise d'instance*, to be allowed to make a new contestation of his opposition of May, 1875, which was refused by the court. — On 23rd November, 1881, the Superior Court dismissed the opposition and petition in revocation of judgment of appellant. This judgment was confirmed by the Queen's Bench, on 4th December, 1882. *Held*, that the judgment of the Court of Queen's Bench should be reversed and the appeal allowed.—*Per* Taschereau, J., delivering the judgment of the court. Dawson's obligation to Ogden was not a *créance* of Ogden personally, but of him as sheriff only, and represented the price of Dawson's purchase at the sheriff's sale. The sheriff's heirs therefore were not entitled to the amount of the obligation in the absence of the allegation and proof, that they or their father in his lifetime paid the amount to the various parties collocated.—Moreover the obligation was null as being against public order, and a nullity of this kind was absolute and need not be pleaded, the tribunal being bound to notice it.—The judgment on the action did not decide anything contrary to these views, because the courts below had not before them the proof that the obligation in question represented nothing but the adjudication price, the necessary documents to establish that fact having been since found by Dawson. The judgment appealed from was not based on *res judicata*; it conceded, as it was obliged to do in the face of the judgment of that court reversing the judgment of the court dismissing the *requête civile*, that the right of the *requête civile* was open. But it held that the opposant had not proved the facts he alleged. This court, however, is of opinion the appellant has clearly proved his allegations of fact: 1. That the words "value received" in the obligation were false; that the obligation was not given to the late sheriff personally, but to him in his official capacity only, and so has proved the *dol personnel*, the fraud by which the late Ogden obtained that obligation, and the fraud of the plaintiff's *auteur* is his fraud; 2. That the obligation was *nul d'une nullité absolue*; 3. The only *res judicata* is in favour of Dawson; 4. That not only the Gales, but all the other parties could ask a re-sale. *Dawson v. Ogden*, Cass. Dig. (2 ed.) 797. •

11. *Title to land — Entail — Life estate — Fiduciary substitution — Privileges and hypothecs — Mortgage by institute — Preferred claim — Prior incumbrancer — Vis major*—16 *Vict. c. 25, registry laws — Practice—Sheriff's sale—Chose jugée — Parties — Estoppel—Sheriff's deed—Deed poll—Improvements on substituted property—Grosses réparations.*] — The institute, *grévé de substitution*, in possession of land and curator to the substitution, upon judicial authority, mortgaged the land under the provisions of the Act for the relief of sufferers by the great Montreal fire of 1852 (16 *Vict. c. 25*), for a loan which was expended in re-constructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in execution by the sheriff in

a suit to which the curator had not been made a party. *Held*, that, as the mortgagee had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the lands from the substitution not yet open, and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the said lands.—The sheriff seized and sold lands under a writ of execution against a defendant described therein, and in the process of seizure and also in the deed to the purchaser at sheriff's sale, as *grevé de substitution*.—*Held*, that the term used was merely descriptive of the defendant and did not limit the estate seized, sold or conveyed under the execution.—Judgment of the Court of Queen's Bench for Lower Canada affirmed. *Taschereau and King, JJ.*, dissenting. *Chef dit Vadeboncœur v. City of Montreal*, xxix., 9.

[Followed in *Deschamps v. Bury* (29 Can. S. C. R. 274); see No. 12, *infra*.]

12. *Title to land—Sheriff—Vacating sale—Exposure to eviction—Actio conductio indebiti—Petition—Refund of price paid—Prior incumbrance—Substitution not yet open—Discharge of incumbrances—Procedure.*—The procedure by petition provided by the Code of Civil Procedure of Lower Canada for vacating sheriff's sales can be invoked only in cases where an action would lie.—The *actio conductio indebiti* for the recovery of the price paid by the purchaser for lands lies only in cases of actual eviction. Mere exposure to eviction is not sufficient ground for vacating a sheriff's sale.—The provisions of art. 714 of the Code of Civil Procedure do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of the deed, nor does that article give the right to have the sale vacated and the amount so paid refunded. *The Trust and Loan Co. v. Quantal* (2 Dor. Q. B. 190) followed.—A sheriff's sale in execution of a judgment against the owner of lands, *grevé de substitution*, based upon an obligation in a mortgage having priority over the instrument by which the substitution was created, discharges the lands from the unopened substitution without the necessity of making the curator to the substitution a party to the proceedings. *Chef dit Vadeboncœur v. The City of Montreal* (29 Can. S. C. R. 9) followed. *Deschamps v. Bury*, xxix., 274.

See No. 11, *ante*.

13. *Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence—Territories Real Property Act—Unregistered transfers—Charging lands—Levy under execution—Indemnity to sheriff—Tort—Pleading—Interpleader—Counterclaim—Signed bill of costs.*—In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under writ of execution, the sheriff is not obliged to interplead but may be properly joined in a defence with the execution creditor.—A solicitor advising his client according to the established jurisprudence of the court in which proceedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the

advice may be subsequently overruled.—Neither a solicitor nor a sheriff is a tortfeasor, as against a transferee whose transfer is unregistered, by registering, in the discharge of their respective duties, an execution of a judgment against lands of the judgment debtor.—The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of a solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution.—In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. *Taylor v. Robertson*, xxxi., 615.

14. *Marriage laws—Dower—Registry laws—Warranty—Succession—Renunciation—Donation—Interdiction.*—A sale by the sheriff under execution against a debtor in possession of an immoveable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of art. 2116 of the Civil Code. *Rousseau v. Burland*, xxxii., 541.

15. *Mines and minerals—Free miner's certificate—Annual renewals—Special renewals—Vesting of interest in co-owners—Sheriff—Levy under execution—R. S. B. C. c. 135, ss. 2, 3, 9, 34—62 Vict. c. 45, ss. 2, 3, 4—R. S. B. C. c. 72, ss. 12, 24.*—The sheriff seized the interest in mineral locations held by an execution debtor in co-ownership with another free miner and, prior to sale under the execution, the debtor allowed his free miner's license to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under the provisions of the fourth section of the "Mineral Act Amendment Act, 1899," and it was contended that the debtor's interest had been thus revived and re-vested in him subject to the execution. *Held*, that upon the lapse of the free miner's certificate the interest in question had, under the statute, become absolutely vested in the co-owner and could not thereafter be revived and re-vested in the judgment debtor by the issue of a special certificate.—Judgment appealed from (9 B. C. Rep. 131) affirmed, *Sedgwick, J.*, dissenting. *Harvey Van Norman Co. et al. v. McNaught*, xxxii., 690.

16. *Return on habeas corpus—Signature to return—Recitals—Contradiction by extrinsic evidence—Matter of record.*—If actually written by him or under his dictation, the return to a writ of *habeas corpus* need not be signed by the sheriff. *Henry, J.*, dissenting. *In re Sproule*, xii., 140.

See HABEAS CORPUS, 2.

17. *Lands taken and sold under execution—Voluntary payment by purchaser—Licen—Interpleader—Application of proceeds.*

See SALE, 66.

18. *Indemnity — Promise by solicitor — Authority to bind client.*

See SOLICITOR, 1.

19. *Sale of lands—Purchase by executor—Trust—Possession—Statute of Limitations—Evidence.*

See TITLE TO LAND, 118.

20. *Sale of lands — Adjudication to joint purchasers — Security — Re-sale à la folle enchère.*

See SALE, 67.

21. *Sale of goods by sheriff—Trespass—Sale of goods by insolvent—Bona fides—Judgment of inferior tribunal—Estoppel—Res judicata—Bar to action—Fraudulent preferences—Pleading.*

See FRAUDULENT PREFERENCES, 8.

22. *Sale of land—Writ of venditioni exponas—Order of court or judge—Vacating sheriff's sale.*

See PRACTICE AND PROCEDURE, 144.

23. *Sheriff's deed—Registration of—Absolute nullity—Folle enchère—Re-sale for false bidding.*

See APPEAL, 394.

24. *Deed by—Champerly—Maintenance.*

See EVIDENCE, 171.

25. *Title to land—Prescription—Limitation of actions—Equivocal possession—Mala fides—Sheriff's deed—Nullity—Conveyances with knowledge of sheriff's sale.*

See EVIDENCE, 239.

26. *Sale of rights in land—Sheriff's deed—Warranty—Construction of deed—Claimant under prior title—Eviction.*

See TITLE TO LAND, 126.

AND see EXECUTIONS.

SHIPMENT; SHIPPING NOTES AND RECEIPTS.

See BILL OF LADING.

SHIPPING.

1. *Charter party—Deficient cargo—Demurrage—Dead freight—Damages.*] — By charter party L. agreed to load D.'s ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather;" ten days demurrage agreed over and above lying days at forty pounds per day; penalty for non-performance estimated amount of freight; should ice set in during loading so as to endanger ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit. The ship was ready to receive cargo on 15th Nov., 1880, at 11 a.m., and L. began loading at 2 p.m. on 16th. After loading a quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the forward hold. No other cargo was ready, and as L. would not put the rye anywhere except in the forward

hold, the loading stopped. At 8 a.m. on 19th loading recommenced and continued night and day until 6 a.m. Sunday, 21st, at which time the vessel sailed, in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. If the ice in the canal had not detained the barges having grain to be loaded, the vessel could have been loaded on the night of the 19th. D. sued because ship had not received full cargo, and claimed 2½ days, 15th, 16th and 17th Nov., and freight on 214½ tons of cargo not shipped. L. contended delay was not due to them but to the ship in not supplying baggers and sewers to bag the grain; that the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight. The Superior Court judgment giving dead freight but refusing demurrage was affirmed by the Queen's Bench. On appeal to the Supreme Court of Canada, *Held*, affirming the judgment appealed from, Henry, J., dissenting, that as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages and that the proper measure of the respondent's claim was the amount of agreed freight which they would have earned upon the deficient cargo. That the demurrage days mentioned in the charter were over and above the laying days and had no reference to the loading of the ship. *Lord v. Davidson*, xiii., 166.

2. *Charter-party — Damage to vessel—Repairs—Nearest port — Deviation—Breach of charter—Practice — Findings of fact.*] — In September, 1882, a vessel sailed from Liverpool, England, for Bathurst, N.B., to load lumber under charter. Having sustained damages on the voyage she was taken to St. John, N.B. for repairs, and when such repairs were completed it was too late in the season to proceed to Bathurst. In an action against the owner for breach of charter-party the jury found that the repairs could have been made at Sidney, C.B., in time to enable the ship to go to Bathurst. *Held*, that the jury having pronounced on the questions of fact, and their verdict having been affirmed by the Supreme Court of New Brunswick (25 N. B. Rep. 13) the Supreme Court of Canada would not interfere with the finding. *Held*, also, that under such finding taking the vessel to St. John was such an unnecessary deviation from the voyage as to entitle the charterer to recover. *Cassels v. Burns*, xiv., 256.

3. *Inland navigation—Negligence — Agony of collision—Damages—Party in fault—Answering signals.*] — The owners of the tug "B.H." sued the owners of the steam propeller "St. M." for damages occasioned by the tug being run down by the propeller in the River Detroit. *Held*, reversing the Maritime Court of Ontario, that as the evidence shewed the master of the tug to have misunderstood the signals of the propeller, and to have directed his vessel on the wrong course when the two were in proximity, the owners of the propeller were not liable and the petition in the Maritime Court should be dismissed. *Robertson v. Wigle; The St. Magnus* xvi., 720.

4. *Narrow channels—Navigation—Lights — Collision—Negligent look-out—Vessel lying in channel—Anchor light — Damages.*] — Suit by owners of tug "Minnie Morton" for damages by being run into by and getting foul with a

raft in tow of the tug "John Owen." The collision occurred on the evening of 1st Oct., 1881. At the time of collision the "Morton," which had been during that and the preceding day acting as a deck for divers, who were engaged in the endeavour to float a vessel, then grounded in the Detroit River, was tied on the north side of it, that is further in the channel, when the "Owen" towing a raft of logs passed down the river to the eastward, and the tail of the raft collided with the "Morton," and carried her down the river where she sank, and could not afterwards be found. The Detroit River is divided into two channels by Bois Blanc Island, and the eastward channel, on the Canadian side, is used for towing rafts down stream. The petitioner averred that the master and crew of the "Owen" in passing the point where the "Morton" was lying, negligently steered the "Owen" nearer to the island than they should have done; that the "Owen" on account of the size of the raft was unable to exercise proper control over it, and it was carried by the current in a westerly direction against the "Morton," and that the slow rate of speed at which the "Owen" proceeded in passing, either from the inability of the tug, or through the negligence of the master and crew to proceed faster, in conjunction with the neglect of the "Owen" to pursue a proper course, directly contributed to the disaster by permitting the raft to approach so near to the "Morton," and with an insufficient rate of speed to resist the action of the current.—The answer denied negligence; averred that the tug and her raft were navigated with all due skill; that the "Owen," after having passed Lime Kiln Crossing, kept as near to the easterly bank of said river as she could be kept with safety; that she was proceeding with as much speed as it was practicable to maintain; that there was a strong north-easterly wind, and that the action of the wind caused the end of the raft to be thrown toward the upper end of the island, and if it came into collision with the "Morton," the same was not imputable to any fault, negligence or misconduct on the part of the tug, her officers and crew.—Defendant contended that there is a great deal of traffic in the river, most of which passes to the eastward of the island referred to: that many rafts in every year, and at all seasons, are towed down the river, and such rafts vary in size, some of them numbering, according to the evidence, 4,000,000 feet; that these rafts necessarily require a great deal of room, in fact occupy while passing the Bois Blanc Island, nearly all the space of the stream navigable at this point; that the "Morton," being so lying in the channel, was at the time of the accident without any lookout or watch of any kind; that she had not any light, or if a light, that it was not of a sufficient size or brightness, nor in accordance with the statute requirement in that behalf, and that the "Morton," lying in this navigable river, not in a harbour nor at a wharf or dock, ought to have been manned so as to have easily moved out of the way of passing vessels or rafts, so as to be out of the position of danger to herself in which she was lying and out of the course of vessels lawfully navigating the stream.—The judge of the Maritime Court of Ontario pronounced in favour of petitioners, condemned the "Owen" for all damages sustained by the petitioners in consequence of the collision and total loss of the "Morton," and fixed the damages at \$2,600. *Held*, that the finding should be affirmed. Gwynne, J., dissenting. *Owen v. Odette; The "Minnie Morton,"* Cass. Dig. (2 ed.) 519.

5. *Rescue of vessel stranded—Proceeding in rem—Salvage—Special contract—Action by agents of owners—Parties.*—In a proceeding in rem against appellant's tug "Marion Teller" for services rendered by the tug "F. A. Folger" in rescuing the former when stranded on the shore of Lake Erie, the petition stated that the master of the "Marion Teller" engaged the tug "F. A. Folger" to proceed to the stranded vessel and rescue her, which the master of the latter tug agreed to do, and after working at her for some time, the "Folger" got the "Teller" into deep water. Plaintiffs who had the management of the rescuing tug sued in their own names for salvage.—The claim was resisted on the ground that plaintiffs were not properly salvors and had no right to bring the action, being neither owners of the tug "Folger" nor master nor mariners on board the tug, but simply agents for the owners under the following agreement:—"It is hereby agreed between John Price, merchant, of Port Stanley, of the first part, and Odette and Wherry, merchants, of Windsor, of the second part, as follows, viz.: "The party of the first part agrees to place his tug "F. A. Folger" in charge of the parties of the second part, for them to manage for the season of 1886, or until the said party of the first part succeeds in selling her; and the said parties of the second part agree to manage the said tug "F. A. Folger" and secure as much work for her as possible, and render monthly statements and remittances, less a commission of 5 % on the gross earnings."—It was further contended, that if plaintiffs had any claim another vessel that assisted was also interested and should be joined, and further, that the rescue was effected in such a manner as to disentitle the plaintiffs to recover.—The judge of the Court of Vice-Admiralty found that there was a contract with the master of the "F. A. Folger" to pay \$10 an hour for the service and gave judgment for plaintiffs on that basis. In addition to the other objections the appellants claimed that the judgment was not given according to the principle governing salvage claims, but that the award should have divided the money among all the persons who assisted in the rescue. *Held*, reversing the judgment that the plaintiffs were not entitled to recover.—*Per Ritchie, C.J.* It is competent for salvors instead of leaving the amount of remuneration to be determined, to agree for a specified sum. . . . The plaintiffs rendered no services whatever. They were the mere agents of the owners for managing the tug, receiving a commission of 5 % on her gross earnings.—The salvage services rendered were by the captain and crew, who, with the owner, are entitled to remuneration for salvage services, and the suit should have been instituted on behalf of such owners, master and crew, and not by plaintiffs on their own behalf. . . . There was no contract between the master of the "Marion Teller" and the plaintiffs as would entitle them to the \$1,110 adjudged to them.—*Per Henry, J.* . . . I do not think it a subject of salvage. . . . Salvage is where a vessel driven on shore is saved. Here the vessel was safe. There must be something saved, but here it was mere work and labour done and performed. . . . The contract was not with the party who brings the suit. He was merely the agent of the owners and was to get a commission for managing the tug. . . . The plaintiff . . . was not the party who performed the service, nor one having any interest in the saving tug. *In re "Marion Teller,"* Clark v. Odette, Cass. Dig. (2 ed.) 521.

6. *Chartered ship—Perishable goods—Ship disabled by excepted perils—Transshipment—Obligation to transship—Repairs—Reasonable time—Carrier—Bailee.*—If a chartered ship be disabled by excepted perils from completing the voyage the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight.—The option to transship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch or otherwise the owner of the cargo becomes entitled to his goods.—*Quære.* Is the ship-owner obliged to transship?—If the goods are such as would perish before repairs could be made the ship-owner should either transship, deliver them up or sell if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable.—And if in such a case the goods are sold without the consent of the owner the latter is entitled to recover from the ship-owner the amount they would have been worth to him if he had received them at the port of shipment or at their destination at the time of the breach of duty. *Owen v. Outerbridge*, xxvi., 272.

7. *Maritime law—Collision—Rules of the road—Narrow channel—Navigation, rules of—R. S. C. c. 79, s. 2, arts. 15, 16, 18, 19, 21, 22 and 23—“Crossing” ships—“Meeting” ships—“Passing” ships—Breach of rules—Presumption of fault—Contributory negligence—Moiety of damages—36 and 37 Vict. (Imp.) c. 85, s. 17—Manœuvres in “agony of collision.”*—If two vessels approach each other in the position of “passing” ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good navigation.—If one of two “passing” ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel; in starboard the helm when it was seen that the helm of the other was hard to port and the vessels are rapidly approaching; and, after signalling that she was going to port, in turning her bow to starboard, she is to blame for a collision which follows.—The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse, if necessary, when approaching another ship, so as to involve a collision, is not to be considered as a fact contributing to a collision, provided the collision could have been avoided by the impinging vessel by reasonable care exerted up to the time of the collision.—Excusable manœuvres executed in “agony of collision” brought about by another vessel, although in contravention of statutory rules, cannot be imputed as contributory negligence on the part of the vessel collided with.—The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard (art. 21), does not override the general rule of navigation which would also apply to appropriate cases. *The Leverington* (11 P. D. 117) followed. *The “Cuba” v. McMillan*, xxvi., 651.

8. *Maritime law—Affreightment—Carriers—Charter-party—Privacy of contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Arts. 1674, 1675, 1676 C. C.—Contract against liability for fault of servants—Arts. 2383 (8); 2390 and*

2413, 2424, 2427 C. C.—The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners and the contract had been made with them only.—The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse ship-owners from liability for damages caused through improper or insufficient stowage.—A condition in a bill of lading, providing that the ship-owners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents, is not contrary to public policy nor prohibited by law in the Province of Quebec.—Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling or any other cause whatever, and that the owners were to be “exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect or error in judgment of the pilot, master, mariners or other servants of the ship-owners; nor for breakage or any other damage arising from the nature of the goods shipped,” such provisions applied only to loss or damage resulting from acts done during the carriage of the goods and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage. *Glengoil Steamship Co. v. Pilkington; Glengoil Steamship Co. v. Ferguson*, xxviii., 146.

9. *Appeal—Certiorari—Merchants’ Shipping Act, 1854—Distressed seaman—Recovery of expenses—“Owner for time being”—Proof of ownership and payment.*—An appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute a rule nisi for a certiorari to bring up proceedings before a police magistrate under The Merchants’ Shipping Act with a view to having the judgment thereon quashed.—Section 213 of The Merchants’ Shipping Act, 1854, makes the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship and empowers the Board of Trade, in Her Majesty’s name, to sue for and recover the same from the master of the ship or “owner thereof for the time being.” *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the latter words mean the owner at the time of action brought. *Held*, further, that a certificate of the Assistant Secretary of the Board of Trade that such expenses were incurred and paid is sufficient proof of payment under the Act though the above section does not provide for a mode of proof by certificate.—Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceeding under The Merchants’ Shipping Act of 1854, proof of ownership may be made according to the mode provided in The Merchants’ Shipping Act, 1894, by which the former Act is repealed.—Under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the Registrar-General of Shipping at London is sufficient proof of ownership.

Quere, Where the Merchants' Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will *certiorari* lie to remove the proceedings into a superior court? *The Queen v. S. S. "Troop" Co.*, xxix., 662.

10. *Customs duties — Duties on goods — Foreign-built ships — Customs Tariff Act, 1897, s. 4.*—A foreign-built ship owned in Canada which has been given a certificate from a British consul abroad and comes into Canada for the purpose of being registered as a Canadian ship is liable to duty under s. 4 of the Customs Tariff Act, 1897.—A taxing Act is not to be construed differently from any other statute. *The King v. Algoma Central Ry. Co.*, xxiii., 277.

[Affirmed on appeal by the Privy Council, July, 1903; see *Can. Gaz.*, vol. xli., p. 400.]

11. *Admiralty law — Collision — Ship at anchor—Anchor light — Lookout — Weight of evidence—Credibility—Findings of trial judge — Negligence.*—The *SS. "Lake Ontario,"* while proceeding in charge of a pilot to her dock in Halifax Harbour, N.S., on a blustery night in January, 1900, came in collision with and sank appellant's coal barge "A.L. Taylor" lying at anchor north of George's Island. The steamship had signalled by guns and whistles for a medical officer at the quarantine grounds before the collision and her officers and crew testified that they were alert anxiously working the steamship through anchored vessels in the darkness and blustery weather, and came suddenly upon the "Taylor," and that no lights were seen on her. The barge caretaker, who was not on deck at the time, swore that a proper anchor light was burning on the barge, his statement being corroborated by the captain of a schooner lying close by and by several boatmen and labourers on the wharves. The trial judge accepted the evidence of the defence as correct and found that the collision and loss were wholly attributable to negligence of the "Taylor" in failing to have an anchor light and to keep a sharp lookout, and dismissed the action. On appeal the Supreme Court affirmed the decision at the trial (7 Ex. C. R. 403). *Dominion Coal Co. v. SS. "Lake Ontario,"* xxxii., 507.

12. *Admiralty law—Collision—Undue speed—Ship in default—Rule 16—Navigation during fog.*—The judgment appealed from (7 Ex. C. R. 390), decided that the "Pawnee," a steamship, was wholly to blame for colliding with the schooner "Roland" in a thick fog near the entrance of St. John Harbour, N.B., in July, 1901, and awarded damages to the owner of the schooner. It held that on hearing fog signals sounded by the schooner, the steamship should have stopped her engines as far as possible and navigated with caution till danger of collision was past, and that, having neglected these precautions, she was wholly to blame. On appeal the Supreme Court (Girouard, J., dissenting), affirmed the principle of the trial court decision, but reduced the damages and allowed no costs on the appeal.—*SS. "Pawnee" v. Roberts*, xxxii., 509.

13. *Assessment and taxes in Halifax, N.S.*—27 *Vict. c. 81, ss. 340, 347, 361 (N. S.)—Vessels sailing abroad.*

See ASSESSMENT AND TAXES, 7.

14. *Maritime Court of Ontario—Legislative jurisdiction—Navigation and shipping.*

See CONSTITUTIONAL LAW, 15.

15. *Agreement with ship's husband — Control and management—Breach—Action.*

See CONTRACT, 194.

16. *Burying anchor—Collision with anchor —Mooring vessels—Custom of port—Ordinary caution—Rule of road—Contributory negligence—Damages.*

See NEGLIGENCE, 38.

17. *Actual total loss — Constructive total loss — Necessity of abandonment — Sale by master.*

See INSURANCE, MARINE, 35.

18. *Contract—Breach—Master and owner—Wrongful dismissal—Notice—Measure of damages.*

See NEW TRIAL, 17.

19. *Charter party—Conditions — Stranding — Delay for repairs — Refusal of cargo — Breach of contract—Evidence.*

See CONTRACT, 3.

20. *Voyage policy — Warranty "at and from"—Assignment as collateral — Insurable interest—Abandonment—Notice—Actual total loss—Constructive total loss—Right of action.*

See INSURANCE, MARINE, 36.

21. *Negligence—Collision—Action—Joinder of defendants—Company—Limited liability—Merchant Shipping Amendment Act, 1862 (Imp.)—Navigation of Canadian waters, 31 *Vict. c. 58, s. 12 (D.)—Motion for judgment — Findings of jury — Weight of evidence — Practice.**

See NAVIGATION, 2.

22. *Trading voyage—Construction of policy — Insurable interest.*

See INSURANCE, MARINE, 31.

23. *Mortgage in contemplation of insolvency — Insolvent Act of 1875, s. 133 — Merchant Shipping Act, 1854 (Imp.)—Conflict of laws.*

See INSOLVENCY, 21.

24. *Lien for freight — Storage — Charter party—Delivery—Tender—Trover for cargo.*

See CARRIERS, 23.

25. *Navigation — Departure from usual course—Delay in prosecuting voyage—Deviation—Enhancement of risk.*

See INSURANCE, MARINE, 29.

26. *Advances—Agreement to insure—Quebec Fire Act—Prescription.*

See CONTRACT, 10.

27. *Abandonment — Loss of voyage — Constructive total loss—Repairs—Diligence—Sale by mortgagees.*

See INSURANCE, MARINE, 42.

28. *Collision at sea — Negligence—Defective steering gear—Question of fact—Interference with decision of local judge in Admiralty.*

See APPEAL, 226.

29. *Marine insurance—Constructive total loss—Notice of abandonment—Sale of vessel by master—Necessity for sale.*

See INSURANCE, MARINE, 44.

30. *Foreign fishing vessels—"Fishing"—Convention of 1818—Three mile limit—59 Geo. III. c. 38 (Imp.)—R. S. C. c. 94 and c. 95.*

See FISHERIES, 4.

31. *Hire of tug—Conditions—Repairs—Negligence—Compensation.*

See LEASE, 10.

32. *Lease—Negligence—Hire of tug—Conditions—Repairs—Compensation—Presumption of fault—Evidence—Measure of damages.*

See NEGLIGENCE, 143.

33. *Fire insurance on ship "while running"—Conditions in policy—Variation from statutory conditions.*

See INSURANCE, FIRE, 36.

34. *Bill of lading—Ship's agent—Mandate—Custom of port—Delivery—Carriers.*

See TRADE CUSTOM, 1.

35. *Carriage of goods—Bill of lading—Limitation of time for suit—Damages from unseaworthiness—Construction of contract.*

See CARRIERS, 13.

36. *Admiralty law—Navigation—Narrow channels—"White Law," r. 24—Right of way—Meeting ships—Collision.*

See NAVIGATION, 1.

SIGNIFICATION.

1. *Of transfer—Condition precedent to right of action—Partnership transaction in real estate—Act of Resiliation, effect of.]—The signification of a transfer or sale of a debt or right of action is a condition precedent to the right of action of the transferee or purchaser against the debtor, and the necessity of such signification is not removed by proof of knowledge by the debtor of the transfer or sale.—The want of such signification is put in issue by *défense au fonds en fait* (general issue.)—M. and B. entered into a speculation together in the purchase of real estate the title to which was taken in the name of B. and the first instalment of purchase money was obtained from a brother of M., to whom B. gave an obligation therefor and transferred to H. a half interest in the property. As each subsequent instalment of purchase money fell due a suit was taken by the vendor against B. and the judgments in such suits as well as the obligation for the first instalment was transferred to M., but without any signification in either case. Subsequently by a formal act of resiliation B. and M. annulled the transfer of the half interest in the property made by B. to M., and formally relieved M. of all further obligation as proprietor *par indivis* for further advances toward the balance due the vendor and threw the burden of providing it entirely upon B. Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the act of resiliation and the reconveyance of the titles which it effected into the name of B. was a virtual abandonment on the part of M. of all previous investments made by him in the property or in the claims of others against that property of which he may have taken transfers. *Murphy v. Bury*, xiv., 668.*

2. *Assignment of rights under policy of insurance—Art. 1571 C. C.—Right of action.*

See INSURANCE, FIRE, 33.

AND see SERVICE OF PROCESS.

SLANDER.

1. *Evidence—Privileged communication—Public officer—Onus of proof.]—In an action of slander against a public officer in respect of the communication of his decision on the case of a subordinate whom he accused of criminal acts, the onus is upon the plaintiff to shew that the slanderous statement was actuated by motives of personal spite and ill-will in order to sustain a verdict for malicious slander. (See 3 Pugs. 670; 18 N. B. Rep. 6; 19 N. B. Rep. 225.) *Dewe v. Waterbury*, vi., 143.*

2. *Special and exemplary damages—Assessment by trial judge—Discretion as to amount—Interference on appeal.]—If the amount of damages awarded at the trial is not such as to shock the sense of justice and shew error or partiality in the discretion exercised by the judge under the circumstances of the case, an appellate court ought not to interfere with such discretion in determining the amount of damages. *Levi v. Reed*, vi., 482.*

3. *Libel—Privileged statements—Public interest—Charging corruption against political candidate—Justification—Challenging suit—Costs.]—The defendant had caused a defamatory statement to be printed in a newspaper, and on a separate fly-sheet, and circulated through the constituency, during a parliamentary election, with a printed challenge to the plaintiff and others implicated in the charges made to justify their innocence by taking an action for damages in case they were not guilty, and offering at the same time to make a deposit to cover the costs of suit.—The Supreme Court of Canada, in affirming the judgment of the Court of Queen's Bench for Lower Canada (which had reversed the judgment of the Superior Court in favour of the plaintiff, and dismissed the action with costs), refused to allow costs under the circumstances. Strong, C.J., dissented, being of opinion that the Superior Court judgment for \$100 damages with costs as of an action for that amount should be restored. *Gauthier v. Jeannotte*, xxviii., 590.*

SOLATIUM.

1. *Assessment of damages—Material loss—Injured feelings—Misdirection as to solatium—New trial—Art. 1056 C. C.]—In an action by relatives under art. 1056 C. C., damages by way of solatium cannot be recovered. Judgment appealed from (M. L. R. 2 Q. B. 25) reversed and new trial ordered. *Canadian Pacific R. W. Co. v. Robinson*, xiv., 105.*

For decision on new trial, see 19 Can. S. C. R. 202; M. L. R. 6 Q. B. 118; and reversal, on further appeal, on question of prescription (1892) A. C. 481. See LIMITATIONS OF ACTIONS, 21.

2. *Award in lieu of solatium—Substantial damages—Appropriate relief—Cross-appeal.]—A respondent whose verdict must be set aside on the ground that it was awarded by way of solatium cannot be given substantial damages where he has failed to give notice of his intention to ask appropriate relief by way of cross-appeal. *City of Montreal v. Labelle*, xiv., 741.*

AND see DAMAGES, 3.

SOLICITOR.

1. *Solicitor—Proceedings in suit—Authority to bind client.*—A promise of indemnity to the sheriff by an attorney is binding on his client where the attorney had the conduct of the suit in the course of which such promise was made and the subsequent acts of the client shewed that he had adopted the attorney's proceedings. Judgment appealed from (25 N. B. Rep. 196) affirmed. *Muirhead v. Shirreff*, xiv., 735.

2. *Practising without certificate — Allowing name to appear as a member of firm—Estoppel*—R. S. O. (1877) c. 140.]—M., a solicitor, who had not taken out the certificate entitling him to practice in the Ontario courts, allowed his name to appear in newspaper advertisements and on professional cards and letter-heads as a member of a firm in active practice; he was not, in fact, a member of the firm, receiving none of its profits and paying none of its expenses, and the firm name did not appear as solicitors of record in any of the proceedings in their professional business. The law society took proceedings against M. to recover penalties imposed on solicitors practising without certificate, in which it was shewn that the name of the firm was indorsed on papers filed in suits carried on by the firm. *Held*, reversing the judgment appealed from (15 Ont. App. R. 150), that M. did not "practice as a solicitor" within the meaning of the Act imposing the penalties, and he was not estopped, by permitting his name to appear as a member of a firm of practising solicitors, from shewing that he was not such a member in fact. *McDougall v. Law Society of Upper Canada*, xviii., 203.

3. *Negligence—Failure to register judgment—Retainer.*—A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment and thereby precluding the client from recovering the amount of his judgment debt.—*Per Strong, J.* A retainer to prosecute an action does not terminate when the judgment is obtained but makes it the duty of the attorney or solicitor without further instructions to proceed after judgment and endeavour to obtain the fruits of the recovery including the making it by registration a charge on the lands of the judgment debtor. *Hett v. Pun Pong* xviii., 290.

4. *Bill of costs—Reference to taxing master—Matter of procedure—Appeal—Jurisdiction.*—The executors of an estate took proceedings to obtain an account from the solicitor; the latter produced his account for costs and disbursements, which were referred to a taxing officer to be taxed and to have an account taken of all moneys received by the solicitor for the estate. In proceeding under this order the officer took evidence of an alleged agreement for settlement of the solicitor's bill and reported a balance due from the solicitor who was ordered to pay the costs of the application. *Held*, affirming the Court of Appeal for Ontario, that the officer not only had authority, but was obliged, to proceed and report as he did and his report should be affirmed.—It is doubtful if a matter of this kind, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court. *O'Donohoe v. Beatty*, xix., 356.

5. *Appeal—Jurisdiction—Disavowal—Prescription—Appearance by attorney—Service of summons*—C. S. L. C. c. 83, s. 44.1—In an action, in 1866, for \$800 and interest at 12½ per cent. against two brothers J. S. D. and W. D. on a promissory note signed by them, one copy of the summons was served at the domicile of J. S. D., at Three Rivers, W. D. then residing in New York. On return of the writ, respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken and in December, 1880, upon the issue of an execution, the appellant, having failed in an opposition to judgment, he filed a petition in disavowal of respondent as attorney of record. The disavowed attorney pleaded, *inter alia*, authorization by a letter signed by J. S. D., saying: "Be so good as to file an appearance in the case to which the inclosed has reference, &c." and also prescription, ratification and insufficiency of the allegations of the petition of disavowal. The petition was dismissed.—On appeal, respondent moved to quash on the ground that the matter in controversy did not amount to \$2,000. *Held*, that as the judgment obtained in March, 1874, on the appearance filed by respondent, exceeded \$2,000, the judgment on the petition was appealable. *Held*, also, that where a petition in disavowal has been served on all parties to the suit and is only contested by the attorney, whose authority to act is denied, the latter cannot, on an appeal, complain that all persons interested in the result are not parties to the appeal. *Dawson v. Dumont*, xx., 709.

6. *Action by firm for costs—Set off—Mutual debts—Special services—Retainer.*—In an action by a firm of attorneys for costs, defendants cannot set off a sum paid by one of them to one of the attorneys for special services to be rendered by him, there being no mutuality and the payment not being for the general services covered by the retainer to the firm. *Held, per Taschereau, J.* A decision of the Court of Appeal affirming the judgment of the Divisional Court which affirmed the report of the taxing officer, on a reference, refusing to allow such set-off, is not a final judgment from which appeal will lie to the Supreme Court of Canada. *McDougall v. Cameron; Bickford v. Cameron*, xxi., 379. *

7. *Costs—Supreme and Exchequer Courts of Canada—Solicitor and client—Quantum meruit—Parol evidence*—Art. 3597 R. S. O.]—In proceedings before the Supreme and Exchequer Courts, there being no tariff as between attorney and client, an attorney has the right to establish the *quantum meruit* of his services by oral evidence in an action for his costs. *Paradis v. Bossé*, xxi., 419.

8. *Negligence—Omission in mortgage—Neglect to register—Laches by client—Evidence—Findings of trial judge.*—C., a member of the defendant's firm of solicitors, was employed to prepare a mortgage for W., who gave instructions, partly verbal and partly written. Nearly six years after W. brought an action against the firm for neglecting to register the mortgage, and shortly before the trial asked to be allowed to add to his statement of claim an allegation of neglect to include a certain property in the mortgage, which he claimed had been included in the instructions. There was conflicting evidence as to the instructions, and judgment given for defendants was sustained by the Divisional Court and by the Court of Appeal. *Held*, affirming the judg-

ment appealed from, that as plaintiff had delayed so long in prosecuting his claim, and the trial judge had decided against him on the evidence, this court would not interfere with that judgment affirmed by two courts.—Appeal dismissed with costs. *White v. Currie* (22 C. L. J. 17); Cass. Dig. (2 ed.) 811.

9. *Lien for costs—Fund in court—Priority of payment—Set-off—Jurisdiction of master—General directions.*—In a suit for construction of a will and administration of testator's estate, where the land of the estate had been sold and the proceeds paid into court, J. J. B., a beneficiary under the will and entitled to a share in said fund, was ordered personally to pay certain costs to other beneficiaries. *Held*, reversing the decision of the Court of Appeal, that the solicitor of J. J. B. had a lien on the fund in court for his costs as between solicitor and client in priority to the parties who had been allowed costs against J. J. B. personally. *Held*, also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the solicitor of his lien, not having been so directed by the administration order and there being no general order permitting such an interference with the solicitor's *prima facie* right to the fund. *Bell v. Wright*, xxiv., 656.

10. *Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence—Territories Real Property Act—Unregistered transfers—Charging lands—Levy under execution—Indemnity to sheriff—Tort—Pleading—Interpleader—Counterclaim—Signed bill of costs.*—In a suit against the sheriff and an execution creditor, in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead, but may be properly joined in a defence with the execution creditor.—A solicitor advising his client according to the established jurisprudence of the court in which proceedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the advice may be subsequently overruled. Neither a solicitor nor a sheriff is a tortfeasor, as against a transferee, whose transfer is unregistered, by registering in the discharge of their respective duties a writ of execution on a judgment against lands of the judgment debtor. The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor, does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution.—In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. *Taylor v. Robertson*, xxxi., 615.

11. *Crown—Contract—Right of action—Public officer—Solicitor and client—R. S. C. cc. 114, 115—Inquiry as to public matters—Remuneration of commissioner—Quantum*

meruit.—The judgment appealed from (7 Ex. C. R. 351) held that a solicitor appointed under R. S. C. c. 115, as commissioner to make inquiry and report on conduct in office of an officer or servant of the Crown, could not recover for his services as such commissioner, there being no provision for such payment; that such service was not rendered in virtue of any contract, but merely by virtue of appointment under the statute, and that such appointment partakes more of the character of a public office than of a mere employment under a contract express or implied. The Supreme Court affirmed the judgment appealed from, Strong, C.J., and Girouard, J., dissenting. *Tucker v. The King*, xxxii., 722.

12. *Agent d'affaires contentieuses—Speculation in litigious cases—Audaces futuna jurat.*—Remarks by Taschereau, J.—Speculations are never viewed with favour by any court of justice. *Rousseau v. Burland*, xxxii., at p. 544.

13. *Constructive contempt—Discretion of court—Final judgment—R. S. C. c. 135, ss. 24 (a), 26 (1) and 27—Fine.*

See APPEAL, 132.

14. *Retainer—Findings of fact—Interference on appeal.*

See APPEAL, 211.

15. *Taxation of costs—Action against school trustees—Locus standi of ratepayer.*

See APPEAL, 179.

16. *Filing case—Factum—Irrelevant matter—Censure—Costs.*

See PRACTICE OF SUPREME COURT, 15, 19, 28.

17. *Costs—Solicitor and client—Taxation in Supreme Court considered inadvisable.*

See COSTS, 44.

18. *Insolvency—Fraudulent preferences—Chattel mortgage—Advances of money—Solicitor's knowledge of circumstances.*

See DEBTOR AND CREDITOR, 28.

19. *Criminal law—Procedure at trial—Canada Evidence Act. 1893—Husband and wife as competent witnesses—"Communications"—Privilege—Construction of statute—Directions given by legal adviser.*

See CRIMINAL LAW, 25.

AND see BAR.

SPECIAL CASE.

Matter submitted by consent—Order for further proofs.—An order for taking further evidence cannot be made, without consent, in a special case where the parties have agreed that the case should be submitted upon the trial judge's notes. *Smyth v. McDougall*, i., 114.

SPECIFIC PERFORMANCE.

1. *Evidence—Statute of Frauds—Contract relating to land—Part performance.*—B., a resident of British Columbia, wrote to his sister in England, that he would like one of

her children to come out to him, and in a second letter he said, "I want to get some relation here, for what property I have, in case of sudden death, would be eat up by outsiders, and my relations would get nothing." On hearing these letters T., a son of B.'s sister and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not and you had better hurry up and come to me at once, for I want you, and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter, T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours. Answer immediately. (Sgd.) B." Under these circumstances, T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death. *Held*, affirming the judgment appealed from, that as there was no agreement in writing for the transfer of the property to T., and the facts shewn were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with, and no performance of the contract could be decreed. *Turner v. Prevost*, xvii., 283.

2. *Contract—Deed of land—Security for loan—Undisclosed trust—Parol evidence—Statute of Frauds.*—Lands of M. were advertised for sale under powers and his wife arranged with the mortgagee to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the cash B. agreed to lend her the necessary amount for a year, taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the price agreed upon, which B. signed, and he told the solicitor that he would advise him by telephone whether the deed would be taken in his own name or in his daughter's. Next day a telephone message from B.'s house instructed the solicitor to make the deed in the name of B.'s daughter, which was done, the deed was executed by M. and his wife and the arrangement with the mortgagee carried out. Subsequently B.'s daughter claimed that she had purchased absolutely for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee subject to re-payment of the loan from B. and for specific performance of the agreement. Plaintiff charged collusion and conspiracy by defendants to deprive her of the property and, in addition to denying that charge, defendants pleaded the Statute of Frauds. *Held*, affirming the judgment appealed from (19 Ont. App. R. 602), Strong, J., dissenting, that the evidence proved that B.'s daughter was aware of the agreement made with B. and, the deed having been executed in pursuance of such agreement, she must be held to have taken the property in trust as B. would have done if the deed had been taken in

his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff. *Barton v. McMillan*, xx., 404.

3. *Agreement to provide by will—Services rendered—Remuneration—Quantum meruit.*—S., a girl of 14, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was 25 when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought action against the executors for specific performance of the agreement to provide for her as amply as for the daughters, or, in the alternative, for payment for her services during the 11 years. While living with her grandfather, S. had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses. *Held*, reversing the Court of Appeal for Ontario, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance. But that S. was entitled to remuneration for her services and \$1,000 was not too much to allow her. *McGugan v. Smith*, xxi., 263.

4. *Contract for exchange of lands—Time for completion—Extension—Waiver—Rescission—Notice—Conduct of party seeking relief.*—The exercise of jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shewn to the conduct of the person seeking relief.—H. and R. agreed to exchange land; the agreement, in the form of a letter by H. proposing terms which R. accepted, provided that the matter was to be closed in ten days if possible. R. at the time had no title to the property he was to transfer, but was negotiating for it. Nearly four months after date of agreement the matter was still unsettled, and a letter was written by H. to R.'s solicitor notifying him that unless something was done by the next morning the agreement would be null and void.—Prior to this there had been interviews between the parties and their solicitors, in which it was pointed out to R. that there were difficulties in the way of his getting a title to the land he proposed to transfer; that there was no registry of the contract which formed the title to be conveyed to him, and that the lands were subject to an annuity. R. took no active steps to get the difficulties removed until after the last letter, when he brought action against the proposed vendor and obtained a decree declaring his title good. He then sued H. for specific performance of the contract for exchange. *Held*, reversing the judgment appealed from (19 Ont. App. R. 134) and restoring the trial court judgment dismissing the action, Taschereau, J., dissenting, that R. not having title when the agreement was made, H. could rescind the contract without giving reasonable notice of his intention, as he would be bound to do if the title were merely imperfect; that the letter to the solicitor was sufficient to put an end to the bargain; and that, even if there had been no rescission, the conduct of R. in relation to the completion of the contract was

such as to disentitle him to relief by way of specific performance. *Held*, also, affirming in this respect the judgment appealed from, that time was originally of the essence of the contract, but there was a waiver by H. of a compliance with the provision as to time by entering into negotiations as to the title after its expiration. *Harris v. Robinson*, xxi, 390.

5. *Agreement to convey land—Defect of title—Will—Devise of fee with restriction against selling—Special legislation—Compliance with provisions of.*—The appeal was from a decision of the Court of Appeal for Ontario, affirming the judgment of the Queen's Bench Division in favour of the plaintiff. Land was devised to Northcote with a provision in the will that he should not sell or mortgage it during his life, but might devise it to his children. Northcote agreed in writing to sell the land to Vigeon, who was not satisfied as to Northcote's power to give a good title, and the latter petitioned under the Vendors and Purchasers Act for a declaration of the court thereon. The court held that the will gave Northcote the land in fee with a valid restriction against selling or mortgaging. [*In re Northcote*, 18 O. R. 107.] Northcote then asked Vigeon to wait until he could apply for special legislation to enable him to sell, to which Vigeon agreed, and thenceforth paid interest on the proposed purchase money. Northcote applied for a special Act which was passed giving him power, notwithstanding the restriction in the will, to sell the land and directing that the purchase money should be paid to a trust company. Prior to the passing of this Act Northcote, in order to obtain a loan on the land, had leased it to a third party, and the lease was mortgaged, and Northcote afterwards assigned his reversion of the land.—In an action by Vigeon for specific performance of the contract with her, defendant claimed that the contract was at an end when the judgment on the petition was given, and that if performance were decreed the amount due on the mortgage should be paid to him and only the balance to the trust company.—The Supreme Court held, affirming the decision of the Court of Appeal, that it was not open to Northcote to attack the decision of the Chancellor on the petition under the Vendors and Purchasers Act; that if it were, and that decision should be overruled, Vigeon would be all the more entitled to specific performance; that the evidence shewed the lease granted by Northcote to have been merely colourable and an attempt to raise money on the land by indirect means; and that the decree should go for specific performance the whole purchase money to be paid in to a trust company. *Northcote v. Vigeon*, xxii, 740.

6. *Vendor and purchaser—Laches—Waiver.*—The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time even though time was not of its essence; nor when he has declared his inability to perform his share of the contract.—The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements. *Wallace v. Hesslein*, xxix, 171.

7. *Sale of land—Agreement for sale—Mutual mistake—Reservation of minerals.*—

The E. & N. Ry. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept as it reserved the minerals on the land while the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals. *Held*, reversing the judgment of the Supreme Court of British Columbia (6 B. C. Rep. 228), Taschereau, J., dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance. *Hobbs v. Esquimalt and Nanaimo Ry. Co.*, xxix, 450.

[Leave was granted for an appeal to the Privy Council and, subsequently, on a compromise between the parties, the appeal was dismissed for want of prosecution. (See Can. Gaz. vol. xxxiii., p. 393.)]

8. *Contract—Delivery—Measure of damages—Reasonable time—Trade custom.*

See CONTRACT, 242.

9. *Agreement respecting boundary line—Valuable consideration—Construction of deed—Equitable relief—Statute of Frauds.*

See BOUNDARY, 1.

10. *Executed and executory contracts—Consolidation with suit on mortgage—Frame of decree for execution and redemption or foreclosure.*

See PATENT OF INVENTION, 4.

11. *Railway aid—Bonus by-law—Prior agreement—Performance of conditions—Action for damages.*

See RAILWAYS, 89.

12. *Lease—Renewal—Option of lessor—Second term—Expiration of term.*

See LANDLORD AND TENANT, 25.

13. *Mortgaged lands—Sale of equity—Agreement in writing—Statute of Frauds.*

See SALE, 95.

14. *Action—Release—New account—Outstanding liability—Curator—Administration—Release—Parties to suit—Purchase of trust estate.*

See ACCOUNT, 4.

15. *Purchase of land—Agreement to assign mortgage as part payment—Second mortgage—Negotiable instrument.*

See CONTRACT, 244.

16. *Contract for purchase of land—Agreement to pay interest—Delay—Default of vendor.*

See VENDOR AND PURCHASER, 30.

17. *Agreement for services—Remuneration—Relationship of parties.*

See CONTRACT, 152.

18. *Vendor and purchaser—Sale of lands—Waiver of objections—Lapse of time—Will, construction of—Executory devise over—De-feasible title—Rescission of contract.*

See VENDOR AND PURCHASER, 32.

19. *Vendor and purchaser—Principal and agent—Sale of lands—Authority to agent—Price of sale—Resulting trust—Conveyance to agent.*

See PRINCIPAL AND AGENT, 9.

AND see CONTRACT, 227-252.

SPEEDY TRIALS ACT.

Legislative jurisdiction—Regulating criminal procedure—Provincial courts—B. N. A. Act, 1867, s. 92, s.s. 14—References under 54 & 55 Vict. c. 25 (D.)—The power given to the provincial governments by the B. N. A. Act, 1867, s. 92, s.s. 14, to legislate regarding the constitution, maintenance and organization of provincial courts includes the power to define the jurisdiction of such courts territorially as well as in other respects and also to define the jurisdiction of the judges who constitute such courts.—C. S. B. C. c. 25, s. 14, enacts that "any County Court Judge appointed under this Act may act as County Court Judge in any other district upon the death, illness, or unavoidable absence of, or at the request of the judge of that district, and while so acting the said first mentioned judge shall possess all the powers and authorities of a County Court Judge in the said district; provided, however, the said judge so acting out of his district shall immediately thereafter report in writing to the Provincial Secretary the fact of his so doing and the cause thereof," and by 53 Vict. c. 8, s. 9 (B. C.), it is enacted that "until a County Court Judge of Kootenay is appointed, the judge of the County Court of Yale shall act as and perform the duties of the County Court Judge of Kootenay, and shall, while so acting, whether sitting in the County Court District of Kootenay or not, have, in respect of all actions, suits, matters, or proceedings being carried on in the County Court of Kootenay, all the powers and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters, and proceedings; and for the purpose of this Act, but not further, or otherwise, the several districts as defined by ss. 5 & 7 of the County Courts Act, over which the County Court of Yale and the County Court of Kootenay, respectively, have jurisdiction shall be united."—*Held*, that these statutes were *intra vires* of the Legislature of British Columbia under said section of the B. N. A. Act, 1867.—By the Dominion statute, 51 Vict. c. 47, "The Speedy Trials Act," jurisdiction is given to "any judge of the County Court," to try certain criminal offences.—*Held*, that the expression, "any judge of the County Court," in such Act means any judge having by force of the provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court Judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature to do so.—"The Speedy Trials Act" is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure.—*Per Taschereau, J.* It is doubtful if Parliament had power to pass those sections of 54 & 55 Vict. c. 25, which

empower the Governor-General-in-Council to refer certain matters to the Supreme Court of Canada for an opinion. *Re County Court Judges (B. C.)*, xxi, 446.

STAMPS.

1. *Unstamped note—Larceny—Valuable security—32 & 33 Vict. c. 21 (D.)*.
See CRIMINAL LAW, 1.

2. *Indirect tax—Duties payable to the Crown—Legislative jurisdiction—B. N. A. Act, 1867, ss. 65, 90, 91, 126, 129—43 & 44 Vict. c. 9, s. 9 (Que.)*.
See CONSTITUTIONAL LAW, 51.

3. *Unstamped bill—"Knowledge"—Double stamping—Pleading—42 Vict. c. 17, s. 13 (D.)*.
See BILLS AND NOTES, 41.

4. *Stamps on petition—Controverted election—Preliminary objections*.
See ELECTION LAW, 118.

AND see BILLS AND NOTES, 41-43.

STARE DECISIS.

1. *Binding effect of judgment—Court equally divided.*—When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the parties to the litigation only, and the court when a similar case is brought before it is not bound by the result of the previous case. *Stanstead Election Case; Rider v. Snow*, xx, 12.

2. *Contract—Public work—Final certificate of engineer—Previous decision—Necessity to follow.*—The Intercolonial Railway Act provided that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the commissioners, that the work was completed to his satisfaction. Before the suppliant's work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors. *Held, per Taschereau, Sedgewick and King, JJ.*, that as the court in *McGreedy v. The Queen* (18 Can. S. C. R. 371), had, under precisely the same state of facts, held that the contractor could not recover, that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed. *Held, per Gwynne, J.*, that independently of *McGreedy v. The Queen*, the contractor could not recover for want of the final certificate. *Held, per Strong, C.J.*, that as in *McGreedy v. The Queen*, a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the court, and on the merits the contractors were entitled to judgment. *Ross v. The Queen*, xxv., 564.

AND see ESTOPPEL—JUDGMENT—RES JUDICATA.

STATUTE OF DISTRIBUTIONS.

Construction—26 Geo. III. c. 11 (N.B.)—*Statute of Distributions*—*Statute of Frauds*—*Revision*—*Repeal*—*Restoration of former law*—*Intestate estate*—*Feme covert*—*Husband's right to residue*—*Neat of kin.*—26 Geo. III. c. 11, ss. 14 & 17 (N.B.), re-enacted 22 & 23 Car. II. c. 10 (Statute of Distributions) as explained by Car. 2, c. 3, s. 25 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of *femes coverts* dying intestate, but that their husbands should enjoy their personal estate as theretofore.—When the statutes were revised in 1854 the Act, 26 Geo. III. c. 11, was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme covert* her next of kin claimed the personality on the ground that the husband's rights were swept away by this omission. *Held*, that the personal property passed to the husband and not to the next of kin of the wife.—*Per* Strong, J. The repeal by R. S. N. B. of 26 Geo. III. c. 11, passed in affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law of New Brunswick.—*Per* Gwynne, J. When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. III. c. 11 (N.B.), it was not necessary to enact the interpretation section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act. *Held*, *per* Ritchie, C.J., Fournier, Gwynne and Patterson, JJ., that the Married Woman's Property Act (C. S. N. B. c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed. *Lamb v. Cleveland*, xix., 78.

AND *see* SUCCESSIONS.

STATUTE OF ELIZABETH.

Assignment for benefit of creditors—*Preferences*—*Chattel mortgage*—R. S. N. S. (5 ser.) c. 92, ss. 4, 5, 10.]—An assignment is void under the Statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on a claim of said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he previously had, though no one of these provisions taken by itself would have such effect.—A provision that "assignee shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part" will also void the assignment under the Statute of Elizabeth.—Authority to the assignee not only to prefer parties to accommodation paper, but also to pay all "costs, charges and expenses to arise in consequence" of such paper, is a badge of fraud. *Kirk v. Chisholm*, xxvi., 111.

AND *see* ASSIGNMENT—DEBTOR AND CREDITOR—FRAUDULENT CONVEYANCES—FRAUDULENT PREFERENCE—PRACTICE AND PROCEDURE.

STATUTE OF FRAUDS.

1. *Contract*—*Parol testimony*—*Undisclosed trust*—*Security for loan*—*Deed in name of third party*—*Specific performance.*]—M. agreed by written contract to give to B. as security for a loan, an absolute deed to be held by B. in trust for the time the loan was to run. By B.'s directions the deed was made out in his daughter's name, who claimed that she purchased absolutely for her own benefit. Action was brought against her and B. for specific performance of contract with B. and a declaration that she was a trustee only subject to re-payment of the loan. Defendants denied the collusion and conspiracy charged and pleaded the Statute of Frauds. *Held*, affirming the judgment appealed from (19 Ont. App. R. 602). Strong, J., dissenting, that the evidence shewed that the daughter was aware of the agreement with B., and the Statute of Frauds did not prevent parol evidence being given of such agreement. *Barton v. McMillan*, xx., 404.

2. *Memorandum in writing*—*Repudiating contract by*—29 Car. II., c. 3.]—A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale. *Martin v. Haubner*, xxvi., 142.

3. *Contract*—*Partnership*—*Dealing in lands*—*Parol agreement.*]—A partnership may be formed by parol agreement notwithstanding that its object may be to deal in lands as the Statute of Frauds does not apply to such a case. *Archibald v. McNerhanie*, xxix., 564.

4. *Pleading*—*Conversion*—*Defect in plaintiff's title*—*Evidence.*]—In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded.—It is only where the action is between the parties to the contract which one of them seeks to enforce against the other that the defendant must plead the Statute of Frauds if he wishes to avail himself of it.—Judgment appealed from (32 N. S. Rep. 549) affirmed. *Kent v. Ellis*, xxxi., 110.

5. *Agreement for valuable consideration*—*Conventional boundary line*—*Equitable relief*—*Specific performance.*]—An agreement to establish a conventional boundary line is not within the Statute of Frauds. *Grassett v. Carter*, x., 105.

See BOUNDARY, 1.

6. *Contract affecting land*—*Specific performance*—*Evidence*—*Part performance.*
See EVIDENCE, 155.

7. *Lease*—*Signature of lessor*—R. S. O. (1887) c. 100, s. 8.

See LANDLORD AND TENANT, 1.

8. *Construction of Statute of Distributions*—*New Brunswick legislation*—*Feme covert.*
See HUSBAND AND WIFE, 4.

9. *Agreement in writing—Sale of mortgaged land—Equity of redemption—Specific performance.*

See **SALE**, 95.

10. *Sale of interest in land—Agreement to transfer proceeds of sale of mine.*

See **CONTRACT**, 248.

11. *Debtor and creditor—Preference—Pressure—R. S. B. C. (1897) cc. 86, 87—The Bank Act, s. 80—Company law—Mortgage by directors—Ratification—B. C. Companies Acts, 1890, 1892, 1894.*

See **FRAUDULENT PREFERENCES**, 17.

STATUTE OF LIMITATIONS.

1. *Acts of possession—Estoppel—Recognition of contingent title—Interruption of prescription.*—The possession of a person residing upon an adjoining property but who was let into possession of the lands in question and controlled and used it as owner from 1830 till his death in 1857, is sufficient for the acquisition of title under the statute.—Recognition of adverse interest in land by the person in possession purchasing and accepting a conveyance thereof, has the effect of interrupting the running of the Statute of Limitations. *Gray v. Richford*, ii., 431.

2. *Partnership dealings—Laches and acquiescence—Interest in partnership lands.*—A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the master's office K. claimed that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a larger sum to be due him from J. for such overcharge. The master held that, as these transactions had taken place nearly twenty years before, K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such claim. His report was overruled by the Divisional Court and Court of Appeal on the ground that the partnership affairs never having been formally wound up the statute did not apply. *Held*, reversing the decision of the Court of Appeal and restoring the master's report, that K.'s claim could not be entertained; that there was, if not absolute evidence at least a presumption of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners considering their relationship and the apparent concert between them. *Tooth v. Kittredge*, xxiv., 287.

3. *Pleading—Petition of Right Act, 1876.*

See **RIDEAU CANAL LANDS**, 1, 2.

4. *Sheriff's sale—Trust—Purchase by executor—Possession—Evidence.*

See **TITLE TO LAND**, 118.

5. *Tenants in common—Remainder—Possession—Survival of tenant for life.*

See **TITLE TO LAND**, 57.

6. *Possession of locus—Trespass quare clausum fregit—Evidence.*

See **TITLE TO LAND**, 82.

7. *Error in survey—Boundaries—Possession.*

See **TITLE TO LAND**, 84.

8. *Title to land—Adverse possession—Defective documentary title.*

See **TITLE TO LAND**, 85.

9. *Trustees under will—Disclaimer—Possession of land.*

See **WILL**, 32.

AND see **LIMITATIONS OF ACTIONS—PRESCRIPTION**.

STATUTE OF MAINTENANCE.

Title to land—Crown grant—Disseisin of grantee—Tortious possession—Conveyance to married woman—Effect of execution of, by husband—Statute of Maintenance, 32 Hy. III., c. 9—Statute of Limitations.—In 1828 certain land in Upper Canada was granted by the Crown to King's College. In 1841, while one M. who had entered on the land was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land, the defendants claiming title through M., set up the Statute of Limitations, alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the Statute of Maintenance, and G. had, therefore, nothing to convey in 1849. *Held*, that it was not proved that the possession of M. began before the grant from the Crown, but assuming that it did M. could not avail himself of the estate of maintenance as he would have to establish disseisin of the grantor, and the Crown could not be disseised; nor would the statute avail as against the patentee as the original entry nor being tortious the possession would not become adverse without a new entry. *Held*, further, that if the possession began after the grant, the deed to G. in 1841 was not absolutely void under the Statute of Maintenance, but only void as against the party in possession, and M. being in possession a conveyance to him would have been good under s. 4 of the statute, and the deed to his wife, a person appointed by him, was equally good.—Further, M. by his assent to the conveyance to his wife and subsequent acts was estopped from denying the title of his wife's grantor. *Webb v. Marsh*, xxii., 437.

STATUTE OF MORTMAIN.

1. *Construction of will—Statutes in New Brunswick—9 Geo. II. (Imp.) c. 36.—Per Strong, J. The Statute of Mortmain (9 Geo. II. c. 36) is not in force in the Province of New Brunswick.—Judgment appealed from (4 Pugs. & Bur. 129) affirmed in the result; Fournier and Henry, J.J., dissenting. Ray v. Annual Conference of New Brunswick, vi., 308.*

See **WILL**, 9.

2. *Will—Revocation—Revival—Codicil—Intention to revive—Reference to date—Removal of executor—Statute of Mortmain—Will executed under mistake—Ontario Wills Act, R. S. O. (1887) c. 109—9 Geo. II., c. 36 (Imp.)*]—*Held, per Gwynne and Sedgewick, JJ., that the Imperial Statute, 9 Geo. II., c. 36 (the Mortmain Act), is in force in the Province of Ontario, the courts of that province having so held (Doe d. Anderson v. Todd (2 U. C. Q. B. 82); Corporation of Whitby v. Liscombe (23 Gr. 1), and the legislature having recognized it as in force by excluding its operation from acts authorizing corporations to hold lands. Macdonnell v. Purcell; Cleary v. Purcell, xxiii., 101.*

STATUTES.

1. OPERATION, COMING INTO FORCE, 1-3.
2. REPEALS AND RE-ENACTMENTS, 4-15.
3. LEGISLATIVE JURISDICTION, 16-22.
4. CROWN, ACTS AFFECTING THE, 23-26.
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7. PENAL ACTS, 36-38.
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10. APPLICATION OF STATUTORY PROVISIONS, 53-113.
11. CONSTRUCTION AND INTERPRETATION, 114-173.
 - (a) *Formal Parts*, 114-118.
 - (b) *Imperative and Directory Provisions*, 119-133.
 - (c) *Other Cases*, 134-173.

1. OPERATION, COMING INTO FORCE.

1. 38 Vict. c. 11. ss. 26, 80—*Construction of statute—When it took effect—Functions of Supreme Court of Canada date from proclamation.*]—The Supreme and Exchequer Courts Act must be construed as if it had been assented to on the 11th January, 1876, when the judicial functions of the court took effect in virtue of the proclamation issued by order of the Governor-General-in-Council under the provisions of the eightieth section of the Act, and no court proposed to be appealed from nor any judge thereof, can, under s. 26 of the Act, grant leave to appeal when judgment had been signed, entered or pronounced previous to the eleventh day of January, 1876. *Taylor v. The Queen*, i., 65.

2. *Coming into force—Retrospective effect—Judgment simultaneous with assent—Question of procedure—Existing adjudication—Supreme and Exchequer Courts Amending Act, 1891, 54-55 Vict. c. 25, s. 3—Appeal from Court of Review.*]—By s. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court sitting in Review, Province of Quebec, in cases which, by the law of that province, are appealable direct to the Judicial Committee of the Privy Council.—A judgment was delivered by the Su-

perior Court sitting in Review at Montreal in favour of D., the respondent, on the same day on which the amending Act came into force.—On an appeal to the Supreme Court of Canada taken by the appellants, *Held*, that the appellants not having shewn that the judgment was delivered subsequently to the passing of the amending Act the court had no jurisdiction. —*Quere*, Whether an appeal will lie from a judgment pronounced after the passing of the amending Act in an action pending before the change of the law. *Hurtubise v. Desmarreau*, xix., 562.

3. *Revenue—Customs duties—Imported goods—Importation into Canada—Tariff Act—Construction—Retrospective legislation—R. S. C. c. 32—57 & 58 Vict. c. 33 (D.)—53 & 59 Vict. c. 23 (D.)*]—By 57 & 58 Vict. c. 33, s. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada." *Held*, reversing the judgment of the Exchequer Court, King and Girouard, JJ., dissenting, that the importation as defined by s. 150 of the Customs Act (R. S. C. c. 32) is not complete until the vessel containing the goods arrives at the port at which they are to be landed.—Section 4 of the Tariff Act, 1895 (58 & 59 Vict. c. 23), provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July. *Held*, that the goods imported into Canada on May 4th, 1895, were subject to duty under said Act. *The Queen v. Canada Sugar Refining Co.*, xxvii., 395.

[Affirmed by Privy Council (1898) A. C. 735.]

2. REPEALS AND RE-ENACTMENTS.

4. *Repeal—R. S. N. S. (4 ser.) c. 29—42 Vict. c. 1, s. 67 (N.S.)—Boards of health.*]—Section 67 of the Act by which municipal corporations were established in Nova Scotia (42 Vict. c. 1) giving them the appointment of health officers . . . and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S. (4th ser.) providing for the appointment of boards of health by the Lieutenant-Governor-in-Council. Ritchie, C.J., doubting the authority of the Lieutenant-Governor to appoint in incorporated counties. *County of Cape Breton v. McKay*, xviii., 639.

5. *Special Act—Repeal of by general Act—Repeal by implication.*]—A general later statute (and a fortiori a statute passed at the same time) does not abrogate an earlier special Act by mere implication.—The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation. *City of Vancouver v. Bailey*, xxv., 62.

6. *Estates tail. Acts abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—28 Vict. c. 2 (N.S.)—Will—Construction of—Executory devise over—Dying without issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S. (2 ser.) c. 114, ss. 23 & 24—Title by will—Conveyance by tenant in tail.*]—The Revised Statutes of Nova Scotia, 1851, (1 ser.) c.

112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 112) the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2) when it was provided as follows: "All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such." Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant. *Held, per Taschereau, Sedgewick and King, J.J.*, that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate tail, as there could not be a valid estate tail to support such remainder. *Held, further, per Taschereau, Sedgewick and King, J.J.*, that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body;" and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could lawfully be conveyed by the first devisee. *Held, per Gwynne and Girouard, J.J.*, that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statutes of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him. *Ernst v. Zwicker*, xxvii., 594.

7. Construction of statute—20 & 21 Vict. c. 54, s. 12 (Imp.)—Application—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.]—The Imperial Act, 20 & 21 Vict., c. 54, s. 12, provides that "nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed; . . . and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its
s. c. d.—43

object the restoration or re-payment of any trust property misappropriated." *Held*, affirming the judgment of the Supreme Court of British Columbia, that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts. *Semble*, that the section only covered agreements or securities given by the defaulting trustee himself. *Quere*, Is the said Imperial Act in force in British Columbia? If in force it would not apply to a prosecution for an offence under R. S. C. c. 164 (The Larceny Act) s. 58.—An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 164, s. 58, which was not re-enacted by the Criminal Code, 1892. *Held*, that the alleged criminal act, having been committed before the Code came into force, was not affected by its provisions and the covenant could not be enforced. Further, the partnership property not having been held on an express trust the civil remedy was not preserved by the Imperial Act. *Major v. McCraney*, xxix., 182.

8. Abolition of primogeniture—Repeal of statute—14 & 15 Vict. c. 6 (Can.)—Devise to heirs.]—The Act 14 & 15 Vict., c. 6, (Can.), abolishing the law of primogeniture in Upper Canada, placed no legislative interpretation on the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named, such heirs were all the brothers and sisters of said person and not his eldest brother only. Judgment of the Court of Appeal (25 Ont. App. R. 326) affirmed. *Wolff v. Sparks*, xxix., 585.

9. Construction—Repugnant clauses—Inoperative provision—Prior enactment—60 & 61 Vict. c. 34, s. 1, s.-ss. (c) & (f).]—The fact that s.-s. (f) of the first section of 60 & 61 Vict. c. 34 (D.), is placed last in point of order in the section does not oblige the court to construe it as indicating the latest mind of Parliament, as the whole section came into force at one time, and the said sub-section is inoperative, as it stands, being repugnant to s.-s. (c) which precedes it.—The two paragraphs are reconciled by construing s.-s. (f) as if the words "by the appeal" were inserted after the word "demanded," thus obviating any repugnancy which might be apparent. *City of Ottawa v. Hunter*, xxxi., 7.

10. 22 & 23 Car. II., c. 10—Distributions—Legislation in New Brunswick—Feme covert.—Intestacy—Next of kin—Re-enactments—Repeals.

See HUSBAND AND WIFE, 4.

11. Municipal by-law—Tramway—Inter-municipal works—Validating Act.

See No. 28, *infra*.

12. Retrospective legislation—Repeal of Act—Turnpike tolls.

See No. 49, *infra*.

13. Repeal of statute—Re-enactment—20 & 21 Vict. c. 54, s. 12 (Imp.)—Application of acts—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.

See No. 7, *ante*.

14. *Abolition of law of primogeniture — Devise to heirs.*

See No. 8, *ante*.

15. *Merchants Shipping Act, 1854 — Imperial Interpretation Act of 1899 — Suits affected by repeal of Acts.*

See No. 152, *infra*.

3. LEGISLATIVE JURISDICTION.

16. *Crown property — Foreshores of harbours — Provincial grant — Estoppel — Act confirming title — B. N. A. Act, 1867.* — If a provincial statute can affect title to land vested in the Dominion of Canada, it does not do so by an act in which the Crown is not specially declared to be affected. Such an Act cannot avail the party invoking it unless it be specially pleaded. *Sydney & Louisburg Coal & Ry. Co. v. Sword*, xxi., 152.

17. *54 & 55 Vict. c. 25 — Reference to Supreme Court.* — *Quere, Per Taschereau, J.*, Is s. 4 of 54 & 55 Vict. c. 25, which purports to authorize a reference to the Supreme Court for hearing "or" consideration, *intra vires* of the Parliament of Canada? *In re Statutes of Manitoba Relating to Education*, xxii., 577.

18. *Constitutional law — Local legislature — Powers of Lieutenant-Governor.* — Inasmuch as the Act 51 Vict. c. 5 (O.), declares that in matters within the jurisdiction of the Legislature of the province, all powers, &c., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several provinces before confederation shall be vested in and exercisable by the Lieutenant-Governor of that province, if there is no proceeding in dispute which has been attempted to be justified under 51 Vict. c. 5 (O.), it is impossible to say that the powers to be exercised under the said Act by the Lieutenant-Governor are unconstitutional. — Gwynne, J., was of opinion that 51 Vict. c. 5 (O.), was *ultra vires* of the Provincial Legislature. Judgment appealed from (19 Ont. App. R. 31) affirmed. *Attorney-General of Canada v. Attorney-General of Ontario*, xxiii., 458.

19. *Constitutional law — Jurisdiction of North-West Territorial Legislature — N.W.T.* — The provisions of Ordinance No. 16 of 1889 (N.W.T.) respecting the personal property of married women, are *intra vires* of the Legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor-in-Council was authorized to legislate by the order of the Governor-General-in-Council passed under the provisions of "The North-West Territories Act." *Conger v. Kennedy*, xxvi., 397.

20. *Penal statute — Prohibited contract — Nullity — Railway director — Partnership with contractor — Action pro socio — "The Consolidated Railway Act, 1879."* — The Supreme Court affirmed the judgment of the Court of Queen's Bench appealed from (Q. R. 8 Q. B. 555) by which it had been held that the provisions of the "Consolidated Railway Act, 1879," s. 19, s.s. 16, were within the legislative jurisdiction of the Parliament of Canada, inasmuch as they had essential connection with the object of Parliament in declaring the capacities of railway directors, and that the prohibition against directors having

interests in contracts with the company was incidental to carrying out the object in view, and further, that although the statute merely provided a penalty against offenders, it had the effect of making void any contract in contravention of its provisions and taking away all right of action under any such contract. *Macdonald v. Riordon*, xxx., 619.

21. *53 Vict. c. 56, s. 18 (O.) — 54 Vict. c. 46 (O.) — Constitutionality — Powers of local legislature.* — The statute 53 Vict. c. 56, s. 18 (O.) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario Legislature, as is also s. 1 of 54 Vict. c. 46, which explains it, but the prohibition can only extend to sale by retail. *In re Local Option Act* (18 Ont. App. R. 572) approved. Gwynne and Sedgewick, J.J., dissenting. *Huson v. Council of South Norwich*, xxiv., 145.

See [1896] A. C. 348.

See CONSTITUTIONAL LAW, 46.

22. *Canadian waters — Property in beds — Public harbours — Erections in navigable waters — Interference with navigation — Right of fishing — Power to grant — Riparian proprietors — Great lakes and navigable rivers — Operation of Magna Charta — Provincial legislation — R. S. O. (1887) c. 24, s. 47 — 55 Vict. (O.) c. 10, ss. 5 to 13, 19 and 21 — R. S. Q. arts. 1375 to 1378.* — Riparian proprietors before confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown. *Robertson v. The Queen* (6 Can. S. C. R. 52) followed. — The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers. — Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide. — Where the provisions of Magna Charta are not in force, as in the Province of Quebec, the Crown, in right of the province, may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in other public harbours, the Crown, in right of the Dominion may grant the beds and fishing rights. Gwynne, J., dissenting. — *Per Strong, C.J.* and King and Girouard, J.J. The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various Provincial Legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation. — The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters, the beds and banks of which are assigned to the provinces under the British North America Act. The legislative authority of Parliament under s. 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal, conferring qualification, and give no exclusive right to fish in a particular locality.

—Section 4 and other portions of c. 95, Revised Statutes of Canada, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne, J., *contra*.—*Per* Gwynne, J. Provincial Legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, s. 91, item 12, including the grant of leases or licenses for exclusive fishing.—*Per* Strong, C.J., Taschereau, King and Girouard, J.J. R. S. O. c. 24, s. 47, and ss. 5 to 13 inclusive of the Ontario Act of 1892, are *intra vires*, but may be superseded by Dominion legislation.—R. S. Q. arts 1375 to 1378 inclusive, are *intra vires*. — *Per* Gwynne, J. R. S. O. c. 24, s. 47 is *ultra vires* so far as it assumes to authorize the land covered with water within public harbours.—The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government, for protection against interference with navigation. The Act of 1892, and R. S. Q. arts. 1375 to 1378, are valid if passed in aid of a Dominion Act for protection of fisheries. If not, they are *ultra vires*. *In re Jurisdiction over Provincial Fisheries*, xxvi., 444.

Varied on appeal by the Privy Council, [1898] A. C. 700.

4. ACTS AFFECTING THE CROWN.

23. *Crown property—Foreshores of harbours—Provincial grant—Estoppel—Act confirming title*—B. N. A. Act, 1867.]—If a provincial statute can affect title to land vested in the Dominion of Canada, it does not do so by an act in which the Crown is not specially declared to be affected.—Such an Act cannot avail the party invoking it unless it be specially pleaded. *Sydney & Louisburg Coal & Ry. Co. v. Sword*, xxi., 152.

24. *Constitutional law—Dominion government—Liability to action for tort—Injury to property on public work—Non-feasance*—39 Vict. c. 27 (D.)—R. S. O. c. 40, s. 6—50 & 51 Vict. c. 16 (D.)—50 & 51 Vict. c. 16, ss. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort (Taschereau, J., expressing no opinion on this point).—By 50 & 51 Vict. c. 16, s. 16 (D.), the Exchequer Court is given jurisdiction to hear and determine, *inter alia*: “(d) Every claim against the Crown arising under any law of Canada” *Held, per* Strong, C.J., and Fournier, J., that the words “any claim against the Crown” in s.-s. (d) without the additional words would include a claim for a tort; that the added words “arising under any law of Canada” do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any Province of Canada, and even if the meaning be restricted to the statute law of the Dominion the effect of s. 58 of 50 & 51 Vict. c. 16, is to reinstate the provision contained in s. 6 of the repealed Act R. S. O. c. 40, which gives a remedy for injury to property in a case like the present. *City of Quebec v. The Queen*, xxiv., 420.

25. *Construction of taxing Act—Customs duties—Duties on goods—Foreign-built ships—Customs Tariff Act, 1897, s. 4.*—A foreign-built ship owned in Canada which has

been given a certificate by a British consul abroad and comes into Canada for the purpose of being registered as a Canadian ship, is liable to duty under s. 4 of the Customs Tariff Act, 1897.—A taxing Act is not to be construed differently from any other statute. *The King v. Algoma Central Ry. Co.*, xxxii., 277.

[Affirmed on appeal by the Privy Council, July, 1903. See Can. Gaz. vol. xli., p. 400.]

26. *Government railway—Injury to employce—Lord Campbell's Act—Liability of the Crown.*

See No. 155, *infra*.

5. ERRORS AND OMISSIONS IN ACTS.

27. *Construction—C. S. C. c. 66, s. 13—14 & 15 Vict. c. 51, s. 13—Substitution of “at” for “and”—Correction of error.*—The substitution of “at” in C. S. C. c. 66, s. 13, for “and” in 14 & 15 Vict. c. 51, s. 13, is the mere correction of an error and does not alter or affect the construction of the section. *Brown v. Toronto & Nipissing Ry. Co.* (26 U. C. C. P. 206) overruled. *Canada Southern Ry. Co. v. Clouse*, xiii., 139.

28. *Construction of statute—Municipal corporation—By-law—Street railway—Construction beyond limits of municipality—Validating Act.*—The Corporation of the Town of Port Arthur passed a by-law intitled “a by-law to raise the sum of \$75,000 for street railway purposes, and to authorize the issue of debentures therefor,” which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, &c., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed, but none was submitted ordering the construction of the work. Subsequently an Act was passed by the Legislature of Ontario in respect to the said by-law which enacted that the same “is hereby confirmed and declared to be valid, legal and binding on the town . . . and for all purposes, &c., relating to or affecting the said by-law and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with.” *Held*, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the said Act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act requiring a by-law providing for the construction of the railway to be passed, but only confirmed the one that was passed as a money by-law. *Held*, also, that an erroneous recital in the preamble to the Act that the town council had passed a construction by-law had no effect on the question to be decided. *Dwyer v. Town of Port Arthur*, xxii., 241.

6. CRIMINAL ACTS.

29. *Construction of ss. 38 & 49, 38 Vict. c. 11—Criminal law—New trial.*—Since the passing of 32 & 33 Vict. c. 29, s. 80, repealing so much of c. 77 of Cons. Stat. (L. C.) as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32 & 33 Vict. c. 36, repealing s. 63 of c. 77 Cons. Stat. (L.C.), the

Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and the Supreme Court of Canada, exercising the ordinary appellate powers of the court, under ss. 38 and 49 of 38 Vict. c. 11, should give the judgment which the court whose judgment is appealed from ought to have given, viz.: To reverse the judgment which had been given and order the discharge of the prisoner. *Laliberté v. The Queen*, i., 117.

30. *Criminal law — Betting on election — Stakeholder* — R. S. C. c. 159, s. 9—*Accessory*—R. S. C. c. 145, s. 7.]—R. S. C. c. 159, s. 9, provides *inter alia* that "every one who becomes the custodian or depository of any money . . . staked, wagered or pledged upon the result of any political or municipal election . . . is guilty of a misdemeanour," and a sub-section says that "nothing in this section shall apply to . . . bets between individuals." *Held*, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the sub-section is not to be construed as meaning that the main section does not apply to a depository of money bet between individuals on the result of an election; such depository is guilty of a misdemeanour, and the bettors are accessories to the offence and liable as principal offenders. R. S. C. c. 145. *Reg. v. Dillon* (10 Ont. P. R. 352) overruled. *Walsh v. Trebilcock*, xxiii., 695.

31. *Criminal Code, 1892, ss. 742-750—New trial*—55 & 56 Vict. c. 29, s. 742.]—The word "opinion" as used in the second sub-section of section seven hundred and forty two of "The Criminal Code, 1892," must be construed as meaning a "decision" or "judgment" of the Court of Appeal in criminal cases. *Viau v. The Queen*, xxix., 90.

32. *Appeal of statute — Re-enactment* — 20 & 21 Vict. c. 54, s. 12 (Imp.)—*Application of Acts—Criminal prosecution — Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.*

See No. 7, *ante*.

33. *Construction of 60 & 61 Vict. c. 24 (D.)—Appeals from Ontario courts—Appeal in criminal case.*

See No. 79, *infra*.

34. *Perjury — Judicial proceeding — De facto tribunal — Misleading justice — Jurisdiction* — R. S. Q. arts. 5551, 5561—*Criminal Code, s. 145.*

See CRIMINAL LAW, 24.

35. *Canada Evidence Act, 1893—Construction and interpretation—Competency of husband and wife as witnesses—"Communications"—Privilege—Reference to Hansard debates.*

See No. 81, *infra*.

7. PENAL STATUTES.

36. *Construction of statute — Jurisdiction of Superior Court*—R. S. C. c. 135, s. 29 (a)—"Quebec Pharmacy Act"—*Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs*—50 Vict. c. 5, s. 7—R. S. Q. arts. 11, 4035, 4039b, 4040, 4046, 4052.]—The amendment to the "Quebec

Pharmacy Act" by 62 Vict. c. 35, s. 2 (Que.) adding art. 4039 (b), Revised Statutes of Quebec, has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. 50 Vict. c. 5, s. 7 (Que); art. 11 R. S. Q.—Penalties for several offences under the said Act may be joined in one action and, when the aggregate amount is sufficiently large, the action may be brought in the Superior Court as a court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the Province of Quebec.—It is improper in such an action to describe the subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty upon a first offence charged.—The sale in the Province of Quebec, by an unlicensed person, of drugs by retail, whether or not such drugs be poisonous, or partially composed of poison, or absolutely free from poison, is a violation of the prohibition contained in art. 4035, Revised Statutes of Quebec, whether or not the articles sold be enumerated in the "Quebec Pharmacy Act" as poisonous or as containing an enumerated poison.—Judgment of the Court of Queen's Bench (Q. R. 9 Q. B. 243) reversed. Taschereau and Gwynne, JJ., dissenting. *L'Association Pharmaceutique de Québec v. Livernois*, xxxi., 43.

[Leave to appeal to Privy Council was refused, August, 1901.]

37. *Statutory prohibition — Penal statute — Wholesale purchase — Guarantee — Validity of contract — Forfeiture — Nova Scotia Liquor License Act — Practice.*]—An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect.—The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute. *Brown v. Moore*, xxxii., 93.

38. "The Consolidated Railway Act, 1879"—*Prohibited contract — Railway director — Partnership with contractor — Action pro socio—Nullity.*

See No. 20, *ante*.

PROHIBITING ACTS.

39. *By-law — Petition to quash — Appeal*—40 Vict. (Que.) c. 29—53 Vict. (Que.) c. 70—*Judgment quashing—Appeal to Supreme Court*—R. S. C. c. 135, s. 24 (g)]—Section 439 of the Town Corporations Act (40 Vict. (Que.) c. 29), not having been excluded from the charter of Ste. Cunégonde (53 Vict. c. 70) is to be read as a part of it and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under s. 310 of said charter.—Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction no appeal lies to the Supreme Court of Canada from its decision. *Cité of Ste. Cunégonde v. Gougeon*, xxv., 78.

40. *Contract — Partnership — Free miners — Dealing in mineral claims — Statute of Frauds — British Columbia Mineral Act.*]—Sections 50 and 51 of the Mineral Act of 1896 (B. C.), which prohibit any person dealing in

a mineral claim who does not hold a free miner's certificate, does not prevent a partner in a claim recovering his share of the proceeds of a sale thereof by his co-partner though he held no certificate when he brought his action, having allowed the one he had up to the time of sale to lapse. *Archibald v. McNerhanie*, xxix., 564.

41. *Rivers and streams — Driving logs — Obstruction — Dam — R. S. O. (1887) c. 120, ss. 1 and 5.*—By R. S. O. (1887) c. 120, s. 1, all persons are prohibited from preventing the passage of sawlogs and other timber down a river, creek or stream, by felling trees or placing any other obstruction in or across the same. *Held*, reversing the judgment appealed from (29 O. R. 206) that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs was an obstruction under this Act. *Farquharson v. Imperial Oil Co.*, xxx., 188.

42. *Construction of statute — Jurisdiction of Superior Court — Suit for joint penalties — Second offences — Sale of drugs — "Quebec Pharmacy Act" — Retrospective legislation.*—The sale by an unlicensed person of drugs by retail in the Province of Quebec, whether such drugs be poisonous or not, or partially composed of poison, or absolutely free from poison, is a violation of the prohibition contained in art. 4035 R. S. Q., whether or not the articles sold be enumerated in the "Quebec Pharmacy Act" as poisonous or as containing an enumerated poison. Judgment appealed from (Q. R. 9 Q. B. 243) reversed, *Taschereau and Gwynne, JJ.*, dissenting. *L'Association Pharmaceutique de Québec v. Livernois*, xxxi., 43.

[The Privy Council refused leave to appeal, August, 1901.]

43. *Construction of statute—20 & 21 Vict. c. 54, s. 12 (Imp.)—Criminal prosecution — Embezzlement of trust funds — Suspension of civil remedy — Stifling prosecution—Partnership.*

See TRUSTS, 22.

44. *Prohibited contract — Penal statute — Nullity.*

See No. 20, ante.

45. *Statutory prohibition — Penal statute — Wholesale purchase — Guarantee — Forfeiture — Nova Scotia License Act—Practice.*

See No. 37, ante.

9. RETROSPECTIVE EFFECT.

46. *Construction of — Winding-up Act — Contributories — Set-off—45 Vict. c. 23, ss. 75, 76 (D.)—Retrospective legislation.*—Sections 75 and 76 of the Winding-up Act (45 Vict. c. 23 [D.]), in respect to claims acquired by contributories within 30 days of the commencement of winding-up proceedings for use as a set-off, only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory and the said Act is not retrospective in regard to a claim purchased in good faith and for value prior to the passing of the statute. *Ings v. Bank of Prince Edward Island*, xi., 265.

47. *Construction — Legislative declaration — Customs duties—Articles imported in parts — Subsequent imposition of duty.*—The several parts of an article were manufactured in the United States and imported into Canada where they were put together. The Crown sought to collect duty on such parts according to the value of the complete article. There was no duty imposed on parts of an article at the time the information was laid. *Held*, that the subsequent passage of an Act, 48 & 49 Vict. c. 61, s. 12, re-enacted by 49 Vict. c. 32, s. 11, imposing a duty on such parts was a legislative declaration that it did not previously exist. *Grinnell v. The Queen*, xvi., 119.

48. *Construction — Retrospective effect — Right of action — Negligence of Crown servant — 44 Vict. c. 25 — R. S. C. c. 38 — 50-51 Vict. c. 16, s. 18.*—*Held*, reversing the judgment appealed from (2 Ex. C. R. 328), that even assuming 50 & 51 Vict. c. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expressed no opinion), the act is not retroactive in effect and gave no right of action for injuries received prior to its passing. *The Queen v. Martin*, xx., 240.

49. *Retroactive effect — Municipal corporation — Turnpike road company—Erection of toll gates — Consent of corporation.*—A turnpike road company had been in existence for a number of years and had erected toll gates and collected tolls therefor, when an Act was passed by the Quebec Legislature, 52 Vict. c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vict. c. 36. After 52 Vict. c. 43 was passed, the company shifted one of its toll gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company contending that the repeal of s. 2 of 52 Vict. c. 43, made that Act retroactive and that the shifting of the toll gate without the consent of the corporation was a violation of said Act. *Held*, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms, s. 2 had no effect and its repeal could not make it retroactive; that the shifting of the toll gate was not a violation of the Act, which only applied to the erection of new gates; and that the extension of the limits of the village could not affect the pre-existing rights of the company. *Village of St. Joachim v. Pointe Claire Turnpike Road Co.*, xxiv., 486.

50. *Construction of statute — Jurisdiction of Superior Court — Suit for joint penalties — Second offences — Sale of drugs — "Quebec Pharmacy Act" — Retrospective legislation.*—Art. 4039 (b) added to the "Quebec Pharmacy Act" by 62 Vict. c. 35, s. 2, has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. — Judgment appealed from (Q. R. 9 Q. B. 243) reversed, *Taschereau and Gwynne, JJ.*, dissenting.

Association Pharmaceutique de Québec v. Livernois, xxxi., 43.

[The Privy Council refused leave to appeal, August, 1901.]

51. *Construction of statute — Amending Act — Retrospection — Sale of lands—Judgments and orders.*—Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under rules 803 *et seq.*, of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following session the legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders and judgments have been attacked before the passing of this amendment." *Held*, Sedgewick, J., dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench, for sale of lands on County Court judgments and not to orders and judgments of the County Courts. *Held*, further, reversing the judgment of the King's Bench (13 Man. L. R. 419), Davies, J., dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force but not from the date on which they were made. *Held*, per Sedgewick, J., that the clause had no retroactive operation at all. *Schmidt v. Ritz*, xxxi., 602.

52. *Commencement of Act — Judgment simultaneous with assent—Effect on appellate jurisdiction.*

See No. 2, *ante*.

10. APPLICATION OF STATUTORY PROVISIONS.

* 53. *Construction of statute—54 & 55 Vict. c. 25—Appeal to Supreme Court.*—*Held*, per Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 & 55 Vict. c. 25, does not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. *Couture v. Bouchard* (21 Can. S. C. R. 181) followed. *Taschereau* and Gwynne, JJ., dissenting.—*Per Fournier, J.* That the statute is not applicable to cases already instituted or pending before the courts, no special words to that effect being used. *Williams v. Irvine*, xxii., 108.

[Followed in *Cowen v. Evans*; *Mitchell v. Trenholme*, and *Mills v. Limoges* (22 Can. S. C. R. 331). See No. 55, *infra*.]

54. *Construction of statute — Married woman's property—Separate estate—Contract by married woman — Separate property exigible—C. S. U. C. c. 73—35 Vict. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 Vict. c. 19 (O.)*—A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property, and in 1887, before the Married Woman's Property Act of that year (R. S. O. c. 132), came into force, she became liable on certain promissory notes made by her. *Held*, reversing the decision of the Court of Appeal, that the liability of her separate property to

satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts of 1877 (R. S. O. cc. 125, 127), and the Married Woman's Property Act, 1884 (47 Vict. c. 19), read in the light furnished by certain clauses of C. S. U. C. c. 73; and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property. *Moore v. Jackson*, xxii., 210.

55. *Appeal to Supreme Court — Pending suits — 54 & 55 Vict. c. 25, s. 3.*—The statute 54 & 55 Vict. c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different," does not apply to cases in which the Superior Court has rendered judgment or to cases argued and standing for judgment (*en délibéré*) before that court, when the Act came into force. *Williams v. Irvine* (12 Can. S. C. R. 108) followed. *Cowen v. Evans*; *Mitchell v. Trenholme*; *Mills v. Limoges*, xxii., 331.

56. *Municipal corporation — Ditches and Watercourses Act, R. S. O. (1887) c. 220—Requisition for drain — Owner of land — Meaning of term owner.*—By s. 6 (a) of the Ditches and Watercourses Act of Ont. (R. S. O. [1887] c. 220), any owner of land to be benefited thereby may file with the clerk of a municipality a requisition for a drain if he has obtained "the assent in writing thereto of (including himself) a majority of the owners affected or interested." *Held*, affirming the judgment of the Court of Appeal, that "owner" in this section does not mean the assessed owner; that the holder of any real or substantial interest is an "owner affected or interested"; and that a mere tenant at will can neither file the requisition nor be included in the majority required.—*Quære*, If the person filing the requisition is not an owner within the meaning of that term are the proceedings valid if there is a majority without him? *Township of Osgoode v. York*, xxiv., 282.

57. *Registry Act, R. S. O. c. 114—Municipal by-law, registration of—Notice.*—R. S. O. (1877) c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests. *City of Toronto v. Jarvis*, xxv., 237.

58. *Public highway—46 Vict. (O.) c. 18—Registered plan — Dedication — User—Construction of statute — Retrospective statute — Estoppel.*—The right vested in a municipal corporation by 46 Vict. (O.) c. 18, to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect of private roads, to the use of which the owners of property abutting thereon were entitled. *Gooderham v. City of Toronto*, xxv., 246.

59. *Mortgage — Mining machinery—Registration — Fixtures — Interpretation of terms — Bill of sale — Personal chattels—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of sale)*

—55 *Vict. (N. S.) c. 1, s. 143 (The Mines Act).*—The “fixtures” included in the meaning of the expression “Personal chattels” by the tenth section of the Nova Scotia “Bills of Sale Act,” are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the “delivery” referred to in the same clause means only such delivery as can be made without a trespass or a tortious Act. —An instrument conveying an interest in lands and also fixtures thereon does not need to be registered under the Nova Scotia “Bills of Sale Act” (R. S. N. S. 5 ser. c. 92), and there is now no distinction in this respect between fixtures covered by a licensee’s or tenant’s mortgage and those covered by a mortgage made by the owner of the fee. *Warner v. Don*, xxvi., 388.

60. *Marital rights—Married woman—Separate estate — Interpretation*—40 *Vict. c. 7, s. 3, and amendments — R. S. C. c. 40—N. W. Ter. Ord. No. 16 of 1889.*—The provisions of Ordinance No. 16 of 1889 (N.-W. T.) are not inconsistent with ss. 36 to 40, inclusively of “The North West Territories Act,” which exempt from liability for her husband’s debts the personal earnings and business profits of a married woman.—The words “her personal property,” used in the said Ordinance No. 16 are unconfining by any context, and must be interpreted not as having reference only to “the personal earnings” mentioned in s. 36, but to all the personal property belonging to a woman, married subsequently to the Ordinance, as well as to all the personal property acquired since then by women married before it was enacted. *Brittlebank v. Gray-Jones* (5 Man. L. R. 33) distinguished. *Conger v. Kennedy*, xxvi., 397.

61. *Master and servant — Negligence — Arts. 3019-3053 C. C.—Civil “Quebec Factories Act” — R. S. Q.—Responsibility — Accident, cause of — Conjecture — Evidence — Onus of proof — Statutable duty, breach of—Police regulations.*—The provisions of the “Quebec Factories Act,” (R. S. Q. arts. 3019 to 3053 inclusively), are intended to operate only as police regulations and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code. *Montreal Rolling Mills Co. v. Corcoran*, xxvi., 595.

62. *Appeal — Jurisdiction*—52 *Vict. c. 37, s. 2 (D.)—Appointment of presiding officers—County Court Judges*—55 *Vict. c. 18 (Ont.)*—58 *Vict. c. 47 (Ont.)—Appeal from assessment—Final judgment.*—By 52 *Vict. c. 37, s. 2*, amending “The Supreme and Exchequer Courts Act,” an appeal lies in certain cases to the Supreme Court of Canada from courts “of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority.” By the Ontario Act, 55 *Vict. c. 48*, as amended by 58 *Vict. c. 47*, an appeal lies from rulings of municipal courts of revision in matters of assessment to the County Court judges of the County Court district where the property has been assessed. On an appeal from the decision of the County Court judges under the Ontario statutes:—*Held*, King, J., dissenting, that if the County Court judges constituted

a “court of last resort” within the meaning of 52 *Vict. c. 31, s. 2*, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act. *Held*, per Gwynne, J., that as no binding effect is given to the decision of the County Court judges, under the Ontario Act cited, the court appealed from was not a “court of last resort” within the meaning of 52 *Vict. c. 37, s. 2*.—*Quære*, Is the decision of the County Court judges a “final judgment” within the meaning of 52 *Vict. c. 37, s. 2*? *City of Toronto v. Toronto Ry. Co.*, xxvii., 640.

63. 51 *Vict. c. 12, s. 51—Civil service—Extra salary—Additional remuneration—Permanent employees.*—The Civil Service Amendment Act, 1888 (51 *Vict. c. 12*), by s. 51, provides that “no extra salary or additional remuneration of any kind whatever shall be paid to any deputy-head, officer or employee in the civil service of Canada, or to any other person permanently employed in the public service of Canada.” *Held*, that reporters employed on the Hansard staff of the House of Commons of Canada, are persons subject to the operation of the statute quoted. *Held*, further, that in the section referred to, the words “no extra salary or additional remuneration” apply only to payments which, if made, would be extra or additional to the salary or remuneration payable to an officer for services which, at the time of his acceptance of the appointment, could legitimately have been intended or expected to be within the scope of the ordinary duties of his office, although additional to them. *The Queen v. Bradley*, xxvii., 657.

64. *Railways*—51 *Vict. c. 29, s. 262 (D.)—Railway crossings — Packing railway frogs, wing-rails, &c.—Negligence.*—The proviso of s.-s. 4 of s. 262 of “The Railway Act” (51 *Vict. c. 29 (D.)*) does not apply to the fillings referred to in s.-s. 3, and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs, or crossings and the fixed rails of switches during the winter months. — Judgment of the Court of Appeal for Ontario (24 *Ont. App. R. 183*) reversed. *Washington v. Grand Trunk Ry. Co.*, xxviii., 184.

[Affirmed by the Privy Council, 24th February, 1899. See Can. Gaz. vol. xxx., p. 543; vol. xxxi., p. 415; vol. xxxii., p. 514; (1898) A. C. 275.]

65. *Winding-up Act — Moneys paid out of court—Order made by inadvertence—Jurisdiction to compel re-payment*—R. S. C. c. 129, ss. 40, 41, 94—*Locus standi of Receiver-General*—55 & 56 *Vict. c. 28, s. 2—Statute, construction of.*—The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money re-paid in order to be disposed of under the provisions of the Winding-up Act. *Held*, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had

not expired. *Held*, also, that even if he was not so entitled to intervene the provincial courts had jurisdiction to compel re-payment into court of the moneys improperly paid out. *Hogaboom v. Receiver-General of Canada; In re Central Bank of Canada*, xxviii., 192.

66. *Civil service—Superannuation—R. S. C. c. 8—Abolition of office—Discretionary power—Jurisdiction.*—Employees in the civil service of Canada, who may be retired or removed from office under the provisions of s. 11 of "The Civil Service Superannuation Act" (R. S. C. c. 18), have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority. *Balderson v. The Queen*, xxviii., 261.

67. *Public works—Railways and canals—R. S. C. c. 37, s. 23—Contracts binding on the Crown—Goods sold and delivered on verbal order of Crown officials—Supplies in excess of tender—Errors and omissions in accounts rendered—Findings of fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 Vict. c. 16, s. 33.*—The provisions of s. 33 of the "Act respecting the Department of Railways and Canals" (R. S. C. c. 37), which require all contracts affecting that department to be signed by the Minister, the Deputy Minister or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that department (Gwynne, J., *contra*).—Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra*). *The Queen v. Henderson*, xxviii., 425.

68. *Married woman—Separate property—Conveyance—Contracts—C. S. N. B. c. 72.*—Section 1 of C. S. N. B. c. 72, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband and not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power for disposing of such property or allow her to enter into contracts which at common law would be void. *Moore v. Jackson* (22 Can. S. C. R. 210) referred to. *Lea v. Wallace* (33 N. B. Rep. 492) reversed. *Wallace v. Lea*, xxviii., 595.

69. *Patent of invention—Canadian patent—Expiration of foreign patent—R. S. C. c. 61, s. 8—55 & 56 Vict. c. 24, s. 1.*—The Exchequer Court of Canada (6 Ex. C. R. 55), declared a certain patent to be a good, valid and subsisting patent, and that it had been infringed by the defendants, and held that, the expression "any foreign patent" occurring in the concluding clause of s. 8 of "The Patent Act," must be limited to foreign patents in existence when the Canadian patent was granted.—On appeal, the Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the appeal with costs. *Dreschel v. Acer Incandescent Light Mfg. Co.*, xxviii., 608.

Cf. amendment to Patent Act passed in 1903.

70. *Joint stock company—Irregular organization—Subscription for shares—Withdrawal—Surrender—Forfeiture—Duty of directors—Powers—Cancellation of stock—Ultra vires—"The Companies Act"—"The Winding-up Act"—Contributories—Pleading.*—After the issue of an order for the winding-up of a joint stock company, incorporated under "The Companies Act" (R. S. C. c. 119), a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company, as, under the provisions of the Act, such grounds may be taken only upon direct proceedings at the instance of the Attorney-General.—The powers given directors of a joint stock company under "The Companies Act" (R. S. C. c. 119), as to forfeiture of shares for non-payment of calls, are intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company, and they cannot be employed for the benefit of the shareholder. *Common v. McArthur*, xxix., 239.

71. *Railway—Running of trains—Approaching crossing—Warning—Shunting—Railway Act, 1888, s. 256.*—Section 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway" applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic. *Canada Atlantic Ry. Co. v. Henderson*, xxix., 632.

72. *Municipal corporation—Assessment—Montreal Harbour improvements—Special taxes—Widening streets—Construction of statute—57 Vict. c. 57 (Que.)—52 Vict. c. 79, s. 139 (Que.)*—Notwithstanding the reference therein to "existing rolls," the application of s. 1 of the Act of 57 Vict. c. 57 (Que.) should be restricted to the cost of the "widening" only of the streets therein named in cases where there were then existing rolls prepared by the commission fixing the limits for that purpose, and these words could not have the effect of extending the nature and character of such works so as to include work manifestly forming part of the harbour improvement scheme and chargeable against a special loan under a by-law based on the provisions of s. 139 of the Montreal City charter, 52 Vict. c. 79. *White v. City of Montreal*, xxix., 677.

73. *Rivers and streams—Floatable waters—Construction of statute—"The Sawlogs Driving Act"—R. S. O. (1887) c. 121—Arbitration—Action upon award—River improvements—Detention of logs—Damages.*—When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them, the owner is entitled to an arbitration under the Sawlogs Driving Act to determine the amount of his damages for such detention and is not restricted to the remedy provided by s. 3 of that Act, namely, removing the obstruction. Judgment of the Court of Appeal (26 Ont. App. R. 19) reversed. *Cockburn & Sons v. Imperial Lumber Co.*, xxx., 80.

74. *Controverted election—Preliminary objections—Status of petitioner—61 Vict. c. 14;*

63 & 64 Vict. c. 12 (D.)—59 Vict. c. 9, s. 272 (Que.)—*Dominion franchises.*]—The principal contention on preliminary objections to a controverted election petition was, that the petitioner had been guilty of corrupt practices before and during the election, and that, by the effect of the statutes, 61 Vict. c. 14 and 63 & 64 Vict. c. 12, the Dominion Franchise Act was repealed, and the provisions of the "Quebec Elections Act" regulating the franchise in the Province of Quebec substituted therefor so as, thereby, to deprive the petitioner of a right to vote under 59 Vict. c. 9, s. 272, and being so deprived of a vote that he had no status as petitioner. In the Election Court, evidence was taken on issues joined and the judge, holding that no corrupt practice upon the right of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada, *Held*, that as corrupt practices had not been proved, the question as to the effect of the statutes did not arise.—*Per Gwynne, J.* The amendment to the Dominion Franchise Act by 61 Vict. c. 14 (D.) and 63 & 64 Vict. c. 12 (D.) has not introduced into that Act the provisions of s. 272 of "The Quebec Elections Act" so as to deprive a person properly on the list of voters for a Dominion election of his right to vote at such election. *Beauharnois Election Case; Loy v. Poirier*, xxxi., 447.

75. Construction of statute — Negligence—Personal injuries — Drains and sewers—Liability of municipality—Officers and employees of municipal corporation—59 Vict. c. 55, s. 26, s. 18 (Que.)—The Act incorporating the Town of St. Louis, Que., gives power to the council to regulate the connection of private drains with sewers, "owners or occupants being bound to make and establish connections at their own cost, under the superintendence of an officer appointed by the corporation." *Held*, affirming the judgment appealed from, that the municipality cannot be made liable for damages caused through the acts of a person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control. *Dallas v. Town of St. Louis*, xxxii., 120.

76. Construction of 41 Vict. c. 102 (N.B.)—Municipal bond — Form—Statute authorizing.]—An Act of the New Brunswick Legislature authorized the County Council of Gloucester County to appoint Almshouse Commissioners for the parish of Bathurst, in said county, who might build or rent premises for an almshouse and workhouse, the cost to be assessed on the parish. The municipality was empowered to issue bonds, to be wholly chargeable on said parish, under its corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed and headed as follows: "Almshouse Bonds, Parish of Bathurst." It went on to state that "This certifies that the Parish of Bathurst, in the County of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer," . . . pursuant to an Act of Assembly (the above mentioned Act), &c. In an action by G. on said bond, *Held*, reversing the judgment of the Supreme Court of New Brunswick (35 N. B. Rep. 255), that notwithstanding the above declaration that the parish was the debtor, the County of Gloucester was liable to pay the amount

due on the bond. *Grimmer v. County of Gloucester*, xxxii., 305.

77. Construction of 58 Vict. c. 25 (N.B.)—Act securing benefits of life insurance to wives and children — Accident insurance.]—*Per Sedgewick, J.* The New Brunswick Act (58 Vict. c. 25), for securing to wives and children the benefit of life insurance applies to accident insurance as well as to straight life insurance. *Cornwall v. Halifax Banking Co.*, xxxii., 442.

78. Construction of 60 & 61 Vict. c. 34 (D.)—Quashing by-law—Appeal de plano—Appeals in Ontario cases.]—The appeals to the Supreme Court from judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 Vict. c. 34 (D.), and no appeal lies as of right unless given by that Act. *Town of Aurora v. Village of Markham*, xxxii., 457.

[See 3 Ont. L. R. 609.]

79. Construction of 60 & 61 Vict. c. 34 (D.)—Appeals from Ontario Courts—Appeal in criminal case.]—The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court (60 & 61 Vict. c. 34), applies only to civil cases. Criminal appeals are regulated by the provisions of the Criminal Code. *Rice v. The King*, xxxii., 480.

80. Company law — "The Companies Act, 1890" (B.C.) and amendment—Construction of statute—Memorandum of association—Conditions imposed by statute — Public policy—Preference stock — Election of directors.]—In the memorandum of association of a joint stock company formed under the provisions of the British Columbia "Companies Act, 1890," and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors or trustees for the management of the business of the company, notwithstanding anything contained in the Act. *Held*, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that such agreement was *ultra vires* of the powers conferred by the statute and null and void, being repugnant to the conditions as to elections of trustees and directors imposed by the Act as matters of public policy. Judgment appealed from (9 B. C. Rep. 275) reversed. *Colonist Printing and Publishing Co. et al. v. Dunsmuir et al.*, xxxii., 679.

81. Canada Evidence Act, 1893—Construction and interpretation—Competency of husband and wife as witnesses — "Communications"—Privilege—Reference to Hansard debates.]—Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify. *Mills, J.*, dissenting.—Evidence by the wife of the person accused of acts performed by her under directions of his counsel, sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. *Mills, J.*, dissenting.—*Per Girouard, J.* (dissenting). The communications between husband and wife, contemplated by the Canada Evidence

Act, 1893, may be *de verbo, de facto* or *de corpore*. Sexual intercourse is such a communication and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received.—*Per Mills, J.* (dissenting). Under the provisions of the Canada Evidence Act, 1893, and its amendments, the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.—*Per Taschereau, C.J.* The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in the statute. *Gosselin v. The King*, xxxiii., 255.

82. 36 Vict. c. 11, s. 22—*Supreme Court of Canada—Construction of statute—New trial.*—Under s. 22 of the Supreme and Exchequer Courts Act, no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion. *Boak v. Merchants' Marine Ins. Co.*, i., 110.

[See R. S. C. c. 135, s. 24 (d), as amended by 54 & 55 Vict. c. 25, s. 2, enacted since date of above decision.]

83. *Implied extinction of right of way—Cobourg Harbour works—10 Geo. IV. c. 11.*—*Held*, that a public right of way from the end of a street to the waters of Lake Ontario had been extinguished by statute by necessary implication. *Corporation of Yarmouth v. Simmonds* (L. R. 10 Ch. D. 518) followed. *Standley v. Perry*, iii., 356.

See TITLE TO LAND, 32.

84. *Construction of 45 Vict. c. 23 (D.)—Winding-up Act—Foreign corporation—Conflict of laws—28 & 29 Vict. c. 63 (Imp.)*—The Act 45 Vict. c. 23 (D.) does not apply to foreign corporations doing business in Canada. *Merchants Bank of Halifax v. Gillespie*, x., 312.

See COMPANY LAW, 18.

85. *Construction of Dominion Telegraph Co. Incorporation Act—34 Vict. c. 52 (D.)—Powers—Cutting trees.*

See TRESPASS, 2.

86. *Nova Scotia Railway Act—Tax on railway—Exemption—Mining company—Construction of railway by—R. S. N. S. (5 ser.) c. 53.*

See RAILWAYS, 135.

87. 54 & 55 Vict. c. 25, s. 3—*Application of—Appeal to Supreme Court—Amount in controversy.*

See APPEAL, 52, 53.

88. *Railway belt in British Columbia—Statutory conveyance to Dominion—Pre-emption prior to—Federal and provincial rights—Lands Act of 1873 and 1879 (B.C.)—47 Vict. c. 6 (D.)*

See CONSTITUTIONAL LAW, 72.

89. *Manitoba Constitutional Act—Matters relating to education—Powers of provincial legislatures—Repeal—Right of appeal to Gov-*

ernor-General-in-Council—33 Vict. c. 3, s. 22, s.-s. 2 (D.)—B. N. A. Act, s. 93, s.-s. 3.

See CONSTITUTIONAL LAW, 2.

90. *Construction of—Foreshore—Property in—Right of C. P. R. Co. to use—Jus publicum—Access to harbour.*

See FORESHORE.

91. *R. S. N. S. (5 ser.) c. 84—Registry—Indorsement on lease—Lease for lives—Protection.*

See LEASE, 31.

92. *Customs duties—50 & 51 Vict. c. 39, items 88 and 173—Exemption from duty—Steel rails for use on railways—Application to street railways.*

See CUSTOMS DUTIES, 3.

93. “*Bills of Exchange Act, 1890*”—“*The Bank Act*,” R. S. U. c. 120—*Constitutional law—Obligations binding on provincial legislatures—Government expenditures—Negotiable instrument—Letter of credit—Powers of executive councillors.*

See CONSTITUTIONAL LAW, 26.

94. *Ex post facto—Legislation—Special tax.*

See MUNICIPAL CORPORATION, 124.

95. *Landlord and tenant—R. S. O. (1887) c. 143, s. 28—Distress—Goods of person holding “under” tenant.*

See LANDLORD AND TENANT, 9.

96. *Repair of streets—Pavements—Assessment of owners—Double taxation—24 Vict. c. 39 (N.S.)—53 Vict. c. 60, s. 14 (N.S.)*

See MUNICIPAL CORPORATION, 125.

97. *Convention of 1818—Fisheries—Three mile limit—Foreign fishing vessels—“Fishing”—59 Geo. III., c. 38 (Imp.)—R. S. C. cc. 94 & 95.*

See FISHERIES, 4.

98. *Lease of mining areas—Rental agreement—Payment of rent—Forfeitures.*

See No. 146, *infra*.

99. *Appeal—Jurisdiction—54 & 55 Vict. c. 25, s. 2—Expropriation—Death of arbitrator—51 Vict. c. 29, ss. 156, 157—Lapse of time for making award—Art. 12 C. C.*

See RAILWAYS, 30.

100. *Appeal—Jurisdiction—Future rights—Alimentary allowance—R. S. C. c. 135, s. 29, s.-s. 2; 54 & 55 Vict. c. 25, s. 3; 56 Vict. c. 29, s. 2.*

See APPEAL, 82.

101. 60 & 61 Vict. c. 34, s. 1 (D.)—*Appeals from Ontario to Supreme Court of Canada—Matters in controversy—Interest of second mortgagee—Surplus on mortgage sale.*

See APPEAL, 84.

102. *Foreign statutory conditions—Force in the Province of Quebec—R. S. O. (1897) c. 203, s. 168.*

See INSURANCE, FIRE, 33.

103. *Repeal of statute — Re-enactment—20 & 21 Vict. c. 54, s. 13 (Imp.)—Application of acts—Criminal prosecution—Embezzlement of trust funds — Suspension of civil remedy — Stifling prosecution—Partnership.*

See No. 7, ante.

104. *R. S. O. c. 135, ss. 24 (j), 28 and 29—54 & 55 Vict. c. 25, s. 3 (D.)—Appeal—Right of appeal to Privy Council—Court of Review—Construction of statute—Final judgment.*

See APPEAL, 197.

105. *Municipal assessment — 59 Vict. c. 61 (N.B.)—Domicile.*

See DOMICILE, 2.

106. *Registration of tax deed—Certificate of title—Priority—R. S. B. O. c. 111.*

See REGISTRY LAWS, 29.

107. *54 & 55 Vict. c. 6, s. 6 (D.)—54 Vict. c. 2, s. 6 (Ont.)—54 Vict. c. 4, s. 6 (Que.)—Awards on arbitration respecting accounts of Province of Canada.*

See APPEAL, 14.

108. *Appeals to Supreme Court of Canada in Ontario cases—60 & 61 Vict. c. 34, s. 1 (a) (D.)*

See APPEAL, 85.

109. *Workmen's Compensation Act — R. S. O. (1897) c. 160—Electric car—Person in charge or control—Negligence of motorman—Injury to conductor.*

See TRAMWAY, 2.

110. *Construction of statute — Sale and management of Crown lands—Grant made in error—Cancellation—Adverse claim—32 Vict. c. 11, s. 26 (Que.)—R. S. Q. 1299.*

See CROWN, 94.

111. *Construction of statute — Amending Act—Retrospective legislation—Sale of lands—Judgments and orders.*

See No. 51, ante.

112. *Effect of statute — Wagering policy—Endowment—Return of premiums paid.*

See INSURANCE, LIFE, 22.

113. *Constitutional law—Construction of B. N. A. Acts—Representation of provinces in House of Commons—Aggregate population of Canada.*

See No. 123, infra

11. CONSTRUCTION AND INTERPRETATION.

(a) Formal Parts.

114. *Reference to title—Intention of Legislature—50 Vict. c. 23 (N.S.) — Application of.]—In construing an Act of Parliament the title may be referred to in order to ascertain the intention of the legislature.—The Act of the Nova Scotia Legislature, 50 Vict. c. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the City of Halifax. O'Connor v. Nova Scotia Telephone Co., xxii, 276.*

115. *R. S. N. S. (5 ser.) c. 92, s. 4—Chattel mortgage—Affidavit—Compliance with statutory form.*

See CHATTEL MORTGAGE, 5.

116. *R. S. N. S. (5 ser.) c. 92 — Bills of sale—Statutory form—Compliance with.*

See CHATTEL MORTGAGE, 6.

117. *Fire insurance—Variation from statutory conditions—Ontario Insurance Act.*

See INSURANCE, FIRE, 36.

118. *Construction of statute—Railway charter—Terminus "at or near" a point named.*

See RAILWAY, 152.

(b) Imperative or Directory Provisions.

119. *Permissive words—"May"—By-law—Resolution—Manitoba Municipal Act, 1884, s. 111.]—In s. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. Ritchie, C.J., and Strong, J., dissenting. Bernardin v. North Dufferin, xix, 581.*

120. *Directory or imperative requirement—Municipal corporation—Collection of taxes—Delivery of roll to collector — 55 Vict. c. 48 (O.)]—By s. 119 of the Ontario Assessment Act (55 Vict. c. 48), provision is made for the preparation every year by the clerk of each municipality of a "collector's roll" containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first of October." . . . Held, affirming the decision of the Court of Appeal, that the provision as to delivery of the roll to the collector was imperative and its non-delivery was a sufficient answer to the suit against the collector for failure to collect the taxes. Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes. Town of Trenton v. Dyer, xxiv., 474.*

121. *Assessment and taxes—Ontario Assessment Act—R. S. O. (1887) c. 193—Arrears of taxes—Distress.]—The provisions of s. 135 of the Ontario Assessment Act (R. S. O. [1887] c. 193), in respect to taxes on the roll being uncollectable, providing for what the account of the collector in regard to the same shall shew on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative. Judgment appealed from (26 Ont. App. R. 459) affirming (30 O. R. 16) affirmed. City of Toronto v. Caston, xxx., 390.*

122. *Taxation — Customs duties—Foreign built ship.]—A taxing Act is not to be construed differently from any other statute. The King v. Algoma Central Ry. Co., xxxii., 277.*

[Affirmed by Privy Council, July, 1903].

123. *Constitutional law—Construction of B. N. A. Acts—Representation of provinces, &c., in House of Commons—Aggregate population of Canada.*—In determining the number of representatives to which Ontario, Nova Scotia and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada," in s.-s. 4 of s. 51 of the B. N. A. Act, 1867, mean the whole population of Canada including that of provinces which have been admitted subsequently to the passing of that Act. The special terms on which the Province of Prince Edward Island was admitted into the Dominion do not except that province from the general operation of the clauses of the B. N. A. Act, 1867, as to representation in the House of Commons as above stated. *In re representation of the Provinces of Canada in the House of Commons of Canada*, xxxiii., 475; *In re Representation of Prince Edward Island in the House of Commons*, xxxiii., 594.

[Leave to appeal to Privy Council by Province of P. E. Island granted, November, 1903.]

124. *Appeal — Pronouncing or entry of judgment—Security—Extension of time—Vacation*—R. S. C. c. 135, ss. 40, 42, 46.

See APPEAL, 430, 431.

125. *Snow and ice on sidewalks—By-law*—55 Vict. c. 42, s. 531 (Ont.)—57 Vict. c. 50, s. 13 (Ont.)

See NEGLIGENCE, 191.

126. *Election petition — Preliminary objections—Filing petition—54 & 55 Vict. c. 20, s. 5 (D.)—R. S. C. c. 1, s. 7, s.-s. 27—Interpretation of words and terms—Legal holiday.*

See ELECTION LAW, 103.

127. *B. C. Mineral Act—Dealing in mineral claims—Free miner's certificate — Partnership—Prohibition under statute.*

See No. 40, ante.

128. *Liquor laws—Municipal corporation—Discretion of members — Refusal to confirm liquor license certificate—Liability of corporation*—R. S. Q., art. 839.

See LIQUOR LAWS, 18.

129. *Controverted election—Parliamentary elections—Status of petitioner—61 Vict. c. 14—63 & 64 Vict. c. 12 (D.)—59 Vict. c. 9 s. 272 (Que.)—Dominion franchise — Incorporation by reference.*

See No. 74, ante.

130. *Construction of statute — Municipal Act, 1883, s. 570 (Ont.)—Municipal Amendment Act, 1886, s. 22 (Ont.)*

See DRAINAGE, 9.

131. *Construction of B. C. "Mineral Act"—Location of mining claim—Approximate hearing—Mis-statement—Minerals in place.*

See MINES AND MINERALS, 10.

132. *Donatio mortis causa — R. S. N. S. [1900] c. 163, s. 35—Corroborative evidence.*

See GIFT, 2.

133. *Perjury — Judicial proceeding — De facto tribunal—Misleading justice — Jurisdiction — R. S. Q. arts. 5551, 5561—Criminal Code. s. 145.*

See CRIMINAL LAW, 24.

(c) Other Cases.

134. *Prince Edward Island "Land Purchase Act of 1875," s. 45—38 Vict. c. 11, ss. 11, 17—Court of last resort in P. E. Island.*—The court of last resort in Prince Edward Island is the Supreme Court of Judicature in that province. *Kelly v. Sullivan*, i., 1.

135. *Construction of statute—Title to land—Tenant for life—Conveyance to railway company—Railway Acts—C. S. C. c. 66, s. 11, s.-s. 1—24 Vict. c. 17, s. 1.*—By C. S. C. c. 66, s. 11 (Railway Act), all corporations and persons whatever, tenants in tail or for life, *grévés de substitution*, guardians, &c., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent . . . seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, &c., so made shall be valid and effectual in law. *Held*, affirming the decision of the Court of Appeal (19 Ont. App. R. 265), that a tenant for life is authorized by this Act to convey to a railway company in fee, but the company must pay to the remainderman or into court, the proportion of the purchase money representing the remainderman's interest. *Midland Ry. Co. v. Young*, xxii., 190.

136. *Ontario Municipal Act — Bridges — Width of stream—R. S. O. (1887) c. 184, ss. 532, 534.*—By the Ontario Mutual Act, R. S. O. [1887] c. 184, s. 532, the council of any county has "exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county, and connecting any main highway leading through the county," and by s. 534 the county council is obliged to erect and maintain bridges on rivers and streams one hundred feet or less in width the bridges are under the jurisdiction of the respective villages through which they flow. *Held*, reversing the decision of the Court of Appeal (20 Ont. App. R. 1), that the width of a river at the level attained after heavy rains and freshets each year should be taken into consideration in determining the liability under the Act; the width at ordinary high-water mark is not the test of such liability. *Village of New Hamburg v. County of Waterloo*, xxii., 296.

137. *Ontario Assessment Act — Unauthorized assessment — Validation — R. S. O. (1887) c. 193, s. 65.*—Section 65 of the Ontario Assessment Act (R. S. O. [1887] c. 193) does not enable the Court of Revision to make valid an assessment which the statute does not authorize. Judgment appealed from (19 Ont. App. R. 675) affirmed. *City of London v. Watt*, xxii., 300.

138. *Construction of statute — Quebec license laws — 55 & 56 Vict. c. 11, s. 26—City of Sherbrooke — Charter — 55 & 56 Vict. c. 51, s. 55 — Powers of taxation.*—By virtue of the first clause of a by-law passed under 55 & 56 Vict. c. 51, an Act consolidating the charter of the City of Sherbrooke, the appellant was taxed five cents on the dollar on the annual value of the premises in which he carried on his occupation as dealer in spirituous liquors, and in addition thereto under clause three of the

same by-law, was taxed a special tax of two hundred dollars also for the same occupation. Section 55 of the Act 55 & 56 Vict. c. 51, enumerates in sub-sections from *a* to *j* the kinds of taxes authorized to be imposed, sub-section (*b*) authorizing the imposition of a business tax on all trades, occupations, &c., based on the annual value of the premises, and sub-section (*g*) providing for a tax on persons, among others, of the occupation of the petitioner. At the end of sub-section (*g*) is the following: "the whole, however, subject to the provisions of the Quebec License Act." The Quebec License Act (art. 927 R. S. Q.) limits the powers of taxation of any municipal council of a city to \$200 upon holders of licenses. *Held*, affirming the judgment of the court below, that the power granted by 55 & 56 Vict. c. 51, to impose the several taxes was independent and cumulative, and as the special tax did not exceed the sum of \$200, the by-law was *intra vires*, the proviso at the end of sub-section (*g*) not applying to the whole section. *Taschereau and Gwynne, J.J.*, dissenting. *Webster v. City of Sherbrooke*, xxiv., 268.

139. *Railway company — Agreement with foreign company — Lease of road for term of years — Transfer of corporate rights.*—The Canada Southern Railway Company, by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to the traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879, it is authorized to enter into traffic arrangements and agreements for the management and working of its railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years. *Held*, reversing the decision of the Court of Appeal (21 Ont. App. R. 297, *sub nom. Wealleans v. The Canada Southern Ry. Co.*), that authority to enter into an agreement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Railway Company is itself protected. *Michigan Central Ry. Co. v. Wealleans*, xxiv., 309.

140. *Practice — Equity suit — Construction of statute as to new trial—Persona designata*—53 Vict. c. 4, s. 85 (N. B.)—53 Vict. c. 4, s. 85 (N. B.), relating to proceedings in equity, provides that in an equity suit "either party may apply for a new trial to the judge before whom the trial was held." *Held*, reversing the decision of the Supreme Court of New Brunswick, *Taschereau, J.*, dissenting, that such application need not be made before the individual before whom the trial was had, but could be made to a judge exercising the same jurisdiction. Therefore, where the judge in equity who had heard the case resigned his office an application for a new trial could be made to his successor. *Footner v. Figes* (2 Sim. 319) followed. *Bradshaw v. Baptist Foreign Mission Board*, xxiv., 351.

141. *British North America Act, ss. 112, 114, 115, 116, 118—36 Vict. c. 30 (D.)—47 Vict. c. 4 (D.)—Provincial subsidies — Half-yearly payments — Deduction of interest.*—By s. 111 of the British North America Act, Canada is made liable for the debt of each province existing at the union. By s. 112 Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the union over \$62,500,000, and chargeable with 5 per cent. interest thereon. Sections 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively, and by s. 116 if the debts of those provinces should be less than said amounts they are entitled to receive, by half-yearly payments in advance, interest at the rate of 5 per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each province, but the Government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in s. 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec:—*Held*, affirming said award, that the subsidy of the provinces under s. 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under s. 118.—By 36 Vict. c. 30 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the union was then ascertained to be \$73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vict. c. 4, in 1884, it was provided that the accounts between the Dominion and the provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to January 1st, 1873, with interest at 5 per cent. from the day on which it would have been so paid to July 1st, 1884, should be deemed capital owing to the respective provinces bearing interest at 5 per cent. and payable after July 1st, 1884, as part of their yearly subsidies. *Held*, affirming the said award, *Gwynne, J.*, dissenting, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the provinces half-yearly, but leaves such deduction as it was under the British North America Act. *Dominion of Canada v. Provinces of Ontario and Quebec*, xxiv., 498.

142. *Construction of statute—Railway Act, 1888, s. 246 (3)—Railway company—Carriage of goods — Special contract — Negligence — Limitation of liability for.*—By s. 246 (3) of the Railway Act, 1888 (51 Vict. c. 29 [D.]),

"every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants." *Held*, affirming the decision of the Court of Appeal (21 Ont. App. R. 204), that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence. *Vogel v. Grand Trunk Ry. Co.* (11 Can. S. C. R. 612), and *Bate v. Canadian Pacific Ry. Co.* (15 Ont. App. R. 388) distinguished. *Robertson v. Grand Trunk Ry. Co.*, xxiv., 611.

143. *Construction of statute—55 Vict. c. 26, ss. 2 and 4 (O.)—Chattel mortgage—Agreement not to register—Void mortgage—Possession by creditor.*—By the Act relating to chattel mortgages (R. S. O. (1887) c. 125), a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vict. c. 26, s. 2 (O.), that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting assignments and preferences" (R. S. O. (1887) c. 124). By s. 4 of 55 Vict. c. 26, a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid as against persons who became creditors . . . before such taking of possession." *Held*, reversing the decision of the Court of Appeal (22 Ont. App. R. 138), that under this legislation a mortgage so void is void as against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set it aside and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession. *Clarkson v. McMaster*, xxv., 96.

144. *By-law—Exclusive right granted—Statute confirming—Extension of privileges—45 Vict. c. 79, s. 5 (Que.)—C. S. C. c. 65.]*—In 1881 a municipal by-law of the City of St. Hyacinthe granted to a company incorporated under a general Act (C. S. C. c. 65), the exclusive privilege for twenty-five years of manufacturing and selling gas in said city, and in 1882 said company obtained a special Act of incorporation (45 Vict. c. 79, Que.), s. 5 of which provided that all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law or agreement of the said City of St. Hyacinthe, are hereby re-affirmed and confirmed to the company as incorporated under the present Act, including their right to break up, &c., the streets . . . and in addition it shall be lawful for the company, in substi-

tution for gas or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise . . . with the same privileges, and subject to the same liabilities, as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this Act." *Held*, affirming the decision of the Court of Queen's Bench, that the above section did not give the company the exclusive right for twenty-five years to manufacture and sell electric light; that the right to make and sell electric light with the same privilege as was applicable to gas did not confer such monopoly, but gave a new privilege as to electricity entirely unconnected with the former purposes of the company and that the word "privilege" there used could be referred to the right to break up streets and should not, therefore, be construed to mean the exclusive privilege claimed. *Held*, also, that it was a private Act notwithstanding it contained a clause declaring it to be a public Act, and the city was not a party to nor in any way assented to it; and that in construing it the court would treat it as a contract between the promoters and the Legislature and apply the maxim *verba fortius accipiuntur contra proferentem* especially where exorbitant powers are conferred. *Compagnie pour l'Eclairage de St. Hyacinthe v. Compagnie Hydrauliques de St. Hyacinthe*, xxv., 168.

145. *Appeal from Court of Review—Appeal to Privy Council—Appealable amount—54 & 55 Vict. c. 25 (D.) s. 3, s.-ss. 3 and 4—C. S. L.-C. c. 77, s. 25—Arts. 1115, 1178 C. C. P.—R. S. Q. art. 2311.]*—In appeals to the Supreme Court of Canada from the Court of Review (which, by 54 & 55 Vict. c. 25, s. 3, s.-s. 3, must be appealable to the Judicial Committee of the Privy Council), the amount by which the right of appeal is to be determined is that demanded, and not that recovered if they are different. *Dufresne v. Guevre-mont* (26 Can. S. C. R. 216) followed. *Citizens Light & Power Co. v. Parent*, xxvii., 316.

146. *Lease of mining areas—Rental agreement—Payment of rent—Forfeitures—R. S. N. S. (5 ser.) c. 7—52 Vict. c. 23 (N. S.)]*—By R. S. N. S. (5 ser.) c. 7, the lessees of mining areas in Nova Scotia were obliged to perform a certain amount of work thereon each year on pain of forfeiture of the lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vict. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by sub-section (c) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act, respecting the payment of rental and its refund in certain cases, and by s. 8, said s. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed, under which E. paid the

rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney-General, on relation of E., to set aside said license as having been illegally and improvidently granted. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, that in such action, the phrase "nearest recurring anniversary of the date of the lease" in sub-section (c) of s. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney-General v. Sheraton* (28 N. S. Rep. 492) approved and followed. *Held*, further, that though the amending Act provided for forfeiture without prior formalities of the lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act. *Temple v. Attorney-General of Nova Scotia*, xxvii., 355.

147. *Master and servant — Hiring of personal services — Municipal corporation — Appointment of officers — Summary dismissal — Libellous resolution — Difference in text of English and French versions of statute*—52 Vict. c. 79, s. 79 (O.)—"A discrétion"—"*At pleasure*."—The charter of the City of Montreal, 1889 (52 Vict. c. 79), s. 79, gives power to the city council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such power may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*." *Held*, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment and the city council was thereby given full and unlimited power in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. Judgment appealed from (Q. R. 6 Q. B. 177) affirmed. *Davis v. City of Montreal*, xxvii., 539.

148. *Construction of contract — 12 Vict. c. 183, s. 20—Contract, notice to cancel—Gas supply shut off for non-payment of gas bill on other premises — Mandamus.*—The Act to amend the Act incorporating the New City Gas Company of Montreal, and to extend its powers (12 Vict. c. 182), provides: "That if any person or persons, company or companies, or body corporate supplied with gas by the company, shall neglect to pay any rate, rent or charge due to the said New City Gas Company, at any of the times fixed for the payment thereof, it shall be lawful for the company or any person acting under their authority, on giving twenty-four hours previous notice, to stop the gas from entering the premises; service pipes, or lamps of any such person, company or body, by cutting off the ser-

vice pipe or pipes, or by such other means as the company shall see fit, and to recover the said rent or charge due up to such time, together with the expenses of cutting off the gas, in any competent court, notwithstanding any contract to furnish for a longer time, and in all cases where it shall be lawful for the said company to cut off and take away the supply of gas from any house, building or premises, under the provisions of this Act, it shall be lawful for the company, their agents and workmen, upon giving twenty-four hours' previous notice to the occupier or person in charge, to enter into any such house, building or premises, between the hour of nine o'clock in the forenoon and four in the afternoon, making as little disturbance and inconvenience as possible, and to remove, take and carry away any pipe, meter, cock, branch, lamp, fitting and apparatus, the property, and belonging to the said company."—*Held*, Taschereau, J., dissenting, that the powers given by the clause quoted are exorbitant and must be construed strictly; that the company has not been thereby vested with power to shut off gas from all the buildings and premises of the same proprietor or occupant, when he becomes in default for the payment of bills for gas consumed in one of them only; and that the provision that the notice to cut off must be given "to the occupier or person in charge," indicates that only premises so occupied and in default should suffer. *Cadieux v. Montreal Gas Co.*, xxviii., 382.

(Reversed on appeal [1899] A. C. 589; see also [1898] A. C. 718.)

149. *Municipal corporation — 55 Vict. c. 42, ss. 397, 404, 467, 473 (Ont.)—City separated from county — Maintenance of court house and gaol — Care and maintenance of prisoners.*—No compensation can be awarded by arbitrators to a county council in respect of the use, by a city separated from that county, of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality.—A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for the use of the court house and gaol.—Judgment appealed from (24 Ont. App. R. 409) affirmed. *County of Carleton v. City of Ottawa*, xxviii., 606.

150. *Municipal corporation — By-law—Art. 4529, R. S. Q.—Approval of electors—Appeal as to costs.*—Under the provisions of art. 4529 of the Revised Statutes of Quebec money by-laws for loans by town corporations require the approval of the majority both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls. *Town of Chicoutimi v. Price*, xxix., 135.

151. *Compliance with provisions of "The Timber Slide Companies Act"—Forfeiture of company's charter—Non-completion of work.*—By R. S. O. [1887] c. 160, s. 54, it was provided that if a timber slide company did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers "unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works." *Semble*, The non-completion

of the work within two years would not, *ipso facto*, forfeit the charter, but only afford grounds for proceeding by the Attorney-General to have a forfeiture declared. *Hardy Lumber Co. v. Pickrel River Improvement Co.*, xxix., 211.

152. *Merchant shipping — Distressed seaman — Recovery of expenses*—"Owner for time being"—*Proof of ownership and payment*.—Section 213 of the Merchants' Shipping Act, 1854, makes the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being." *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the latter words mean the owner at the time of action brought.—Notwithstanding the provision in the Imperial Interpretation Act of 1899 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under the Merchants' Shipping Act of 1854, proof of ownership of a ship may be made according to the mode provided in the Merchants' Shipping Act, 1894, by which the former Act is repealed. *The Queen v. S. S. "Troop" Co.*, xxix., 662.

153. *Ditches and Watercourses Act, 1894 (Ont.) — Owner of land—Declaration of ownership — Award — Defects — Validating award*—57 *Vict. c. 55*—58 *Vict. c. 54 (Ont.)*.—A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under The Ditches and Watercourses Act, 1894, of Ontario. *Township of Osgoode v. York* (24 *Can. S. C. R. 282*) followed.—If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction.—Section 24 of the Act which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings does not validate an award or proceedings where the party initiating the latter is not an owner. *Township of McKillop v. Township of Logan*, xxix., 702.

154. *Constitutional law — B. N. A. Act, 1867, s. 111—Debts of Province of Canada—Deferred liabilities—Toll bridge of Chambly*—8 *Vict. c. 90 (Can.)*—*Reversion to Crown—Indemnity—Arbitration and award — Condition precedent — Petition of right—Remedial process—Vendor's lien*.—A toll bridge with its necessary buildings and approaches was built and maintained by Y., at Chambly, in the Province of Quebec, in 1845, under a franchise granted to him by an Act (8 *Vict. c. 90*) of the late Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use and that Y., or his representatives should then be compensated therefor by the Crown, provision being also made for ascertaining the value of the works by arbitration and award. *Held*, affirming the judgment appealed from (6 *Ex. C. R. 103*), that the claim of the applicants for the value of the works at the time they vested in the Crown on the expiration of the fifty years' franchise was a liability of the late Province of Canada com-

ing within the operation of s. 111 of the B. N. A. Act, 1867, and thereby imposed on the Dominion; and that there was no lien or right of retention charged upon the property, and that the fact that the liability was not presently payable at the date of the passing of the B. N. A. Act, 1867, was immaterial. *The Attorney-General of Canada v. The Attorney-General of Ontario* ([1897] A. C. 199; 25 *Can. S. C. R. 434*) followed. *The Queen v. Yule*, xxx., 24.

[The Privy Council refused leave to appeal (34 *Can. Gaz. 272*).]

155. *Government railway — Injury to employee—Lord Campbell's Act—Art. 1056 C. C.—Exoneration from liability—R. S. C. c. 38, s. 50.*—Art. 1056 C. C. embodies the action previously given by a statute of the Province of Canada, in effect re-enacting Lord Campbell's Act. *Robinson v. Canadian Pacific Ry. Co.* ([1892] A. C. 481) distinguished.—In s. 50 of the Government Railway Act (R. S. C. c. 38), providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the minister," the words "notice, condition or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow-servants. *Grand Trunk Ry. Co. v. Vogel* (11 *Can. S. C. R. 612*) disapproved. *The Queen v. Grenier*, xxx., 42.

See foot-note to col. 967, ante.

156. *Municipal corporation — Railways — Taxation — By-laws — Voluntary payment — Action en répétition*—29 *Vict. c. 57, s. 21 (Can.)*—29 & 30 *Vict. c. 57 (Can.)*.—The statute, 29 *Vict. c. 57 (Can.)*, consolidating and amending the Acts and Ordinances incorporating the City of Quebec, by s. 4 of s. 21, authorizes the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactories, occupations, business, arts, professions or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised or in operation in the city; and all persons by whom the same are or may be carried on, exercised or put in operation therein, either on their own account or as agents for others; and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation." *Held*, that the general words of the statute quoted are sufficiently comprehensive to authorize the imposition of a business tax upon railway companies; and further, that the power thus conferred might be validly exercised by the passing of a by-law to impose the tax in the same general terms as those expressed in the statute. Judgment appealed from (Q. R. 8 Q. B. 246) affirmed. *Canadian Pacific Ry. Co. v. City of Quebec*; *Grand Trunk Ry. Co. v. City of Quebec*, xxx., 73.

157. *Appeal—Divisional Court judgment—Appeal direct—R. S. C. c. 135, s. 26, s.s. 3—Appeal from order in chambers.*—*Held*, per Strong, C.J., and Gwynne, J. (Taschereau and Sedgewick, JJ., *contra*), that under s. 26, s.s. 3 of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a divisional court of the High Court of Justice

for Ontario may be granted in cases where there is no right of appeal to the Court of Appeal. *Farquharson v. Imperial Oil Co.*, xxx., 188.

158. Construction of "Winding-up Act"—Contributories—Set-off—Application of ss. 75 and 76.

See No. 46, ante.

159. Construction—Supreme and Exchequer Courts Act, s. 51—Conviction for murder—Appropriate remedy—Jurisdiction.

See HABEAS CORPUS, 2.

160. Construction of ss. 91, s.-s. 24; 92, s.-s. 5; 109 and 117, B. N. A. Act, 1867—Indian lands—Treaty No. 3.

See INDIAN LANDS.

161. Re-enactments—Repeal—Construction of 26 Geo. III. c. 11 (N.B.)—Revision in 1854—Interpretation of re-enacted statutes.

See STATUTE OF DISTRIBUTIONS.

162. Controverted Elections Act—R. S. C. c. 9, s. 30—Judicial discretion.

See ELECTION LAW, 15, 140.

163. Insurance, life—Conditions and warranties—Indorsements on policy—Inaccurate statements—Misrepresentations—Latent disease—Material facts—Cancellation of policy—Return of premium—55 Vict. c. 39, s. 33 (Ont.)

See INSURANCE, LIFE, 27.

164. Vis major—16 Vict. cc. 25 and 77—Mortgage of substituted lands—Estoppel—Judicial authorization.

See TITLE TO LAND, 35.

165. Criminal Code, 1892, ss. 742-750—New trial—55 & 56 Vict. c. 29, s. 742.

See No. 31, ante.

166. Appeal—Jurisdiction—Special leave—R. S. C. c. 135, ss. 40, 42—Form of application and order—Cross-appeal to Privy Council—Inspection pending such appeal—Stay of proceedings—Costs.

See APPEAL, 90, 131.

167. R. S. N. S. (5 ser.) c. 112—Statute of Limitations—Possession—Tenants in common.

See LIMITATIONS OF ACTIONS, 26.

168. Construction of statute—Jurisdiction of Superior Court—Suit for joint penalties—Second offences—Sale of drugs—"Quebec Pharmacy Act"—Retrospective legislation.

See No. 42, ante.

169. Construction of Exchequer Court Act—50 & 51 Vict. c. 16, s. 16 (D.)—"Public work"—"Officer or servant of the Crown"—R. S. C. c. 41, ss. 10, 69.

See MILITARY LAW, MILITIA, 2.

170. Construction of B. C. "Mineral Act"—R. S. B. C. c. 135—Location of mining claim—Certificate of work—Evidence to impugn.

See MINES AND MINERALS, 11.
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171. Construction of statute—Mines and minerals—Free miner's certificate—Annual renewals—Special renewal—Vesting of interest in co-owners—Sheriff—Levy under execution—R. S. B. S. c. 135, ss. 2, 3, 9, 34—62 Vict. c. 45, ss. 2, 3, 4—R. S. B. C. c. 72, ss. 12, 24.

See MINES AND MINERALS, 16.

172. Construction of statute—Special leave to appeal—"Judge of court appealed from"—Jurisdiction—R. S. C. c. 135, s. 42.

See APPEAL, 336.

173. Construction of statute—R. S. N. S. (1900) c. 71, ss. 263, 264—Municipal regulations—Operation of tramway—By-law or resolution—63 Vict. c. 176 (N.S.)

See TRAMWAY, 6.

STENOGRAPHIC NOTES.

Stenographic notes of evidence—Extension in longhand.]—Stenographic notes extended in the handwriting of another person but signed by the stenographer employed at the trial cannot be objected to. *Megantic Election Case; Frechette v. Goulet*, ix., 279.

STOCK.

See COMPANY LAW—SHARES AND SHAREHOLDERS.

STOCK JOBBING.

See BROKER.

STOPPAGE IN TRANSIT.

Sale of goods on credit—Insolvency of consignee—Stoppage in transitu—Goods in bond.]—The appellants, merchants in New York, sold goods to E. B. & Co., at Toronto, on credit, and consigned in bond. A bill of lading was received by E. B. & Co., who paid the freight and gave their acceptance for the price, cartage and American bonding charges. The goods were entered and bonded in consignee's name, and placed in customs bonded warehouse subject to payment of duties. E. B. & Co. sold and delivered part of the consignment and the remainder was bonded under 31 Vict. c. 6 (D.), in a portion of E. B. & Co.'s warehouse partitioned off and used by the customs authorities. Before the acceptances matured, and while part of the goods remained in bond, E. B. & Co. became insolvent. Held, affirming judgment appealed from (1 Ont. App. R. 179), that the *transitus* was at an end, and appellants had lost the right to stop the goods remaining in bond. *Howell v. Alport* (12 U. C. C. P. 375), and *Graham v. Smith* (27 U. C. C. P. 1), overruled. *Wiley v. Smith*, ii., 1.

STOWAGE.

Negligence—Bill of lading—Contract against liability.

See CARRIERS, 10, 16.

STREAMS.

See RIVERS AND STREAMS—WATERCOURSES.

STREET RAILWAY.

See TRAMWAY.

SUBROGATION.

1. *Consent of creditor—Loan for payment of debts—Acquittance by borrowed funds—Convention—Error in registration—Art. 1155 C. C.*—No formal or express declaration of subrogation is required under para. 2, art. 1155, C. C., when the debtor borrowing the money declares in his deed of loan that it is for the purpose of paying his debts, and in the acquittance he declares that the payment has been made with the moneys furnished by the new creditor for that purpose.—Where subrogation is given by the terms of a deed the erroneous noting of the deed by the registrar as a discharge, and the granting by him of erroneous certificates, cannot prejudice the party subrogated. Judgment appealed from, (21 R. L. 88) affirmed. *Owens v. Bedell*, xix., 137.

2. *Policy of fire insurance—"Mortgage clause"—Payment to mortgagee—Subrogation—Discharge of mortgage.*—Where a policy of insurance against fire contains the "mortgage clause," payment by the insurer to the mortgagee in the case of loss, when the insured has forfeited his rights under the policy, does not operate as a discharge of the mortgage, but simply substitutes the insurer to the mortgagee's rights as his remedy in such a case. *Per Taschereau, J., in re Guerin v. Manchester Fire Assur. Co.*, xxix., 139, at p. 136.

(NOTE.—Compare *Imperial Fire Ins. Co. v. Bull*, xviii., 697; 15 Ont. App. R. 421; 14 O. R. 322.)

See INSURANCE, FIRE, 71.

3. *Charges on lands—Payment and subrogation—Priority.*—Appellant purchased wild lands in Ontario subject to a mortgage and other charges, including one in favour of respondent, subsequent in point of time to the others. Appellant had agreed to pay the claims out of the proceeds of sale of the lands and the purchase money was sufficient to do so, but he claimed that he was substituted to some of the prior encumbrances and that the balance in his hands should pay those charges in priority to respondent's claim. The referee upheld this contention. The Supreme Court affirmed the judgments of the Divisional Court and Court of Appeal for Ontario, which reversed the referee's decision, and held that all prior claims were wiped out, and the respondent's charge should be first paid. *Lyc v. Armstrong*, 7th December, 1900.

4. *Fire insurance—"Mortgage clause"—Payment to mortgagee—Liability of insurer to insured—Subrogation in rights of mortgagee—Release of mortgage.*

See INSURANCE, FIRE, 71-74.

AND see ASSIGNMENTS, 13-38.

SUBSTITUTION.

1. *Curator—Right of action—Intervention by plaintiff—Art. 154, C. C. P.—Cause en délibéré—Assignment by institutes.*—A curator to a substitution has no right of action to recover from a curator in whose stead he has been appointed any moneys due by the latter and belonging to institutes.—Also, held, that an assignee of the institutes has no right to intervene in an action brought by said assignee in his capacity of curator to the substitution, and in which no final judgment could have been obtained which could impair the legal rights of the institutes. *Semble*, an intervention filed when the action has been heard on the merits and the case is *en délibéré* is irregular. Judgment appealed from (4 Dor. Q. B. 213) affirmed. *Dorion v. Dorion*, xiii., 193.

See No. 9, *infra*.

1a. *Sale of lands grevé de substitution—Bail-à-rente—Donation—Sale—Consideration—Rente foncière—Prohibition to alienate—Onerous title—Nullity—Arts. 970, 1234 C. C.—18 Vict. c. 250—Evidence.*—By 18 Vict. c. 250, W. F. and E. F. were authorized to sell lands grevés de substitution, in consideration of a non redeemable rent representing the value of the property. On 7th September, 1860, they assigned to A. F., part of the entailed property, in consideration of a *rente foncière* of £6 annually, payable by a deed stipulating that the assignee could not alienate the land, nor any part thereof, without express written consent of the assignors, under penalty of, nullity. The property was subsequently seized by a judgment creditor of A. F., and W. F. opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate. *Held*, affirming the judgment appealed from (3 Q. L. R. 349), that the deed was in accord with the provisions of 18 Vict. c. 250; that it was a purely onerous title on its face, and consequently the prohibition to alienate was void. *Held*, also, that parol testimony ought not to have been admitted as evidence to vary the character of the deed as an onerous title.—*Quare*, Whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration. *Fraser v. Pouliot*, iv., 515.

2. *Substitution non ouverte—Minority—Tutor ad hoc—Matter of procedure.*—A tutor *ad hoc* cannot intervene to represent minors in an action for account and removal of a trustee under a substitution. Judgment appealed from (12 Q. L. R. 258) reversed. Strong, J., dissenting on the ground that the case involved merely a question of procedure with which an appellate court ought not to interfere. *Rattray v. Larue*, xv., 102.

3. *Will—Usufruct—Remainder—Conveyance by usufructuary—Sale under execution.*—A will devised property to H. in usufruct during natural life, and the same property absolutely to J., subject to the usufruct, but in the event of J. pre-deceasing M., then to M. absolutely. *Held*, affirming the judgment appealed from (Q. R. 1 Q. B. 197), that the will did not create a substitution, but a simple bequest of usufruct to M. and of ownership to J. upon survival. *McGregor v. Canada Investment & Agency Co.*, xxi., 499.

4. *Institute—Restoration of property—Conversion of freehold—Substitute—Revendication—Damages—Right of action—Pre-*

scription—Possession—Art. 2268, C. C.—Bad faith—Evidence.]—On the 27th October, 1828, S., a widow, by her will instituted her eleven children her universal legatees; one being D., the father of the plaintiffs. The following clause affected the property bequeathed to the children:—"Pour être partagé également, pour iceux en jouir leur vie durant, pour après leur mort, retourner et appartenir à leurs enfants nés et naître en légitime mariage, ou à leurs héritiers suivant la loi." She died 29th July, 1834, and her will was published 15th April, 1835. On partition the land in question fell to plaintiffs' father, who enjoyed it to the time of his death, 5th March, 1872, leaving eight children including the six the plaintiffs who, being S.'s grandchildren, renounced to the succession of their father, claimed all rights that might accrue to them as substitutes, and took possession of the land.—During his enjoyment of the land in virtue of the will of his mother, D. by two deeds, dated 18th December, 1866, and 8th October, 1868, sold to defendants the right to work, draw and carry away all the sand that could be found in certain parts of the land. The defendants opened sand pits on the property and removed all the valuable sand which could be found during the period from 1867 to 1870.—The plaintiffs contended that their father, as institute, had no right to make the sales, and claimed the value of the sand.—The Superior Court rendered judgment in favour of plaintiffs, which was affirmed by the Court of Queen's Bench in principle, but the amount reduced by two-eighths, in respect of the shares of a daughter not properly represented in the cause and of a son who had ratified the sales made by his father. *Held*, affirming the judgment appealed from, that the substitute has on the opening of the substitution a personal action, founded on the obligation which the law imposes upon the institute to restore the property, to compel the latter to deliver to him any property detached from the land and so converted into moveables which remain in specie in his possession, or to indemnify him in money for any property so detached which may have gone into the hands of *tiers détenteurs*.—As against *tiers détenteurs* of moveables detached from the land which is the subject of substitution, the substitute has a real action, an action of revendication, for the recovery of his property.—In such an action alternative conclusions may be taken that the *tiers détenteur* may deliver the thing sought to be recovered, or, if being a possessor in bad faith he has ceased to possess by consuming the thing, or by disposing of it to another, that he may be made to pay damages.—If it is alleged in the action that the thing has already been destroyed, consumed, or converted, then the first alternative conclusion may be suppressed.—As regards prescription, the action of the substitute falls under article 2268 C. C. and the *tiers détenteur* of moveable property subject to substitution, in order to avail himself of prescription must shew possession in good faith for three years from the date of the opening of the substitution before the institution of the action.—The publication and insinuation of the will was not sufficient notice from which to presume bad faith, which must be proved, but the contracts of sale of 18th December, 1866, and 8th October, 1868, described the property as belonging to the "succession Dufresne," and this was sufficient to put them in bad faith, as they had no right to assume their *auteur* was the absolute proprietor. *Bulmer v. Dufresne*, Cass. Dig. (2 ed.) 873.

5. *Construction of Will—Donation — Partition, per stirpes or per capita—Usufruct —Alimentary allowance — Accretion between legatees.*]—The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament." *Held*, Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate (subject to the usufruct), to their children, which took effect at the death of the testator. *Held*, also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct. *Held*, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*. *Robin v. Duguay*, xxvii., 347.

6. *Title to land—Entail—Life estate—Fiduciary substitution—Privileges and hypotheses—Mortgage by institute—Preferred claim—Prior incumbrances—Vis major—16 Vict. c. 25—Registry laws—Practice—Sheriff's sale—Chose jugée—Parties—Estoppel—Sheriff's deed—Deed poll—Improvements on substituted property—Grosses réparations—Art. 2172 C. C.—29 Vict. c. 26 (Can.)*]—The institute, *grèvé de substitution*, in possession of land and curator to the substitution, upon judicial authority, mortgaged the lands under the provisions of the Act for the relief of sufferers by the great Montreal fire of 1852 (16 Vict. c. 25), for a loan which was expended in constructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in execution by the sheriff in a suit to which the curator had not been made a party. *Held*, that, as the mortgage had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the lands from the substitution not yet open, and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that

of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the said lands.—An institute, *grevé de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major*, in order to make necessary and extensive repairs (*grosses réparations*), upon obtaining judicial authorization, and in such case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata*, and the substitute called to the substitution is estopped from contestation of the necessity and expense of the repairs.—The sheriff seized and sold lands under a writ of execution against a defendant, described therein, and in the process of seizure and also in the deed by him to the purchaser, as *grevé de substitution*. *Held*, that the term used was merely descriptive of the defendant, and did not limit the estate seized, sold or conveyed under the execution. *Held*, further, *per* Taschereau, J., that art. 2172 of the Civil Code of Lower Canada, as interpreted by the statute, 29 Vict. c. 26 (Can.) applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.—Judgment of the Court of Queen's Bench affirmed, Taschereau and King, JJ., dissenting. *Chef dit Vadeboncoeur v. City of Montreal*, xxix., 9.

[Followed in *Deschamps v. Bury* (29 Can. S. C. R. 274), No. 7, *infra*.]

7. *Title to land—Sheriff—Vacating sale—Exposure to eviction—Actio conductio indebiti—Petition—Refund of price paid—Prior incumbrance—Substitution not yet open—Discharge of incumbrances.*—The procedure by petition provided by the Code of Civil Procedure of Lower Canada for vacating sheriff's sales can be invoked only in cases where an action would lie. *The Trust and Loan Co. v. Quintal*, (2 Dor. Q. B. 190) followed.—The *actio conductio indebiti* for the recovery of the price paid by the purchaser for lands lies only in cases of actual eviction. Mere exposure to eviction is not sufficient ground for vacating a sheriff's sale.—The provisions of article 714 of the Code of Civil Procedure do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of the deed, nor does that article give a right to have the sale vacated and the amount so paid refunded.—A sheriff's sale in execution of a judgment against the owner of lands, *grevé de substitution*, based upon an obligation in a mortgage having priority over the instrument by which the substitution was created, discharges the lands from the unopened substitution without the necessity of making the curator to the substitution a party to the proceedings. *Chef dit Vadeboncoeur v. City of Montreal*. (29 Can. S. C. R. 9) followed. *Deschamps v. Bury*, xxix., 274.

8. *Bank stock—Substituted property—Trust—Registration of substitution—Arts. 931, 938, 939 C. C.—Pledge by trustee—Redemption—Condictio indebiti—Arts. 1047, 1048 C. C.*—The curator of the substitution of W. P. paid respondents \$8,632, to redeem 34 shares of the Bank of Montreal stock entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P., one of the *grevés*, and manager of the estate, had pledged to respondents for advances made

to him personally. Appellants representing the substitution, demanded the money which they alleged H. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of W. P., and there was no inventory to shew they formed part of the estate, and no *acte d'emploi* or *remploi* to shew that they were acquired with the assets of the estate. *Held*, *per* Ritchie, C.J., and Fournier and Taschereau, JJ., affirming the judgment appealed from, and the judgment of the trial court (16 Q. L. R. 193), that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover.—*Per* Strong and Fournier, JJ. That bank stock cannot be held as regards third parties in good faith to form part of substituted property on the ground that it has been purchased with the moneys belonging to the substitution without an act of investment in the name of the substitution and a due registration thereof. Patterson, J., dissented. *Petry v. Caisse d'Economie de N. D. de Québec*, xix., 713.

See No. 6, *ante*.

9. *Devise by institute—Transfer of rights—Mandatory—Action for new account—Release—Parties—Purchase of trust estate—Curator—Administration—Form of action—Indivisibility—Release—Specific performance—Art. 1484 C. C.—Art. 920 C. C. P.*—Respondent, representing the institutes and substitutes under the will of the late J. D., brought an action against appellant, one of the institutes who acted as curator and administrator of the estate for a certain time, for an account of three particular sums, which plaintiff alleged defendant had received while curator. *Held*, reversing the judgment appealed from (18 R. L. 647), that an action did not lie against the appellant for these particular sums apart and distinct from an action for an account of his administration of the rest of the estate.—Plaintiff alleged that he represented S. D., one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of defendant £447 7s. 6½d., defendant having in an action of account settled by deed with S. D. for \$4,000, which he agreed to pay and for which plaintiff became surety: *Held*, that as the deed gave defendant a full and complete discharge of all accounts as curator or administrator of the estate, plaintiff could not claim a further account of these particular sums.—Plaintiff also claimed to represent F. D. and E. D., two other institutes, in virtue of assignments to him by them on 21st January and 15th November, 1869, respectively. In 1865, after defendant had been sued in an action of account, by a deed of settlement, F. D. and E. D. agreed to accept as their shares in the estate \$4,000 each, and gave defendant a complete and full discharge: *Held*, affirming the judgment appealed from, that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement.—By the judgment appealed from (18 R. L. 647), defendant was condemned to account for his own share transferred to plaintiff in 1862, and also for C. D.'s share, another institute who in 1882 transferred his rights to plaintiff. The transfer by defendant was as co-legatee of such rights and interests as he had at the time of transfer, and he had at that time received the sixth of the sum for

which he was asked to account: *Held*, reversing the court below, that plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in action to account as mandatory or *negotiorum gestor* of plaintiff. 2. That F. D. and E. D., having acquired an interest in C. Z. D.'s share after the transfer of their shares to plaintiff in 1869, plaintiff could not maintain his action without making them parties to the suit.—*Quere*, Were the transfers made by the institutes to plaintiff while curator, null and void under art. 1484 C. C.? *Dorion v. Dorion*, xx., 430.

See No. 1, *ante*.

10. *Title to land—Acceptance by institute—Parent and child—Rights of children not yet born—Revocation of deed—Prescription—Bona fides—Recital in deed—Presumption against purchaser—Arts. 930, 2191, 2193, 2202, 2207, 2251, 2253 C. C.*—A substitution created by a donation *inter vivos* in favour of the children of the institute, even before they are born, is irrevocable after acceptance by their parent, and the law of the Province of Quebec on the subject, as declared by the Civil Code, is the same as the old law of that province in existence before the promulgation of the Civil Code of Lower Canada.—Where an institute has accepted a donation creating a substitution in favour of his children, his acceptance as institute constitutes valid acceptance of the substitution on behalf of his children thereafter born to him during marriage.—Where the title deed of a purchaser of lands bears upon its face recitals which would have led upon inquiry to evidence of the defeasibility of his vendor's title, he must be presumed to have been aware of the precarious nature of the title he was purchasing and prescriptive title cannot afterwards be invoked either by him or those in possession under him as holders in good faith under translatory title.—As good faith is required for the ten years' prescription under the Civil Code, that prescription cannot be invoked against a substitution which has been duly registered, such registration being sufficient to constitute any third party, who might subsequently purchase from the institute a holder in bad faith. Judgment appealed from (Q. R. 5 Q. B. 490) reversed. *Meloche v. Simpson*, xxix., 375.

[The Privy Council refused leave to appeal, May, 1899.]

11. *Construction of will—Opening of substitution—Legacy to substitutes—Legatees taking per stirpes or per capita.*—By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, during her lifetime, and, after her death, to his surviving children, and, by the sixth clause, provided as follows: "Quant à la propriété de mes dits biens meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et lègue aux enfants légitimes de mes enfants, qui seront mes petits-enfants; pour, par mes dits petits-enfants, jouir, faire et disposer de mes dits biens en pleine propriété et par égales parts et portions entre eux, à compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituant mes légataires universels en propriété." *Held*, reversing the judgment appealed from, that all the grandchildren participated in the legacy and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substi-

tution created by the will, for such portion of his estate, should be divided among all the grandchildren then living in equal shares, the grandchildren taking *per capita* and not *per stirpes*. *Remillard v. Chabot*, xxxiii., 328.

SUCCESSION.

1. *Acceptance by minor subsequent to action—Retroactive effect.*—The acceptance of a succession subsequent to action, and *pendente lite* on behalf of a minor as universal legatee has a retroactive operation. *Martindale v. Powers*, xxiii., 597.

2. *Will—Codicil—Testamentary succession—"Heir"—Universal legatee—Arts. 596, 597, 831, 864, 840 C. C.—14 Geo. III., c. 83, s. 10 (Imp.)—41 Geo. III. c. 4 (L. C.)*—R. A. who died in Montreal in 1896 had, by his will made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residuary estate. M. A. died in 1855 leaving a will appointing five of her children her universal legatees. R. A. subsequently took communication of the will of the deceased M. A. and made a codicil to his own will in the terms following:—"With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A. . . . my will and desire is that her said share of said residue shall go to her heirs." *Held*, Gwynne and Girouard, J.J., dissenting, that under the provisions of the Civil Code of Lower Canada, the words "her heirs" in the codicil must be construed as meaning the persons to whom the succession of M. A. devolved as universal legatees under her will. *Allan v. Evans*, xxx., 416.

3. *Renunciation of succession—Dower—Warranty—Donation—Authorization—Interdiction—Marriage laws—Registry laws—Sheriff's sale—Arts. 1467, 2116 C. C.*—*Per Taschereau, J.* Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which the vendor has given warranty. *Rousseau v. Burland*, xxxii., 541.

4. *Provincial bonds—Succession duties—Property exempt—Sale under will—Duty on proceeds—Costs—Proceedings by or against the Crown.*—Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General claimed succession duty on the whole estate. *Held*, affirming the judgment appealed against (35 N. S. Rep. 223), Sedgewick and Mills, J.J., dissenting, that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale were when passing to legatees. Costs will be given for or against the Crown as in other cases. *Lovitt v. Attorney-General of Nova Scotia*, xxxiii., 350.

5. *Hypothecary debts—Legatee of hypothecated land—Liability of universal legatee—Art. 889 C. C.*

See WILL, 58.

6. *Acceptance — Acts of administration — Conservatory acts — Fraudulent artifices — Arts. 646, 650 C. C.*

See NOTARY, 1.

7. *Failure of heirs—Escheat—Limitation of action.*

See TITLE TO LAND, 131.

8. *Sale of right by co-heir—Insolvency of co-heir—Sale by curator—Retrait successoral —Art. 710 C. C.—Prescription.*

See RETRAIT SUCCESSORAL.

9. *Testamentary executors—Balance due by tutor—Practice — Action for account—Provisional possession—Envoi en possession—Parties—Extra-judicial consent to form of action.*

See EXECUTORS AND ADMINISTRATORS, 8.

SUITS.

See ACTIONS.

SUPERANNUATION.

See CIVIL SERVICE—PENSION DE RETRAITE.

SUPREME COURT PRACTICE.

See PRACTICE OF THE SUPREME COURT OF CANADA.

SURETYSHIP.

1. *Contract with firm—Continuing security to firm and member or members constituting firm for the time being—Death of partner—Liability of surety.]—S., by indenture under seal, became surety to the firm of C. & Sons for goods to be sold to Q., and agreed to be a continuing security to the firm or "to the member or members for the time being constituting the said firm of C. & Sons," for sales to be made by the firm or "any member or members of the said firm of C. & Sons," to Q., so long as they should mutually deal together.—The senior member of the firm died, and by his will appointed the other members of the firm his executors. They entered into a new agreement of co-partnership and continued to carry on the business under the firm name of C. & Sons, and subsequently transferred all their interest in the business to a joint stock company. The action against S. was for goods sold to Q. after such death, *Held*, reversing the judgment appealed from (11 Ont. App. R. 156), and restoring the judgment of the Common Pleas Division (5 O. R. 189), that the death dissolved the firm of C. & Sons, and put an end to the contract of suretyship. *Starrs v. Cosgrave Brewing and Malting Co. of Toronto*, xii., 571.*

2. *Bank official—Surety—Misconduct—Illegal transactions—Proper banking business—Sanction of directors.]—The sureties of an absconding bank cashier are not relieved from liability by shewing that the bank employed their principal in transacting what was not properly banking business, in the course of*

which he appropriated the bank funds to his own use, the claim against the sureties being for the moneys so appropriated by the principal, and not for losses occasioned by such illegal transactions. *Springer v. Exchange Bank of Canada; Barnes v. Exchange Bank of Canada*, xiv., 716.

3. *Mortgage to bank—Continuing security—Present indebtedness of principal—Commercial paper — Dealings by bank — Taking forged paper in renewal—Release of surety.]—McK. gave a mortgage to the bank as security for present indebtedness of, and future advances to, a customer of the bank. By the terms of the mortgage McK. was to be liable for promissory notes, &c., of the customer outstanding at date of mortgage, and all renewals, alterations and substitutions thereof. *Held*, per Ritchie, C.J., Fournier and Taschereau, JJ., that the bank having given up the promissory notes, &c., and accepted as renewals thereof, forged and worthless paper, McK. was, to the extent of such worthless paper, relieved from liability as such surety. *Held*, per Strong, J., that the bank, having accepted the renewals in the ordinary course of banking business, and it not being shewn that they were guilty of negligence, the surety was not relieved. *Held*, per Gwynne, J., that as there was a reference ordered to take an account of the notes alleged to be forged, the consideration of the surety's liability should be postponed until the account was taken. Judgment appealed from (12 O. R. 498) affirmed. *MERCHANTS' Bank of Canada v. McKay*, xv., 672.*

4. *Bond — Illegal consideration — Stifling prosecution.]—In an action on a bond executed by J. to secure a debt of L. to the bank the evidence shewed that L., who had married an adopted daughter of J., was agent of the bank, and, having embezzled the bank funds, the bond was given in consideration of an agreement not to prosecute. *Held*, affirming the Supreme Court (N. S.), that the consideration for the bond was illegal and J. was not liable thereon. *People's Bank of Halifax v. Johnson*, xx., 541.*

5. *Interference with rights of surety—Discharge.]—The Union Bank agreed to discount the paper of S., A. & Co., railway contractors, indorsed by O'G., as surety, to enable them to carry on a railway contract for the Atlantic & North-West Ry. Co. O'G. indorsed the notes on an understanding or an agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was in consequence executed. After several estimates had been thus paid to the bank it was found that the work was not progressing favourably, and the railway company then, without the assent of O'G., but with the assent of the contractors and the bank, guaranteed certain debts due to creditors of the contractors and out of moneys subsequently earned by the contractors made large payments for wages, supplies and provisions necessary for carrying on the work. In October, 1888, the bank, also, without the assent of O'G., applied for and got possession of a cheque for \$15,000, which had been accepted by the bank and held by the company as security for the due performance of the contract, in consideration of signing a release to the railway company "for all payments heretofore made by the*

company for labour employed on said contract and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, &c., as they might think proper, but did not give the right to guarantee contractors' debts or pay for provisions and food, &c. *Held*, that there was such an interference with the rights of O'G. as surety as to discharge him. *Taschereau and Gwynne, JJ.*, dissenting. *O'Gara v. Union Bank of Canada*, xxii., 404.

[Appeal to Privy Council dismissed non-prosecution. See 24 Can. Gaz., p. 224].

6. *Discharge of surety — Reservation of rights — Promissory note — Discharge of maker.*—Where the holder of a promissory note had agreed to accept a third party as his debtor in lieu of the maker.—*Held*, affirming the judgment of the Court of Appeal (20 Ont. App. R. 298, *sub nom. Holliday v. Hogan*), that as according to the evidence there was a complete novation of the maker's debt secured by the note and a release of the maker in respect thereof, the indorsers on the note were also released. *Holliday v. Jackson & Hallett*, xxii., 479.

7. *Insurance—Guarantee—Notice to insurer of defalcation—Diligence.*—A guarantee policy insuring the honesty of W., an employee, was granted upon the express conditions, (1) that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept, and (2) that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts, and the evidence shewed that no proper supervision had been exercised over W.'s books, and the guarantors were not notified until a week after employers had full knowledge of the defalcation, and W. had left the country. *Held*, affirming the judgment of the court below (Q. R. 2 Q. B. 6), that as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation, they were not entitled to recover under the policy. *Harbour Commissioners of Montreal v. Guarantee Co. of North America*, xxii., 542.

8. *Mortgage — Discharge — Action on promissory note — Security for mortgage debt.*—A. and B. partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved A. assumed all the liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note. *Held*, that by the terms of the dissolution of partnership the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change his release of the principal, A., discharged B., the surety, from liability for the debt. Judgment appealed from (20 Ont. App. R. 695) affirmed. *Alison v. McDonald*, xxiii., 635.

9. *Postmaster's bond — Penal clause — Lex loci contractus — Negligence — Laches of the Crown officials — Release of sureties—Arts. 1053, 1054, 1131, 1135, 1927, 1929-1965 C. C.]*—In an action by the Crown on the information of the Attorney-General for Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the security to be given by the officers of Canada" (31 Vict. c. 37; 35 Vict. c. 19) and "The Post Office Act" (38 Vict. c. 7):—*Held*, affirming the judgment appealed from (6 Ex. C. R. 236), Strong, C.J., dissenting, that the right of action under the bond was governed by the law of Quebec. *Held*, further, that such a bond was not an obligation with a penal clause within the application of arts. 1131 and 1135 of the Civil Code of Lower Canada. *Held*, also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute. *Black v. The Queen*, xxix., 693.

10. *Conditional warranty—Consignment on dcl credere commission — Notice — Possession of goods — Art. 1959 C. C.]*—T. wrote a letter agreeing to guarantee payment for goods consigned on *dcl credere* commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods and permitted others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guarantee:—*Held*, that the condition of the guarantee had not been complied with by the creditor, and that he could not hold the warrantor responsible. *Brown v. Torrance*, xxx., 311.

11. *Insolvent Act of 1875—Defaulting assignee—Official bond.*—Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee. Judgment appealed from (4 Dor. Q. B. 220) affirmed. *Létourneau v. Dansereau*, xii., 307.

12. *Promissory note — Secrecion — Remedy by indorser — Capias — Art. 1953 C. C.—Art. 798 C. C. P.*

See FRAUDULENT PREFERENCE, 4.

13. *Promissory note — Indorser giving time to maker—Release.*

See BILLS AND NOTES, 44.

14. *Indorsement to secure advances — Financial agents' commission — Remuneration for indorsement.*

See CONTRACT, 254.

15. *Conditional guarantee — Proof of loss.*

See EVIDENCE, 157.

16. *Guarantee of debt—Indorsement of note—Evidence.*

See **BILLS AND NOTES**, 45.

AND see **PRINCIPAL AND SURETY**.

SURRENDER.

1. *Déclaration d'hypothèque—Abandonment of mortgaged lands—Personal condemnation.*—In an action *en déclaration d'hypothèque* the defendant may, in default of his surrendering the property within the period fixed by the court, be personally condemned to pay the full amount of the sheriff's claim. *Dubuc v. Kidston*, xvi., 357.

2. *Indian lands—Surrender — Crown grant—Sale of lands for taxes—Lists attached to warrant—*32 Vict. c. 36, s. 128 (O.). *R. S. O. (1877) c. 108, s. 156.*—In 1857, a lot, forming part of a tract surrendered to the Crown by the Indians, was sold, and in 1869 the Dominion Government issued a patent therefor to the plaintiff. In 1870, the lot, less two acres, was sold to one D. K., for taxes assessed and accrued due for 1864 to 1869, who sold to defendant, and defendant purchased the two acres at a sale for taxes in 1873. The warrants for sale of the lands were signed by the warden with the seal of the county, and authorized the treasurer "to levy upon the various parcels of land hereinafter mentioned for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands in question. The lists and the warrant were pasted together by the whole length of the top, but the lists were not authenticated by the signature of the warden nor the seal of the county. By the Assessment Act, 32 Vict. c. 36, s. 128 (O.), the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county.—*Held*, affirming the judgment appealed from (4 Ont. App. R. 159), Fournier and Henry, JJ., dissenting, that upon the surrender the lands became ordinary unpatented Crown lands, and upon being granted became liable to assessment; that the list and warrant may be regarded as one entire instrument and, as the substantial requirements of the statute had been complied with, any irregularities had been cured by *R. S. O. (1877) c. 180, s. 156. Church v. Fenton*, v., 239.

3. *Treaty No. 3—North-West Angle—Vesting of title—Occupancy — Lands reserved for Indians—*B. N. A. Act, s. 91, s.s. 24—s. 92, s.s. 5—s. 109, 117.]—The lands within the boundary of Ontario in which the claims or rights of occupancy of the Indians were surrendered or became extinguished by the Dominion Treaty of 1873, known as the North-West Angle Treaty, No. 3, form part of the public domain of Ontario and are public lands belonging to Ontario by virtue of the provisions of the British North America Act, 1867.—Only lands specifically set apart and reserved for the use of the Indians are "lands reserved for Indians" within the meaning of s. 91, item 24 of the British North America Act (1867), Strong and Gwynne, JJ., dissenting. *St. Catharines Milling and Lumber Co. v. The Queen*, xiii., 577.

[Judgment affirmed by the Privy Council (14 App. Cas. 46).]

4. *Constitutional question — Legislative jurisdiction—Appeal per saltum.*

See **APPEAL**, 330.

5. *Treaties with Indians—Surrender of Indian rights — Mines and minerals — Crown grant — Constitutional law —*43 Vict. c. 28 (D.)

See **TITLE TO LANDS**, 141.

AND see **TITLE TO LAND** and **TREATIES**.

SURVEYS.

1. *Title to land—Old grant—Starting point—Metes and bounds.*—In an action of ejectment the question to be decided was, whether the locus was situate within the plaintiff's lot No. 5, in concession 18, or within defendant's lot adjoining No. 24, in concession 17.—The grant, through which plaintiff's title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost, and this starting point could not be ascertained. *Held*, affirming the judgment appealed from (11 Ont. App. R. 788), Strong and Taschereau, JJ., dissenting, that such southern boundary could not be ascertained by measuring back exactly eighty-four chains from the river. *Plumb v. Steinhoff*, xiv., 739.

2. *Boundaries — Trespass — Reference to surveyors — Duty of surveyors — Old line.*—R., who held a license from the government to cut timber on Crown lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and replevied logs alleged to be so cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under the license of R. should be surveyed and established by named surveyors and the stumps counted, &c. *Held*, reversing the judgment appealed from (26 N. B. Rep. 258), that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line. *Snowball v. Ritchie*, xiv., 741.

3. *Plan of sub-division — Description in deed — Staking out lines — Estoppel — Mistake — Licensed use — Standing by without objection.*

See **BOUNDARY**, 1.

4. *Agreement as to boundaries—Plan signed by parties — Statute of Frauds — Equitable jurisdiction.*

See **BOUNDARY**, 2.

5. *Expropriation of land — Tenants in common — Propriétaires par indivis — Construction of agreement — Misdescription — Plans and books of reference — Registry laws — Satisfaction of condition as to indemnity.*

See **RAILWAYS**, 32.

6. *Bornage—Concession line—Evidence.*

See **BOUNDARY**, 5.

7. *Mines and minerals — Adverse claim — Form of plan — Right of action—Condition precedent — Necessity of actual survey—R. S. B. C. (1897) c. 135, s. 37—R. S. B. C. (1897) c. 3, s. 16.*

See MINES AND MINERALS, 15.

8. *Description of lands — Surveyor's line—Boundary marks—Plan.*

See NEW TRIAL, 36.

SURVIVORSHIP.

1. *Tenants in common — Joint tenants — Construction of will.*

See WILL, 7.

2. *Joint tenancy—Life estate—Remainder.*

See TITLE TO LAND, 79.

TAIL.

See ESTATE TAIL—SUBSTITUTION.

TARIFF ACT.

See CUSTOMS DUTIES.

TAXATION.

See ASSESSMENT AND TAXES—CONSTITUTIONAL LAW — CUSTOMS—DUTIES — LEGISLATION—MUNICIPAL CORPORATION—SUCCESSION DUTIES.

TAX DEEDS AND TAX SALES.

See ASSESSMENT AND TAXES — MUNICIPAL CORPORATIONS — SALE—TITLE TO LAND.

TELEGRAPH AND TELEPHONE LINES.

1. *Contract — Exclusive privileges — Operation of railway — Telegraph lines — Foreign corporation — Public interest — Restraint of trade.*

See COMITY.

2. *Lease of system—Operation—Trouble de droit—Trespass.*

See LEASE, 23.

3. *Construction of line—Wrongful cutting of trees—Justification by statute—Necessity of act done—Construction of statute.*

See TRESPASS, 2.

4. *Telephones — Transmission of messages — Agreement not to "transmit"—Construction of contract.*

See CONTRACT, 9.

5. *Telephone lines—Placing poles on street —Proximate cause of injury.*

See NEGLIGENCE, 192.

TENANT.

1. *Drainage scheme—Injury to land—Right to recover damages.*

See MUNICIPAL CORPORATION, 86, 93.

2. *Recourse for damages — Expropriation—Right of action.*

See ACTION, 139.

3. *Fencing — Laying out boundaries — Construction of deed — Estoppel by conduct—Words of limitation — Description of lands—Registry laws—Notice of prior title—Riparian rights — Possession — Acquisitive prescription — Tenant by sufferance — Right of action—Adding parties—Practice.*

See RAILWAYS, 82, 153.

See LANDLORD AND TENANT—LEASE—LESSOR AND LESSEE—TITLE TO LAND.

TENANT AT WILL.

1. *Possession — Caretaker — New tenancy —Statute of Limitations.*

See TITLE TO LAND, 78.

2. *Attornment in mortgage — Tenancy at will—Privilege of landlord—Distress for interest.*

See MORTGAGE, 56.

TENANT FOR LIFE.

1. *Conveyance to railway company by — Railway Acts—C. S. C. c. 66, s. 11, s-s. 1—24 Vict. c. 17, s 1 (O.).*

See RAILWAY, 149.

2. *Construction of will—Words of futurity —Joint lives—Time for ascertainment of class —"Lawful heirs"—Survivor dying without issue.*

See WILL, 35.

AND see TITLE TO LAND.

TENANT IN TAIL.

Construction of statute — Estates tail — Will — Executory devise over — "Dying without issue"—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant — Statutory title—Title by will—Conveyance by tenant in tail.

See WILL, 19.

AND see SUBSTITUTION—TITLE TO LAND.

TENANTS IN COMMON.

1. *Construction of will — Devise in severalty — Joint tenancy—Evidence—Partition.] —A devise to testator's two sons, their heirs, &c., provided that the devisees should jointly and in equal shares pay testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of 2, 3, 4, 5, 6 and 7 years respectively. The estate vested before the statute abolishing joint tenancies in Nova*

Scotia came into operation. *Held*, reversing the judgment appealed from (21 N. S. Rep. 378), Taschereau and Gwynne, JJ., dissenting, that these provisions for payments of debts and legacies indicated an intention on the testator's part to effect a severance of the devise and the devisees took as tenants in common and not as joint tenants. *Fisher v. Anderson* (4 Can. S. C. R. 406) followed.—On the trial of a suit between persons claiming through the respective devisees for partition of the real estate so devised, evidence of a conversation between the devisees, which plaintiff claimed would shew that a severance was made after the estate vested, was tendered and rejected as being evidence to assist in construing the will. *Held*, Gwynne, J., dissenting, that it was properly rejected. *Held*, per Gwynne and Patterson, JJ., that the evidence might have been received as evidence of a severance between the devisees themselves if a joint tenancy had existed. *Clark v. Clark*, xvii., 376.

2. *Trustees — Powers — Party wall — Tenants in common.*—M., owner of two warehouses, Nos. 5 & 7 (the dividing wall being necessary for the support of both) executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation to the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was claimed by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M. to have it declared that the wall in question was a party wall: *Held*, reversing the judgment of the Court of Appeal, that the trustees of the will and marriage settlement were bound by the trust declared in the instruments under which they derived their powers, and even if it could be shewn that the confirmation deed had the effect of conveying a greater quantity of land than the deed from the trustees of the marriage settlement, such a voluntary conveyance in favour of one beneficiary, which would operate prejudicially to the interests of the other beneficiaries would be a breach of trust and consequently void. *Held*, that upon the execution of the deed by way of marriage settlement of No. 5, the wall common to the two warehouses, Nos. 5 and 7, became a party wall of which the owners of the warehouses were tenants in common. *Lewis v. Allison*, xxx., 173.

3. *Construction of will — Survivorship — Joint tenants—Tenants in common.*

See WILL, 7.

4. *Action for use and occupation—Trespass —Mesne profits—Parties.*

See EJECTMENT, 2.

5. *Will — Survival of tenant for life — Remainder—Owner in fee—Statute of Limitations—Adverse possession.*

See TITLE TO LAND, 57.

6. *Will — Devise to two sons — Devise over of one's share — Condition — Contest—Codicil.*

See WILL, 16.

7. *Partition of lands — Statute of Limitations—Possession—R. S. N. S. (5 ser.) c. 112.*

See LIMITATIONS OF ACTIONS, 26.

TENDER.

1. *Deficiency in goods delivered—Payment into court — Acknowledgment of liability — Estoppel.*

See ACTION, 128.

2. *Charter party — Lien for freight—Storage—Trove for cargo.*

See CARRIERS, 23.

3. *Railway construction — Bond — Unilateral undertaking—Acceptance.*

See CONTRACT, 257.

4. *Pledge — Deposit with tender—Forfeiture — Breach of contract — Municipal corporation — Right of action — Restitution of thing pledged.*

See PLEDGE, 9.

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TERRITORIAL DIVISIONS.

Habeas corpus — Jurisdiction — Form of commitment — Judicial notice — R. S. C. c. 135, s. 32.

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TIMBER BERTHS AND LICENSES.

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Incorporated company—Forfeiture of charter — Estoppel — Compliance with statute—Res judicata—Collection of tolls.

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TIME.

1. *Renewal of chattel mortgage — Computation of time—N.-W. Ter. Ord. No. 5 of 1881.*

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2. *Appeal — Time limit — Commencement of — Pronouncing or entry of judgment — Security — Extension of time — Order of judge—R. S. C. c. 135, ss. 40, 42, 46.*

See VACATION, 7.

3. *Appeal — Time limit — Commencement of — Pronouncing or entry of judgment — Security — Extension of time — Order of judge—R. S. C. c. 135, ss. 40, 42, 46.*

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TITLE TO LAND.

1. DEEDS AND CONVEYANCES, 1-26.
2. EVIDENCE OF TITLE, 27-31.
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1. DEEDS AND CONVEYANCES.

1. *Lex loci* — *Conveyance under Foreign Bankruptcy Act*—*Lands in Canada*.]—An assignment or conveyance under foreign bankruptcy proceedings is ineffectual to pass title to lands in Canada. *Macdonald v. Georgian Bay Lumber Co.*, ii., 364.

See 2 Ont. App. R. 36.

2. *Contract* — *Rescission* — *Conveyance of land* — *Misrepresentation* — *Fraud* — *Deceit* — *Notice*—*Inquiry*.] — A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit.—B. bought land described as "two parcels containing 18 acres more or less," and afterwards brought an action for rescission of his contract, on the grounds that he believed he was buying the whole lot offered for sale, being some 25 acres, and that the vendor had falsely represented the land sold as extending to the river front. The evidence shewed that B. had knowledge, before his purchase, that a portion of the lot had been sold. *Held*, affirming the Court of Appeal for Ontario (23 C. L. J. 299) that even if B. was not fully aware that the portion so sold was that bordering on the river front, the knowledge he had was sufficient to put him on inquiry as to its situation, and he could not recover on the ground of misrepresentation. *Bell v. Macklin*, xv., 576.

3. *Deed absolute in form*—*Mortgage* — *Evidence of intention*.]—To induce a court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only the evidence of such intention must be of the clearest, most conclusive and unquestionable character (7 Man. L. R. 203, affirmed). *McMicken v. Ontario Bank*, xx., 548.

4. *Words of grant*—*Passing title*—*Legacy*.] —The words "property" and "estate" are both sufficient to pass realty. *Cameron v. Harper*, xxi., 273.

5. *Form of deed*—*Signature by a cross*—19 Vict. c. 15, s. 4 (Can.).—*Registry laws*—*Litigious rights*—*Acquiescence*—*Evidence* — *Commencement of proof* — *Warrantor impeaching title*—*Arts.* 1025, 1027, 1472, 1480, 1487, 1582, 1583, 2134, 2137 C. C.]—Where the registered owner of lands was present but took no part in a deed, subsequently executed by the repre-

sentative of the vendor, granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof.—The conveyance by an heir-at-law of real estate which had been already granted by his father during his lifetime is an absolute nullity and cannot avail for any purposes whatever against the father's grantee who is in possession of the lands and whose title is registered.—Writings under private seal which have been signed by the parties but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence.—The grantees of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given.—Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights. *Powell v. Waters*, xxviii., 133.

6. *Scire facias* — *Title to land*—*Annulment of letters patent* — *Tender*—*Sale or pledge*—*Vente à réméré*—*Concealment of material fact*—*Arts.* 1274-1279 R. S. Q. — *Registration*—*Transfer of Crown lands*—*Art.* 1007 C. P. Q. —*Art.* 1553 C. C.]—A sale of land subject to the right of redemption (*vente à réméré*), transfers the title in the lands to the purchaser in the same manner as a simple contract of sale. *Salvas v. Vassal* (27 Can. S. C. R. 68) referred to. *The Queen v. Montminy*, xxix., 484.

7. *Sale of land* — *Conveyance absolute in form*—*Mortgage*—*Resulting trust*—*Notice to equitable owner*—*Estoppel*—*Inquiry*.] — The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners (34 N. S. Rep. 453, affirmed). *Oland v. McNeil*, xxxii., 23.

8. *Railways*—*Location of permanent way*—*Fencing*—*Laying out of boundaries*—*Construction of deed*—*Estoppel by conduct*—*Words of limitation* — *Registry laws* — *Notice of prior title*—*Riparian rights*—*Possession* — *Acquisitive prescription*—*Tenant by sufferance*—*Arts.* 569, 1472, 1487, 1593, 2193, 2196, 2242, 2251 C. C. —*Art.* 77 C. P. Q. —14 & 15 Vict. c. 51—25 Vict. c. 61, s. 15—*Findings of fact*—*Assessment of damages* — *Emphyteutic lease* — *Domaine direct* — *Domaine utile* — *Alienation*—*Right of action*.—*Adding parties*.]—A railway company purchased land from P., bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines, but the railway fencing was placed inside the stakes above the water-line, although the company could not have the quantity of land conveyed unless they took possession of the edge of the river. P. remained in possession of the strip of land between the fence and the water's edge and of the bed of the stream *ad medium flum.* and, after the registration of the deed to the company, sold the rest of his property including water rights, mills, and dams constructed in the stream to the defendant's *auteur*, describing the property sold as "including that part of the river which is not included in the right of way, &c." The plaintiffs never operated their line of railway but, immediately on its

completion, under powers conferred by their charter, and the Railway Act, 14 & 15 Vict. c. 51, leased it for 999 years to another company and the railway has been ever since operated by other companies under the lease. The plaintiffs' *action pétitoire*, including a claim for damages, was met by pleas: (1) That the lease was an alienation of all plaintiffs' interest in the lands occupied by the railway and left them without any right of action; (2) that the right of way sold never extended beyond the fencing, such being the interpretation placed upon the conveyance by permitting P. to retain possession of the strip of land in question and the river *ad medium flum*; (3) that by ten years' possession as owner in good faith under transitory title the defendant had acquired ownership by the prescription of ten years, and (4) that, by thirty years' adverse possession without title, the defendant and his *auteurs* had acquired a title to the strip of land and riparian rights in question. On appeal the Supreme Court, *Held*, 1. That the description in the deed to the railway company included, *ex jure naturæ*, the river *ad medium flum aquæ* as an incident of the grant and that their title could not be defeated by subsequent conveyance through their vendor and warrantor, notwithstanding that they may not have taken physical possession of all the lands described in the prior conveyance. 2. That the possession of the strip of land and the waters and bed of the river *ad medium flum* by the vendor and his assigns, after the conveyance to the company, was not the possession *animo domini* required for the acquisitive prescription of ten years under art. 2251 C. C., but merely an occupation as tenant by sufrance upon which no such prescription could be based. 3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the lands conveyed. 4. That the terms of the description in the subsequent conveyance by P. to the defendant's *auteur* were a limitation equivalent to an express reservation of that part of the property which had been previously conveyed to the company and prevented the defendant acquiring title by ten years' prescription, and further that he was charged with notice of the prior conveyance through the registration of the deed to the company. 5. That the acquisitive prescription of thirty years under art. 2242 C. C., could not run in favour of the original vendor who had warranted title to the lands conveyed to the company because, after his sale to them, he could not possess any part of the property which he had failed to deliver *animo domini* nor in good faith.—The judgment appealed from was reversed on the questions of law as summarized, Davies, J., *dubitante*, but the findings, on conflicting testimony in respect of damages, made by the trial judge were not disturbed on the appeal.—On the question raised as to the right of action to recover the lands and for damages caused to the permanent way, it was *Held*, affirming the judgment appealed from, that the lease to the companies which held and operated the railway, amounted to an emphyteutic lease assigning the *domaine utile* and all the plaintiffs' rights in respect of the railway, reserving, however, the *domaine direct*, and, consequently, the plaintiffs had the right of action *au pétitoire* as owners of the legal estate, although the right of action for the damages, if any, sustained would belong to the lessees.—

Semble that, if necessary, the lessees might have been allowed to be added as parties, plaintiffs in the action, in order to recover any damages which might have been sustained, if there had been any satisfactory proof that damages had been caused through the fault of the defendant. *Massawippi Valley Ry. Co. v. Reed*, xxxiii, 457.

9. *Escrow—Estoppel—Covenant that grant-or was seized in fee.*

See DEED, 20.

10. *Mortgage—Parol agreement to sell—Expropriation—Compensation—Married woman—R. S. N. S. (4 ser.) c. 36, s. 40.*

See ADMINISTRATION, 1.

11. *Deed—Bail à rente—Onerous title—Evidence to vary deed—Substitution—Rente foncière—Sale—Donation—Prohibition to alienate—18 Vict. c. 250—Domaine de la seigneurie de la Rivière-du-Loup—Arts. 970, 1234 C. C.*

See DEED, 4.

12. *Promise of sale—Resolutive condition—Resciliation—Mise en demeure.*

See CONTRACT, 4

13. *Plan of survey—Description in deed—Conventional boundary—Mistake—Specific performance—Statute of Frauds—Licensed use.*

See BOUNDARY, 1.

14. *Error in mortgage—Omission in description—Rectification—Estoppel.*

See VENDOR AND PURCHASER, 19.

15. *Security for loan—Deed absolute in form—Purchase for value without notice—Registration.*

See MORTGAGE, 34.

16. *Husband and wife—Fraudulent conveyance—Recovery of land.*

See EJECTMENT, 1.

17. *Fraudulent conveyance—Control of insolvent estate—Possession—Sale by assignee.*

See No. 133, *infra*.

18. *Misdescription—Non-existent subdivision—Crown grant avoided.*

See CROWN, 91.

19. *Mortgage of trust estate—Equity running with estate—Equitable recourse—Construction of deed—Description of lands—Falsa demonstratio—Water lots—Accretion to lands—After acquired title—Contribution to redeem—Discharge of mortgage—Parol evidence to explain deed—Estoppel by deed.*

See DEED, 26.

20. *Right of redemption—Third parties—Delivery and possession of thing sold.*

See PLEDGE, 8.

21. *Ambiguous description—Possession—Presumptions in favour of occupant.*

See DEED, 27.

22. *Life estate — Substitution — Privileges and hypothecs — Mortgage by institute — Preferred claims — Prior incumbrance — Registry laws — Sheriff's sale — Chose jugée — Estoppel — Grosses réparations.*

See No. 35, *infra*.

23. *Railways — Expropriation of land — Title to land — Tenants in common — Propriétaires par indivis — Construction of agreement — Misdescription — Plans and books of reference — Satisfaction of condition as to indemnity — Registry laws — Estoppel — R. S. Q. arts. 5163, 5164 — Art. 1590 C. C.*

See RAILWAYS, 32.

24. *Description of lands — Metes and bounds — Sale en bloc — Possession beyond boundaries — Prescription — Construction of deed — Notice — Sale to married woman — Propre de communauté — Cadastral plans and descriptions.*

See No. 87, *infra*.

25. *Construction of contract — Sale of mining claim — Breach of agreement — Re-conveyance — Enhanced value.*

See MINES AND MINERALS, 21.

26. *Authorization to married woman — Dover — Interdiction of husband — Renunciation of succession — Donation by interdict.*

See No. 111, *infra*.

2. EVIDENCE OF TITLE.

27. *Crown lands — Letters patent — Parliamentary title — Equitable defence — 38 Vict. c. 12 (Man.) — 35 Vict. c. 23 (U.)*]. — In 1875 L. applied for a homestead entry for land preempted by F., and paid \$10 fee at the Dominion Lands Office, but was subsequently informed that his application could not be recognized, and the \$10 refunded. F. subsequently paid for the land by bounty warrant under 35 Vict. c. 23, s. 23. L. entered upon the land and made improvements. In 1878, after claims by F. and L. had been considered the land was granted by the Crown to F., who brought ejectment against L. to recover possession. F., as proof of his title, put in the letters patent, and L. was allowed, against the objection of counsel, to set up an equitable defence and go into evidence attacking the grant as having been issued in error, and by improvidence and fraud. A verdict for the defendant was maintained by the Court of Queen's Bench for Manitoba. *Held*, reversing the judgment appealed from (Man. Rep. Temp. Wood, 233), that L., not being in possession under the statute, had no parliamentary title to the possession of the land, nor any title whatever that could prevail against the title of F. under the grant. — *Per* Gwynne, J. Under the practice prevailing in England in 1870, in force in Manitoba under 38 Vict. c. 12, at the time of suit, an equitable defence could not be set up in an action of ejectment. *Farmer v. Livingstone*, v., 221.

[See note (o) at p. 254, Man. Rep. Temp. Wood.]

28. *Lost grant — Statute of Frauds — Parol evidence — Trust — Costs on equal division of court.*]. — Bill for account of the rents and purchase money received by defendant upon the lease and sale of lot 18 containing 100 acres of land, in which the plaintiff's father (now

dead) and the defendant his brother were jointly interested. Deceased had for years assisted defendant in improving and cultivating this lot, on which they lived. Defendant had spoken of his brother having a deed of 50 acres of the place on which he lived. Defendant, who had the fee of the whole lot, had, in 1850, made a deed to his brother of some land, which plaintiff insisted was 50 acres of this lot, but this deed had been lost. Defendant admitted having given his brother a deed of the adjoining lot 17 to enable him to vote. It contained 120 acres and defendant's only interest in it was, that the person from whom he purchased lot 18, had cleared a few acres on it, and the Inspector of Clergy Reserves reported that he claimed the lot, but he was never recognized as a purchaser, and never made any payment on account of the land. The deed to deceased had never been registered. In 1856, defendant made a lease of lots 17 and 18 to F. through deceased, and in 1875 sold lot 18 to F. with the concurrence of deceased. Defendant swore that deceased had never made any claim to the rent, and denied the whole case attempted to be made by the plaintiff, but his evidence was not consistent or corroborated. *Held*, affirming the judgment appealed from (4 Ont. App. R. 63), *per* Ritchie, C.J., and Fournier and Henry, JJ. That the evidence sufficiently established a deed by defendant to his brother of one-half of lot 18 for valuable consideration, that the understanding between the brothers was that when the land should be sold, a sale should be effected for their joint benefit, and that the land was sold to F., by defendant, with the knowledge and concurrence of his brother and for the benefit of both. Therefore the defendant should account to his brothers' representatives for his brother's share, as money had and received. — *Per* Strong, Taschereau and Gwynne, JJ. Although the evidence sufficiently established a deed for valuable consideration by defendant to his brother of one-half of lot 18, there was not sufficient evidence of either trust or contract as regards the payment of any portion of the purchase money received by the defendant, on the sale made by him, to entitle the plaintiff to any relief. — The court being equally divided, the appeal was dismissed without costs. *Curry v. Curry*, Cass. Dig. (2 ed.) 778.

29. *Action en déclaration d'hypothèque — Translatory title — Prescription — Good faith — Arts. 2251, 2202, 2253 C. C. — Judicial admission — Art. 1245 C. C. — Art. 320 C. C. P.*]. — The respondents having lent a sum of money to one Liboiron, subsequently, on the 9th May, 1876, took a transfer of his property by the deed *en dation de paiement*, in which the registered title deed of Liboiron to the same was referred to and by which it also appeared that the appellants had a *baillleurs de fonds* claim on the property in question. Liboiron remained in possession and sub-let part of the premises, collected the rents and continued to pay interest to the appellants for some years on the *baillleurs de fonds* claim. In 1887 the appellants took out an action en *déclaration d'hypothèque* for the balance due on their *baillleurs de fonds* claim. The respondents pleaded that they had acquired in good faith the property by a translatory title, and had become freed of the hypothec by ten years' possession. Art. 2251 C. C. *Held*, reversing the judgments of the courts below, that the oral and documentary evidence in the case as to the actual knowledge on the respondents' part of the existence of this regis-

tered hypothec or *baillleurs de fonds* claim was sufficient to rebut the presumption of good faith when they purchased the property in 1876, and therefore they could not invoke the prescription of ten years. Fournier, J., dissented.—In their declaration the appellants alleged that the respondents had been in possession of the property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the 9th May, 1876, the words "1st December, 1886." The motion was refused by the Superior Court, which held that the admission amounted to a judicial avowal from which they could not recede, and the Court of Queen's Bench affirmed this decision.—On appeal to the Supreme Court it was *Held*, reversing the judgment of the court below, Fournier, J., dissenting, that the motion should have been allowed by the Superior Court so as to make the allegation of possession conform with the facts as disclosed by the evidence. Art. 1245 C. C. *Baker v. Société de Construction Métropolitaine*, xxii., 364.

30. *Tenants in common — Will — Remainder — Adverse possession — Decease of remainderman — Estate of inheritance — Owner in fee — Statute of Limitations.*

See No. 57, *infra*.

31. *Form of deed — Signature by cross — Registry laws — Purchaser of litigious rights — Commencement of proof in writing — Warrant or impeaching title.*

See No. 5, *ante*.

3. INCUMBRANCES.

32. *Accretion — Riparian lands — Right of access — Implied extinction by statute — Cobourg harbour works—22 Vict. c. 72—10 Geo. IV. c. 11.]—Under authority of 10 Geo. IV. c. 11, the Cobourg Harbour Company, in 1820 constructed a wharf, southerly from the road allowance between lots 16 and 17 of the Township of Hamilton, which forms Division street in the Town of Cobourg. By mud and earth raised by dredging and gradual accretions, prevented from washing away by crib-work, the original wharf was widened to the full width of Division street, and the company built a store house and a fence dividing it from the land at the water's edge which appellant had gained by accretion since the original wharf was made. The appellant filed a bill complaining that access to this alluvial land was obstructed by the store house and fence, and asked a decree for their removal. The judgment appealed from reversed the decree and dismissed the bill with costs. *Held*, affirming the Court of Appeal for Ontario, (2 Ont. App. R. 195), that land gained by alluvial deposits from natural or artificial causes, or from causes in part natural and in part artificial, so long as the accretion was gradual and imperceptible, accrues to the owner of the adjacent land; that the store house and fence complained of were not built on the street, but on an artificial structure constructed under statutory authority for harbour purposes, and therefore, appellant was not entitled to indemnity for obstruction of access to his alluvial land through the premises of the respondents; that the public right of way from the end of Division street to the water's edge, was extinguished by*

statute by necessary implication. *Corporation of Yarmouth v. Simmons* (10 Ch. D. 18) followed. *Standly v. Perry*, iii., 356.

33. *Easement — Right of way — Lanes shewn on sale plan—Subsequent acceptance of conveyance according to altered plan — Estoppel.]—The City of Toronto offered land for sale, according to a plan shewing one block of 5 lots, each about 200 feet in depth, running from east to west, bounded north and south by a lane, and east by a lane running along the whole depth of the block and connecting the other two lanes. South of this block was a similar block of smaller lots, running north and south. The lane at the east of the first lot was a continuation, after crossing the long lane between the blocks, of lot 10 in the second block. The advertisement of sale stated that "lanes run in rear of the several lots." M. purchased the first block, and C. lot 10 in the second. Before registry of the plan, M. applied to the city council to have the lane at the east of the block closed up and included in his lease, which was granted. C. then objected to taking a lease of his lot with the lane closed, but afterwards accepted a lease which described the land as leased according to the plan exhibited at the sale and plan 352 (which shewed the lane closed). He brought an action against the city and M. to have the lane re-opened. *Held*, affirming the judgment appealed from (11 Ont. App. R. 416), that C. having accepted a lease after the lane was closed, in which reference was made to plan 352, he was bound by its terms and had no claim to a right of way over land thereby shewn to be included in the lease to M.—*Per Gwynne, J.* Under the contract evidenced by the advertisement and public sale C. acquired no right to the use of the lane afterwards closed. *Carey v. City of Toronto*, xiv., 172.*

34. *Seigniorial tenure—Deed of concession—Construction of deed—Words of limitation — Covenant by grantee—Charges running with the title — Servitude — Condition si voluero — Prescriptive title — Edits & ordonnances (L. C.) — Municipal regulations — 23 Vict. (Can.) c. 85.]—In 1768 the Seigneur of Berthier granted an island called "l'Isle du Milieu," lying adjacent to the "Common of Berthier," to M. his heirs and assigns (*ses heirs et ayants cause*) in consideration of certain fixed annual payments and subject to the following stipulation: "en outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la commune, sans aucun recours ni garantie à cet égard de la part du sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour surêté de quoi il a hypothéqué tous ses biens présents et à venir et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre." *Held*, reversing the decision of the Court of Queen's Bench, Strong, C.J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee but created a real charge or servitude upon l'Isle du Milieu for the benefit of the "Common of Berthier."—That the servitude consisted in suffering inroads from the cattle of the common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence.—This servitude results not only from the terms of the seigniorial grant, but also from the circumstances and conduct of the*

parties from a time immemorial.—That the two lots of land, although not contiguous, were sufficiently close together to permit the creation of a servitude by one in favour of the other.—That the stipulation as contained in the original grant of 1768 was not merely facultative.—That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements. *La Commune de Berthier v. Denis*, xxvii., 147.

35. *Entail—Life estate—Substitution—Privileges and hypothecs—Construction of statute—16 Vict. c. 25 and 77—Mortgage by institute—Preferred claim—Prior incumbrancer—Registry laws—Practice—Sheriff's sale—Chose jugée—Parties—Vis major—Estoppel—Arts. 945, 947, 950, 951, 953, 956, 958, 959, 2060, 2172 C. C.—Art. 707-711 C. C. P.—Art. 781 C. P. Q.—Sheriff's deed—Grosses réparations.*—Upon being judicially authorized, the institute in possession of a parcel of land in the City of Montreal, *grévé de substitution*, and a curator appointed to the substitution, mortgaged the land, under the provisions of the Act for the relief of sufferers by the Montreal fire of 1852, 16 Vict. c. 25, to obtain a loan which was expended in re-constructing buildings on the property. Default was made in payment of the mortgage moneys and the mortgagor obtained judgment against the institute and caused the land to be sold in execution by the sheriff in a suit to which the curator had not been made a party. *Held*, that as the mortgage had been judicially authorized and was given special preference by the statute superior to any rights or interests that might arise under the substitution, the sale by the sheriff, in execution of the judgment so recovered, discharged the land from the substitution not yet open and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grévé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the lands.—An institute, *grévé de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major* in order to make necessary and extensive repairs (*grosses réparations*), upon obtaining judicial authorization, and in such a case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata* and the substitute called to the substitution is estopped from contestation of the necessity and extent of the repairs.—The sheriff seized and sold lands under execution against a defendant described in the writ of execution, process of seizure and in the deed to the purchaser as "*grévé de substitution*." *Held*, that the term used was merely descriptive of the defendant and did not limit the estate sold or conveyed under the execution. Judgment of the Court of Queen's Bench for Lower Canada affirmed, *Taschereau* and King, JJ., dissenting. *Held*, further, *per Taschereau, J.*, that art. 2172 of the Civil Code of Lower Canada, as interpreted by the statute 39 Vict. c. 26, applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate. *Vadeboncaur v. The City of Montreal*, xxix., 9.

36. *Title to land—Substitution—Acceptance by institute—Parent and child—Rights of*

*children not yet born—Arts. 930, 2191, 2193, 2202, 2207, 2251, 2253 C. C.]—A substitution created by a donation *inter vivos* in favour of the children of the institute, even before they are born, is irrevocable after acceptance by their parent, and the law of the Province of Quebec on the subject, as declared by the Civil Code, is the same as the old law of that province in existence before the promulgation of the Civil Code of Lower Canada.—Where an institute has accepted a donation creating a substitution in favour of his children his acceptance as institute constitutes valid acceptance of the substitution on behalf of his children. *Meloche v. Simpson*, xxix., 375.*

[Leave to appeal to the Privy Council refused.]

37. *Construction of deed—Partition—Charge upon lands.]—A deed for the partition of land held in common contained a conveyance of a portion thereof to M. W., for certain considerations therein recited of which one was the condition that she should procure from her minor children, upon their coming of age, the necessary quitclaim deeds for the release of their interest in another portion of the land in question apportioned and conveyed to her co-parceners, and the amount of certain payments of money then made for the purpose of effectuating the partition, was by the deed of partition declared to remain a lien on that portion of the land thereby conveyed to M. W. until such quitclaims should have been obtained and delivered to her said co-parceners. *Held*, that the said recital was sufficient to charge that portion of the said land so conveyed to M. W. with the amount of the said payments of money as a security for the due execution and delivery of the quitclaims in conformity with the condition stipulated in the deed of partition. *Green v. Ward*, xxix., 572.*

38. *Right of way—Easement—User.]—A right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purpose in respect to any other property. Judgment appealed from (26 Ont. App. R. 95) affirmed. *Purdum v. Robinson*, xxx., 64.*

39. *Easement—Sale of land—Unity of possession—Severance—Continuous user.]—When two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous easement passes with the sale as an absolute legal right. But the easement must have been enjoyed by the former owner at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale. Judgment appealed from (32 N. S. Rep 340) affirmed. *Hart v. McMullen*, xxx., 245.*

40. *Appeal—Jurisdiction—Scrivitude—Action confessoire—Execution of judgment therein—Localization of right of way—Opposition to writ of possession—Matter in controversy—Future rights.]—An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has*

no jurisdiction to entertain an appeal. *O'Dell v. Gregory* (24 Can. S. C. R. 661) followed; *Chamberland v. Fortier* (23 Can. S. C. R. 371) and *McGoey v. Leamy* (27 Can. S. C. R. 193) distinguished.—If the jurisdiction of the court is doubtful the appeal must be quashed. *Langevin v. Les Commissaires d'Ecole de St. Marc* (18 Can. S. C. R. 599) followed. *Cully v. Ferdaiz*, xxx., 330.

41. *Trespass — Overhanging roof—Right of view — Evidence — Boundary line—Waiver—Servitude.*—In 1844 the defendants constructed a toll-house close to or on the boundary of their land with windows overlooking an adjoining vacant lot, and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or by any subsequent owner till after the purchase of the lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable and defendants paid the costs of the necessary alteration. In 1900 the plaintiff instituted the present action against defendants to have the remaining projection of the roof demolished and the windows closed up. There was no evidence that there ever had been a division line established between the properties and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty. *Held*, affirming the judgment appealed from, *Strong, C.J.*, dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute, and consequently that his action could not be maintained. *Held*, further, *per Girouard, J.*, following *Delorme v. Cusson* (28 Can. S. C. R. 66), that, as the plaintiff and his *auteurs* had waived objection to the manner in which the toll-house had been constructed and permitted the roof and windows to remain there, the demolition could not be required at least so long as the building continued to exist in the condition in which it had been so constructed. *Parent v. The Quebec North Shore Turnpike Road Trustees*, xxxi., 556.

42. *Devise of real property — Condition of will—Restraint on alienation.*—A devisee of real estate under a will was restrained from selling or encumbering the property for a period of twenty-five years after the death of the testator. *Held*, reversing the judgment appealed from, that as the restraint, if general, would have been void the limitation as to time did not make it valid. *Blackburn v. McCallum*, xxxiii., 65.

43. *Easement — Trespass—Notice — Party wall—Registration—Visible incumbrance.*

See DEED, 41, and NOTICE, 3.

44. *Trespass — Boundaries — Easement—Estoppel.*

See USER, 2.

45. *Improvements in watercourse—Flooding lands—Servitude — Possession—Prescription.*

See RIPARIAN RIGHTS, 2.

46. *Substituted roadway—Right to original road allowance—Adjoining lands—Public uses.*

See HIGHWAYS, 33.

47. *Sale of substituted lands—Restoration—Damages—Revendication — Prescription—Art. 2268 C. C.—Bad faith—Evidence.*

See SUBSTITUTION, 4.

48. *Action en déclaration d'hypothèque—Translatory title—Prescription—Good faith—Judicial admission.*

See No. 29, ante.

49. *Public highway—Private roads—Registered plan—Dedication—User — Construction of statute—Retrospective statute—Estoppel—46 Vict. (O.) c. 18.*

See MUNICIPAL CORPORATION, 169.

50. *Sheriff's sale—Deed—Action to vacate—Petition—Exposure to eviction—Actio condictio indebiti—Refund of price paid—Substitution not yet open — Prior incumbrance — Arts. 706, 710, 714, 715 C. C. P.—Arts. 1511, 1535, 1586, 1591, 2060 C. C.*

See SUBSTITUTION, 7.

51. *Vacating sheriff's sale — Substitution non ouverte—Discharge of incumbrance.*

See No. 67, infra.

52. *Estoppel — Acquiescement — Floatable waters—Water power—River improvements—Joint user—Servitude — Arts. 400, 549, 550, 551 and 1213 C. C.*

See SERVITUDE, 7.

53. *Water lots—Trespass—Harvesting ice.*

See RIVERS AND STREAMS, 5.

54. *Interdiction — Marriage laws—Authorization — Dower — Registry laws — Sheriff's deed—Warranty — Succession—Renunciation — Donation by interdict.*

See No. 111, infra.

4. INHERITANCE, SUCCESSION AND DEVISE.

55. *Will—Devise void for remoteness—Rule as to inheritance — Intestacy — Estate tail—Descent to heir-at-law.*—A devise to a first great grandson, still unborn, is void for remoteness.—A devise of this kind, shewing no intention to give another an estate or interest independent of or unconnected with the devise to the great grandson, makes no valid disposition to disinherit the heir-at-law. (*Strong, J.*, dissented).—*Per Ritchie, J.* Where a rule of law, independent of and paramount to the testator's intentions, defeats the devise, the proper course is to let the property go as the law directs in cases of intestacy. *Ferguson v. Ferguson*, ii., 497.

See 7 Ont. App. R. 452, and also WILL, 26.

56. *Will—Devise—Mortgage — Foreclosure—Suit to sell real estate for debts—Decree—Conveyance by purchaser — Assignment of mortgage—Statute confirming title—5 Geo. II. c. 7 (Imp.)—R. S. N. S. (4 ser.) c. 36, s. 47.]—A. M. died in 1838 and by his will left real estate to his wife, M. M., for her life, and after her death to their children. At his death there were two small mortgages on the real estate to one T. which were subsequently foreclosed, but no sale was made under the decree on foreclosure. In 1841 the mortgages and interest of the mortgagee in the foreclosure suit were assigned to one U. who, in 1849,*

assigned and released the same to M. M. In 1841 M. M., administrator with will annexed of A. M., filed a bill under 5 Geo. II. c. 7 (Imp.), for the sale of this real estate to pay debts of the estate, she having previously applied to the Governor-in-Council, under a provincial statute, for leave to sell, which was refused. A decree was made and the lands sold, M. M. becoming purchaser. She afterwards conveyed the lands to the Commissioners of the Lunatic Asylum, and the title passed, by various Acts of the Legislature, to the defendants. M. K., devisee under the will of A. M., brought ejectment for recovery of the lands, and contended that the sale under the decree was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor-in-Council. The validity of the mortgages and of the proceeding in the foreclosure sale were also attacked. The action was tried before a judge without a jury and a verdict was found for defendants, which the Supreme Court refused to disturb. *Held*, affirming the judgment appealed from (6 Russ. & Geld. 92), that even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee, T., or those claiming under her, the assignment of the mortgages being merely a release of the debts and not passing the real estate, and the plaintiff, therefore, could not recover in an action of ejectment.—*Seemle*, that such sale was not invalid but passed a good title, the statute 5 Geo. II. c. 7, being in force in the Province. Henry, J., *dubitante*. — *Held*, also, that the statute R. S. N. S. (4 ser.) c. 36, s. 47, vested the land in defendants if they had not a title to the same before. Henry, J., *dubitante*. *Kearney v. Creelman*, xiv. 33.

[The Privy Council refused leave to appeal from this judgment.]

57. *Tenants in common—Will—Remainder—Adverse possession—Decease of remainderman—Estate of inheritance—Owner in fee—Statute of Limitations.*—On appeal from a judgment of Rose, J., affirmed by the Divisional Court, the judgment of the Court of Appeal for Ontario recited in effect, that action was for a declaration that plaintiff had an estate in fee simple in remainder in lands subject to an estate in defendant H. for the life of defendant R. Defendants denied any title whatever in plaintiff, and relied on actual possession and title by Statute of Limitations.—That on 4th June, 1844, W. R. conveyed the whole of lot 55 . . . Spadina avenue, Toronto, to J. H. and S. H. in fee simple, as tenants in common, and the conveyance was duly registered.—On 14th August, 1846, J. H., by his will, devised to his wife, Anne, for life or widowhood, all his real estate "consisting of the N. $\frac{1}{2}$ of lot 55." The will then proceeded: "The above named property left to my wife at the end of her natural life or when she become married again, I then will and bequeath to my brother S. H. during his natural life, and then at the expiration of that time it is to go to my heir. I also will and bequeath to my heir one sterling shilling. I hereby appoint my brother Simon sole executor."—J. H. and S. H. were step-brothers without any blood relationship between them.—J. H. died in 1847 leaving his wife Anne surviving him, and there is no evidence who was his heir-at-law. It was agreed by counsel on the argument that no one has ever come forward to claim the property as heir.—On the death of J. H. his widow A. H. went into s. c. d.—45.

possession until her death in June, 1856.—On the 12th May, 1854, S. H. made his will as follows: "I give all my property real and personal to my wife Eliza to be enjoyed by her during her natural life, and after her death I give to my adopted son G. W. and his heirs one-half of the lot that I own on Spadina avenue together with the house erected on the said half-lot in which I now reside; and the other half of the said lot with the house erected on the last mentioned half lot I give, devise and bequeath to W. and P. H. the sons of R. H. and their heirs after the death of my said wife. In this last mentioned half-lot I have an estate in remainder expectant upon the death of Anne H. who has a life estate in the same." He died in January, 1855, leaving him surviving not only his own wife Eliza, but also the widow of J. H.—Anne H. died in June, 1856, and upon her death Eliza H. took possession, and some time afterwards married again a man named A. R.—On 8th November, 1867, R. and his wife leased the land for 15 years to P., reciting that S. H. had been seized thereof in his lifetime, and by his will had devised the same to his wife for her natural life, and on 15th December, 1870, this lease was assigned to C.—A. R., the husband, having died, his widow on 1st September, 1873, made another lease of the whole lot 55 to the same C. for the term of her natural life. In the lease the land is described as more particularly described in the deed from W. R. to S. H. of 3rd June, 1844, and recited that the lessor's former husband, S. H., had by will devised the land to her for her life. This lease was surrendered, and on 16th October, 1882, Mrs. R. made a new lease of the whole lot for the term of her natural life to M. M., describing the land in the same manner and with the same recitals as the lease of September, 1873, to C.—In 1882 and 1884 respectively plaintiff acquired by purchase the estates in remainder of W. and P. H., named in the will of S. H. as devisees in fee after the death of Mrs. H., and in 1888 he was negotiating with Mrs. R., for a conveyance of her life estate, and a quit claim deed to plaintiff was prepared and approved of by Mrs. R.'s solicitors, but was not executed.—On 22nd September, 1888, Mrs. R. by deed, expressed to be for \$5,000, conveyed the whole lot 55 in fee to her co-defendant H., reciting that about February, 1855, she entered into adverse possession thereof and has ever since demeaned herself as owner thereof, and continued and is now in undisputed possession and occupation of the same, whereby her title thereto has become absolute and indefeasible.—Action was brought on 22nd October, to determine the rights of the parties.—The parties signed admissions of the facts to the effect stated above, with this qualification. The first admission is: "That J. H. was in his lifetime the owner in fee of N. $\frac{1}{2}$ of lot 55, plan D 10, on W. side Spadina avenue, Toronto, which is the land mentioned in plaintiff's statement of claim." The deed of the whole lot to both J. H. and S. H. as tenants in common in fee was not produced or referred to. This admission without anything further might well be taken to mean that J. H. was the sole owner of this land in his lifetime and at the time of his death, and accordingly the case was argued before the trial judge upon that footing, and upon this supposition that when S. H. made his will he had no title or interest in the land but what he derived under the will of J. H., viz., a life

estate expectant on a prior life estate in Anne H., and that having predeceased her he had nothing to devise, and that nothing did or could pass to any one by his will. Under these circumstances the question was whether, although nothing could pass by her husband's will, Mrs. R. (or H.) having entered and occupied as tenant for life under the will, was not estopped as against the plaintiff from denying that her husband had title, and whether she could set up the Statutes of Limitations against the plaintiff's estate in remainder.—Rose, J., held that defendants were estopped, and gave judgment for the plaintiff, from which defendants appealed to the Divisional Court.—“While the case was before the Divisional Court the conveyance of 1844, was, at the suggestion of the court, produced in evidence, and that court expressing no dissent from the grounds on which Rose, J., had disposed of the case, held that it was manifest from the deed that Mrs. R.'s possession was under the will of her husband and that she could not be allowed to set up the Statutes of Limitations against the plaintiff claiming under the same will.—On the next appeal the argument of appellant was that S. H. having no title but a life estate, expectant on a prior life estate in Anne H., and having predeceased her, had no interest whatever which he could dispose of by his will, and that when Mrs. J. H. died S. H.'s widow could get nothing, not even possession by virtue of her husband's will, that she could take possession like any stranger, and if she did no one could turn her out but J. H.'s heir-at-law, that just as she could get nothing under the will so neither could W. and P. H., or the plaintiff claiming under them, and unless he could shew some title from J. H.'s heir-at-law, he must fail. The Court of Appeal thought the first question was whether upon the evidence, as it then was, S. H. had not a title when he made his will and when he died, quite independently of J. H.'s will.—That the admissions of title to J. H. in his lifetime, read in the light of the deed of 1844, under which his title was acquired, shews that while it was the fact that J. H. had title there was also title to S. H., and that the latter had an estate in the land at the time of his death which passed by his will to his widow (now Mrs. R.), for life with remainder in fee to W. and P. H., who conveyed to plaintiff; that the judgment might well be supported on the ground on which it was rested by the trial judge, on the supposition that S. H. had no title when he made his will or when he died, but only a life estate. On that supposition this case is not distinguishable from *Board v. Board* (L. R. 9 Q. B. 48), and was not affected by *Re Stringer's Trusts* (6 Chy. D. 1), because it is distinguishable for the reasons explained by the Chancellor in *Smith v. Smith* (5 Ont. R. 695), *Clarke v. Adie* (2 App. Cas. 435).—The judgment in favour of plaintiff was affirmed. Held, as to the first ground taken by the Court of Appeal, that the evidence did not support it, for by the case in which the action was launched and by the admissions of counsel, as well as by the direct statement of S. H.'s will, J. H. owned the N. $\frac{1}{2}$ of the lot. As to the second ground, that S. H. when he died having no estate or interest in the property which could pass by his will or any possession, his widow entered as a stranger, and adversely to the heirs of J. H.; that the statements in the leases, which were statements made to strangers, could not prevent

the statute from running in her favour against the heirs of S. H., much less to give title to parties who would have taken in remainder under S. H.'s will, if S. H. had owned in fee, or had had such possession as would have raised a presumption of ownership in fee; and therefore there was no case calling for any interference of the court to make a declaration as to the title of the lot in favour of the plaintiff as against the defendants.—*Per Patterson, J.* The judgment of the Court of Appeal proceeds upon grounds which would be of force if S. H. had died seized as did the testator in *Broad v. Broad* (L. R. 9 Q. B. 48), or had had possession so as to give operation to the principle of *Asher v. Whitlock* (L. R. 1 Q. B. 1), or had title of any kind as in *Paine v. Jones* (L. R. 18 Eq. 320).—Appeal allowed with costs. *Hayes v. Coleman*, cf. Cass. Dig. (2 ed.) 833.

58. *Will — Devise for life — Remainder to devisee's children—Estate tail.*—Land was devised to D. for life “and to her children, if any, at her death,” if no children to testator's son and daughter. D. had no children when the will was made. Held, that the devise to D. was not of an estate in tail, but on her death her children took the fee. *Grant v. Fuller*, xxxiii., 34.

59. *Devise of real property — Condition of will—Restraint on alienation.*—A devisee of real estate under a will was restrained from selling or encumbering the property for a period of twenty-five years after the death of the testator. Held, reversing the judgment appealed from, that as the restraint, if general, would have been void the limitation as to time did not make it valid. *Blackburn v. McCullum*, xxxiii., 65.

60. *Contingent estate in fee — Executory devise over — Title by possession — Interruption of Statute of Limitations — Acceptance of conveyance of limited estate.*

See WILL, 57.

61. *Agreement to convey — Defect in title — Devise in fee with restriction against sale—Special legislation—Specific performance — Vendor and purchaser.*

See SPECIFIC PERFORMANCE, 5.

62. *Vendor and purchaser — Sale of lands — Waiver of objections — Lapse of time — Will, construction of — Executory devise over — Defeasible title — Rescission of contract.*

See WILL, 61.

63. *Estates tail — Executory devise over — “Dying without issue” — “Lawful heirs” — “Heirs of the body” — Estate in remainder expectant — Statutory title — Title by will — Conveyance by tenant in tail.*

See WILL, 19.

64. *Authorization to married woman — Dower — Interdiction of husband — Renunciation of succession — Donation by interdict.*

See No. 111., *infra*.

5. JUDICIAL TITLES.

65. *Ejectment — Action by devisee—Mortgage by testator — Foreclosure — Decree for*

sale — Payment of debts—Conveyance by purchaser — Assignment of mortgage — Statute confirming title.—A. M. died in 1838, and by his will left real estate to his wife, M. M., for life, and after her death to their children. At the time of his death there were two small mortgages on the real estate which were subsequently foreclosed, but no sale was made under the decree.—In 1841 the mortgages and the interest of the mortgagee in the foreclosure suit were assigned to U., who, in 1849, assigned and re-leased the same to M. M.—In 1841 M. M., administrator with will annexed of A. M., filed a bill in chancery (under 5 Geo. II., c. 7 [Imp.]) for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor-in-Council, under a statute of the province, for leave to sell the same, which was refused. A decree was made and the lands sold, M. M. becoming purchaser. She afterwards conveyed to the Commissioners of the Lunatic Asylum, and the title passed, by various Acts of the Legislature of Nova Scotia, to the present defendants. M. K., devisee under the will of A. M., brought an action of ejectment to recover the lands, and in the course of the trial contended that the sale under the decree in the chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor-in-Council. The validity of the mortgages and of the proceedings in the foreclosure suit were also attacked. The action was tried before a judge without a jury, and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb. (6 Russ. & Geld. 92).—*Held*, affirming the judgment appealed from, that even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, the assignment of the mortgages being merely a release of the debts and not passing the real estate, and the plaintiff, therefore, could not recover in an action of ejectment.—*Seem*, that such sale was not invalid, but passed a good title, the statute 5 Geo. II., c. 7 (Imp.) being in force in the province; Henry, J., *dubitante*.—*Held*, also, that the statute R. S. N. S. (4 ser.) c. 36, s. 47, vested the lands in the defendants, if they had not a title before. Henry, J. *dubitante*. *Kearney v. Creelman*, xiv, 33.

[The Privy Council refused leave to appeal in this case.]

66. *Entail — Life estate — Fiduciary substitution — Privileges and hypothecs — Mortgage by institute — Preferred claim — Prior incumbrancer — Vis major — 16 Vict. c. 25 — Registry laws — Practice — Sheriff's sale — Chose jugée — Parties — Estoppel—Sheriff's deed — Deed poll — Improvements on substituted property — Grosses réparations — Art. 2172 C. C.—29 Vict. c. 26 (Can.)*—The institute, *grévé de substitution*, in possession of land and curator to the substitution, upon judicial authority, mortgaged the land under the provisions of the Act for the relief of sufferers by the great Montreal fire of 1852 (16 Vict. c. 25), for a loan which was expended in re-constructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in execution by the sheriff in a suit to which the curator

had not been made a party. *Held*, that, as the mortgage had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the lands from the substitution not yet open, and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grévé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the said lands.

—An institute, *grévé de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major* in order to make necessary and extensive repairs (*grosses réparations*), upon obtaining judicial authorization, and in such case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata*, and the substitute called to the substitution is estopped from contestation of the necessity and expense of the repairs.—The sheriff seized and sold lands under a writ of execution against a defendant described therein and in the process of seizure and also in the deed by him to the purchaser, as *grévé de substitution*. *Held*, that the term used was merely descriptive of the defendant and did not limit the estate seized, sold or conveyed under the execution. *Held*, further, *per* Taschereau, J., that art. 2172 of the Civil Code of Lower Canada, as interpreted by the statute, 29 Vict. c. 26 (Can.), applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.—Judgment of the Court of Queen's Bench affirmed, Taschereau and King, JJ., dissenting. *Chef dit Vadeboncœur v. City of Montreal*, xxix., 9.

[Followed in *Deschamps v. Bury* (29 Can. S. C. R. 274), No. 67, *infra*.]

67. *Sheriff's sale — Vacating sale — Arts. 706, 710, 714, 715 C. C. P.—Refund of price paid — Exposure to eviction — Arts. 1511, 1535, 1586, 1591, 2060—Actio conducto indebiti — Substitution non ouverte — Prior incumbrance — Discharge — Procedure.*—The provisions of art. 714 C. C. P. do not apply to sheriffs' sales which have been perfected by payment of the price of adjudication and the execution of a deed, nor does that article give a right to have such a sale vacated and the amount so paid refunded.—A sheriff's sale in execution of a judgment against the owner of lands, *grévé de substitution*, based upon an obligation in a mortgage having priority over the deed creating a substitution, discharges the lands from the unopened substitution without the necessity of making the curator to the substitution a party to the proceedings. *Chef dit Vadeboncœur v. City of Montreal* (29 Can. S. C. R. 9) followed. *Deschamps v. Bury*, xxix., 274.

[See Q. R. 11 S. C. 397 and 12 S. C. 155, judgments of courts below affirmed by this decision.]

68. *Sale in execution — Procès verbal of seizure — Insufficient description — Nullity.*—Under art. 638 C. C. P. it is necessary, in addition to the official number on the cadastral plan to mention in addition, in a *procès verbal* of seizure, the names of the streets on which

subdivided lots have their frontage. *Montreal Loan and Mortgage Co. v. Fauteux*, iii., 411.

See *SHERIFF*, 2 and 3.

69. *Ratification of title—Crown pleading prescription—Translatory title—Estoppel.*

See No. 76, *infra*.

70. *Debt of executor — Judgment against estate — Purchase by executor at sheriff's sale—Trust—Possession by devisee—Statute of Limitations—Evidence.*

See No. 118, *infra*.

71. *Sheriff's deed — Nullity — Mala fides—Prescription—Equivocal possession.*

See *EVIDENCE*, 239.

72. *Certificate of title—Registration of tax deed—Priority.*

See No. 110, *infra*.

73. *Sale of land—Warranty—Construction of deed—Sheriff's deed—Sale of rights in land—Eviction under prior title.*

See No. 126, *infra*.

74. *Interdiction — Marriage laws—Authorization — Dower—Registry laws — Sheriff's deed—Warranty — Succession—Renunciation—Donation by interdict.*

See No. 111, *infra*.

5. POSSESSION.

(a) Limitations and Prescription.

75. *Estoppel — Married woman—Possession—Marchande publique—Opposition to seizure—Prescription—Renunciation of community—Arts. 1379, 2191 C. C.—Art. 632 C. C. P.]—In 1856 McC., *marchande publique*, acquired lands by deed, in the quality of a wife separated as to property from her husband. After his death in 1886, she renounced *communauté de biens* by *acte de renunciation*, which recited that said lands belonged to the community which subsisted between her and her late husband but remained in possession thereof. Upon seizure of the lands as belonging to the vacant estate of the deceased, she opposed the sale on the ground that the seizure was made *super non domino et non possidente*, and set up title and possession. *Held*, that by her declaration in the *acte de renunciation* the opposant had destroyed any title or possession she may have had to the lands and was estopped from contesting the seizure, and that she could not afterwards claim the lands under the former deeds or by prescriptive title by long possession. *McCorkill v. Knight*, iii., 233.*

See 1 Legal News, 42.

76. *Limitation of actions — 9 Vict. c. 37—Crown pleading prescription — Good faith—Translatory title — Ratification of title—Impenses et améliorations — Titre précaire—Inscription en faux—Arts. 2211, 2251, 2206 C. C.—Arts. 116, 473 C. C. P.—Estoppel.]—Suppliant claimed, as transferee of heirs of W., jr., lands granted by the Crown in January, 1806, to W., sr., and the rents, issues and profits. Pleas were filed: 1. Peremptory exception, setting up title deeds and possession in Her Majesty; 2. Prescription by 30, 20 and 10 years; 3. Exception that the transfers to peti-*

tioner were made without valid consideration, and he was purchaser of *droits litigieux*; 4. General issue; 5. supplementary plea claiming value of improvements. Answers, that the deeds of sale relied upon conveyed no right of property in the land; 2. Inscription *en faux* against a judgment of ratification of title to a part of the lands; 3. Denying the allegations of plea of prescription, and particularly the *bona fides*; 4. To the supplementary plea, bad faith on the part of the *détenteurs*, also general answers. Proof was made at *enquête* before a commissioner. In the Exchequer Court J. T. Taschereau, J., dismissed the petition with costs (4 Can. S. C. R. 7). On appeal to the Supreme Court of Canada:—*Held*, Fournier and Henry, JJ., dissenting. 1. That before and also under the Civil Code, art. 2211, the Crown had, in the Province of Quebec, the right to invoke prescription against a subject, which could be interrupted by legal proceedings. 2. That the Crown having acquired in good faith under translatory titles, had by ten years' peaceable, open and uninterrupted possession, acquired an unimpeachable title to the lands in question. 3. That art. 473 C. C. P. does not render the judgment attacked an absolute nullity merely for want of being paraphrased by the judge, especially as it was duly entered of record and registered in the register of the court. 4. That the petitioner was bound to have produced the minute, or draft of judgment attacked, but having only produced a certified copy of the judgment, the inscription *en faux* against the judgment falls to the ground. 5. That even if the title of one of the *auteurs* was *titre précaire*, the heirs by their own acts had ceded and abandoned all their rights and pretensions to the land in dispute, and that the petitioner who held under them was bound by their acts. *Held*, also, that the *impenses* claimed by the incidental demand of the Crown should have been payable by the petitioner, even if he had succeeded in his action. *Held*, per Taschereau and Gwynne, JJ. That a deed under 9 Vict. c. 37, s. 17, before a notary (though not under the seal of the commissioners) from a person in possession, and subsequently ratified by the Superior Court, was a valid deed, that all rights of property were purged, and that if any of the *auteurs* of the petitioner failed to urge their rights to the monies deposited by reason of the customary dower, the ratification of the title was none the less valid. *Chevrier v. The Queen*, iv., 1.

77. *Documentary title — Statutory title — Trespass—Plea of liberum tenementum—Possession.]—In an action of trespass quare clausum fregit for trying the title to land, the defendants pleaded not guilty; and that at the time of the alleged trespass the land was the freehold of two of the defendants, and they justified breaking and entering the close in their own right, and the other defendants as their servants, and by their command. The case was tried without a jury and a verdict rendered for plaintiff with \$30 damages. The judgment was set aside by the Common Pleas, and verdict entered for defendants under R. S. O. (1877) c. 50, s. 287. The Court of Appeal for Ontario reversed this judgment and restored the verdict as originally found. On appeal to the Supreme Court:—*Held*, that the defendants on whom the onus lay of proving their plea of *liberum tenementum*, had not proved a valid documentary title, or possession for twenty years of that actual, continuous and visible character necessary to give them a title under the Statute of Limitations; there-*

fore plaintiff was entitled to his verdict. *HENRY, J.*, dissenting. *McConaghy v. Denmark*, iv., 609.

78. *Tenant at will—Caretaker — New tenancy—Statute of Limitations — Possession—Findings of fact.*—The plaintiff's father allowed him to occupy 100 acres of a block consisting of 400 acres, and he was to look after the whole, to pay taxes, to take timber for his own use, but not to give any timber to any one else, or allow any one else to take it. He settled in 1849 upon the south half of lot No. 1 and, having got a deed for the same in November, 1864, he sold it and, in December following, moved to the north half where he remained ever since. The father died in 1877, devising the north half of the north half (the land in dispute) to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres by the will, entered upon it, and plaintiff brought trespass, claiming title by possession. The trial judge found that the plaintiff entered into possession and so continued merely as caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent to move plaintiff off the land, because he had allowed timber to be taken, and that plaintiff undertook to cut no more, to pay the taxes and to give up possession whenever required to do so by his father. *Held*, reversing the Court of Appeal for Ontario (4 Ont. App. R. 563), that the evidence established the creation of a new tenancy at will within ten years.—*Per Gwynne, J.* That there was also abundant evidence from which the judge at the trial might fairly conclude, as he did, that the relationship of servant, agent or caretaker, in virtue of which the respondent first acquired the possession, continued throughout, and that an appellate court ought to have reversed on questions of fact. *Ryan v. Ryan*, v., 387.

[Followed in *Heward v. O'Donohoe*, 19 Can. S. C. R. 341. See No. 80, *infra*.]

79. *Statute of Limitations — Possession of tenant—Life estate — Remainder—Joint tenants—Survivorship.*—In 1837 lands were conveyed in trust for E. A. for her life, with remainder as follows: Lot No. 2 to G. A., and lot No. 1 to A. A., to the use of them, their heirs and assigns, as joint tenants and not as tenants in common. The tenant for life, entered into possession of lot No. 2, and in 1862 put her son (husband of defendant) into possession without exacting rent; he died a few months after, and the widow continued in possession, and was in possession in 1875, when the tenant for life died. In 1878, A. A. obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action for recovery of lot No. 2.—*Held*, affirming the judgment appealed from (7 Ont. App. R. 592; 2 C. L. T. 544), that as there was no time prior to the death of the tenant for life when either the trustees or those entitled in remainder could have interfered with the possession of the lot, the Statute of Limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.—*Held*, also, that for the purposes of the action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the

joint tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs. *Adamson v. Adamson*, xii., 563.

80. *Caretaker in occupation — Severance of title — Fencing — Possession—Prescription.*—In an action against O. to recover possession of land it was shewn that he had been in possession over 20 years; that he was originally in as a caretaker for one of the owners; that afterwards the property was severed by judicial decree and such owner was ordered to convey certain portions to the others; that after the severance O. performed acts shewing that he was still acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways. *Held*, reversing the judgment appealed from (18 Ont. App. R. 529), that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker and he had acquired no title by possession. *Ryan v. Ryan* (5 Can. S. C. R. 387) followed. *Heward v. O'Donohoe*, xix., 341.

See No. 78, *ante*.

81. *Possession — Statute of Limitations—38 Vict. c. 16 (O.)—Non-claim.*—C. R., at the time of his death (1864) was owner in fee and died intestate leaving him surviving his widow M. R., but no issue. After his death the widow remained in possession and occupation, by herself, or her tenants, of the whole premises up to her death (6th October, 1881). By lease on 3rd May, 1881, she demised the premises to O. for 5 years from 1st April, 1881. At the time of her death O. was in possession as tenant under this lease.—The plaintiff had for some years resided with M. R. on the premises, and continued to reside there some time after M. R.'s death, but subsequently left O. as tenant in possession. One of the defendants, pretending to be an heir at-law of the late C. R., shortly after the death of M. R., procured O. to accept from him a lease of the premises for one year, and to attorn to him as landlord.—On 24th October, 1882, plaintiff took action against O., then in possession, claiming title as residuary devisee under the last will of M. R., who had acquired title by length of possession subsequent to the death of her husband. The defendant Ross obtained an order to defend as landlord, and he was made a party defendant in the action. In his defence he claimed title as one of the heirs-at-law of C. R., and alleged an agreement by M. R. with the heirs-at-law by which she had been permitted to occupy the land by way of assignment of dower for life, that she had occupied as caretaker and by virtue of such agreement, and that her occupation was not adverse to his title, or that of the other heirs-at-law.—At the trial the judge entered a verdict for defendant. The full court set aside the verdict and directed judgment to be entered for the plaintiff. Ross appealed, and the Court of Appeal for Ontario affirmed the judgment of the court below. *Held*, affirming the judgment appealed from, that there was no evidence of an agreement between the heirs-at-law of C. R. and his widow that she should occupy the land during her life in lieu of dower, and nothing to shew that the heirs could not have brought an action and recovered the land at any time between the death of

C. R. and 1st July, 1877, when their right and title were extinguished or ceased by virtue of the statute, 38 Vict. c. 16 (Ont.). *Oliver v. Johnston*, Cass. Dig. (2 ed.) 651.

See 3 O. R. 26.

82. *Trespass — Statute of Limitations — Evidence—Possession—Description of lands.*—Action by F. for trespass for breaking and entering plaintiff's close, described as land and land covered with water in Dartmouth, being and forming the bed, bank and waters of the stream leading from Dartmouth First Lake and falling into the waters of Halifax Harbour, and breaking down fences and walls of plaintiff there standing. The case was tried in 1873 before a jury, who were unable to agree and were discharged by the judge without rendering a verdict. No further proceedings were taken in the cause until November, 1878, when plaintiff, assignee in insolvency of F., having intervened, it was ordered, by consent of parties, that a verdict should be entered for plaintiff upon the evidence taken by the judge, and the cause remitted to the full court *in banco*, which should have power to draw inferences of fact as a jury might and to enter judgment for either party, and, in case of verdict for the plaintiff, power to fix damages. Plaintiff claimed the *locus in quo*, under deed from the I. & R. Navigation Co., executed by the president and secretary to F. on 1st April, 1870. Defendant claimed under deed from the executors of S., as land to which S. acquired title by possession, as far back as 1832, and continuing up to the time of his death in 1870.—The Supreme Court (N. S.) entered judgment for the defendant with costs. *Held*, affirming the judgment appealed from, that plaintiff failed to shew beyond a reasonable doubt that the *locus in quo* was within the boundary of the canal property and included in the deed to F., and the court below was justified in coming to an opposite conclusion; and further, that if the property was so included and the company ever had a title to the *locus*, there was evidence of such an exclusive and continuous possession that any such right or title was barred by the Statute of Limitations. *Creighton v. Kuhn*, Cass Dig. (2 ed.) 845.

83. *Crown grant — Disseisin of grantee — Tortious possession — Conveyance to married woman — Effect of execution of, by husband—Statute of Maintenance, 32 Hy. VIII., c. 9 —Statute of Limitations.*—In 1828 certain land in Upper Canada was granted by the Crown to King's College. In 1841, while one, M., who had entered on the land was in possession, King's College conveyed it to G.. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land, the defendants, claiming title through M., set up the Statute of Limitations, alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the Statute of Maintenance, and G. had, therefore, nothing to convey in 1849. *Held*, that it was not proved that the possession of M. began before the grant from the Crown, but assuming that it did M. could not avail himself of the Statute of Maintenance as he would have to establish disseisin of the grantor, and the Crown could not be disseised; nor would the statute avail as against the patentee as the original entry not being tortious the posses-

sion would not become adverse without a new entry. *Held*, further, that if the possession began after the grant the deed to G. in 1841 was not absolutely void under the Statute of Maintenance, but only void as against the party in possession, and M. being in possession a conveyance to him would have been good under s. 4 of the statute, and the deed to his wife, a person appointed by him, was equally good. Further, M. by his assent to the conveyance to his wife and subsequent acts was estopped from denying the title of his wife's grantor. Judgment appealed from (19 Ont. App. R. 564) affirmed. *Webb v. Marsh*, xxii., 437.

84. *Old survey — Error — Boundaries — Possession — Statute of Limitations.*—Appeals were taken from decisions of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the respondent in each case. They had, respectively, brought actions against the appellant for trespass to land which were defended on the ground of want of title in the plaintiffs and title by possession in the defendant. At the trial evidence was given by plaintiff of a survey of the lands, and defendant's land adjoining, made in 1809, by a provincial land surveyor, in which, as he reported to the Crown Land Department, he had made a mistake owing to a bend in the circumference of his compass and which he corrected by moving the posts he had planted as the line was traced. The defendant claimed that the line as first run was the true line. As to possession the evidence was that defendant had cut timber on the land in dispute for many years, and also tapped maple trees for sugar, but had not fenced the land until some six or seven years prior to the action. The trial judge found that plaintiffs had respectively proved title to their land and that the acts of ownership shewn by defendant were mere acts of trespass committed either wilfully or in ignorance as to boundaries and not such as would enable his possession to ripen into a title.—The Supreme Court affirmed the decision of the Court of Appeal in both cases and dismissed the appeals. *Horton v. Casey*; *Horton v. Humphries*, xxii., 739.

85. *Disseisin — Adverse possession—Paper title — Joint possession — Statute of Limitations.*—A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's County, N. S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg County, which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land, and in 1866 he conveyed the whole to a son of C., then about 24 years old, who resided with C., from the time he took possession. Both deeds were registered in Queen's County. The son shortly after married and went to live on the Queen's County portion. He died in 1872, and his widow, after living with C. for a time, married P. and went back to Queen's County. P. worked on the Lunenburg land with C. for a few years, when a dispute arose and he left. C. afterwards, by an intermediate deed, conveyed the land in Lunenburg County to his wife. On one occasion P. sent a cow upon the land in Lunenburg County, which was driven off, and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for

such entry the title to the land was not traced back beyond the deed executed in 1856. *Held*, affirming the decision of the Supreme Court of Nova Scotia (25 N. S. Rep. 1), that C's son not having a clear documentary title his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him; that neither he nor his successors in title ever had actual possession of the land in Lunenburg County; that the possession of C. was never interfered with by the deeds executed; and having continued in possession for more than twenty years, C. had a title to the land in Lunenburg County by prescription. *Parks v. Cahoon*, xxiii, 92.

86. *Partition of land — Tenants in common — Statute of Limitations — Possession.*—Under the Nova Scotia Statute of Limitations (R. S. N. S. [5 ser.] c. 112) a possession of land in order to ripen into a title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period the law will attribute the interruption to the person having title.—Possession by a series of persons during the necessary period will bar the title though some of such persons in possession were not in privity with their predecessors.—Where one or two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favour of the tenant in possession. Judgment appealed from (32 N. S. Rep. 1) affirmed. *Handley v. Archibald*, xxx, 130.

87. *Description of lands—Metes and bounds — Sale en bloc—Possession beyond boundaries — Prescription — Construction of deed — Notice — Sale to married woman — Propre de communauté — Cadastral plan and description — Arts. 1503, 2168, 2174, 2185, 2210, 2227, 2232, 2251, 2254 C. C.*—In June, 1868, by deed of gift, P. granted to his son, F., an emplacement, described by metes and bounds and stated to have 30 feet frontage, "tel que le tout est actuellement . . . et que l'acquéreur dit bien connaître" declaring, in the deed, that the donation had actually been made in 1860, although no deed had been executed, and that since then F. had been in possession as owner and erected buildings. Under this donation the donee and his vendees claimed 36 feet frontage as having been actually occupied by him and them since F. took possession as owner in 1860, and also that plaintiff had acquired a prescriptive title by 10 years' possession with title, at the time of the present action in 1897, which was taken to recover possession of the disputed six feet then in occupation of defendant, whom plaintiff alleged to be a trespasser. *Held*, that the deed in 1868 operated as an interruption of prescription and limited the title to 30 feet frontage as therein described.—Plaintiff's wife purchased from F. in 1885 by deed describing the emplacement in a manner similar to the description in the donation, but also making reference to its number on the cadastral plan of the parish which described it as of greater width. *Held*, that the description in the deed of 1885 left the true limits of the emplacement subject to determination according to the title held by the plaintiff's *auteur* which granted only 30 feet frontage; that by the registered title plaintiff was charged with

either actual or implied notice of this fact and that, consequently, he had not, in good faith, possessed more than 30 feet frontage under this deed and could not invoke an acquisitive prescription of title to the disputed 6 feet by 10 years' possession thereunder, and further, that no augmentation of the lands originally granted could take place in consequence of the cadastral description of the emplacement.—The words "Tel que le tout est actuellement et que l'acquéreur dit bien connaître" used in the deed of gift, cannot be interpreted in contradiction of the special description that precedes them and can only be construed as extending "dans les limites ci-dessus décrites."—A prescriptive title to lands beyond the boundaries limited by the description in the deed of conveyance can only be acquired by 30 years' possession.—*Quære*, Is a deed of sale of lands in Quebec to a married woman without the authorization of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under art. 2254 C. C., to serve as the ground for a prescription of ownership under translatory title, by 10 years' possession? *Chalifour v. Parent*, xxxi, 224.

88. *Possessory title — Statute of Limitations.*—In 1892, M. obtained a grant of land from the Crown and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years, when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons, who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896, the descendants of the younger children of M. gave a deed of this land to B., who proceeded to cut timber from it. In an action for trespass by P., *Held*, affirming the judgment appealed from, that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870, which had ripened into a title. If not, the deed to his sons, in 1870, gave them exclusive possession and, if they had not a perfect title then, they had twenty years after, in 1890. *Bently v. Peppard*, xxxiii, 444.

89. *Acquisition by prescription—Possession — Trespass on wild lands—Isolated acts—Statute of Limitations.*—Isolated acts of trespass committed on wild lands from year to year will not give the trespasser a title under the Statute of Limitations. *Sherren v. Pearson*, xiv, 581.

See PRESCRIPTION, 15.

90. *Right of way — Easement — Common use—Prescription.*

See USER, 1.

91. *Ordnance lands — Reversion of lands not in use for canal purposes—Limitation of actions—User by the Crown—Purchase in conflict with public use.*

See RIDEAU CANAL LANDS, 2.

92. *Watercourses — Flooding lands — Servitude—Possession—Prescription.*

See RIPARIAN RIGHTS, 2.

93. *Escheat — Fraud — Champerty — Litigious rights—Limitation of action.*

See No. 131, *infra*.

94. *Debt of executor — Judgment against estate—Purchase by executor at sheriff's sale —Trust—Possession by devisee—Statute of Limitations—Evidence.*

See No. 118, *infra*.

95. *Tenants in common — Will — Remainder — Adverse possession — Decease of remainderman — Estate of inheritance—Owner in fee—Statute of Limitations.*

See No. 57, *ante*.

96. *Action en déclaration d'hypothèque — Translatory title—Prescription—Good faith—Judicial admission.*

See No. 29, *ante*.

97. *Location of railway — Fencing—Laying out boundaries—Construction of deed — Notice — Possession — Prescriptive title—Tenant by sufferance.*

See No. 8, *ante*.

(b) Evidence of Possession.

98. *Dominion Lands Act, 35 Vict. c. 23, s. 33, s.-s. 7, 8—Homestead patent—Equitable or statutory title—Demurrer—39 Vict. c. 23, s. 69.]—The plaintiff, in his bill of complaint, alleged in the 6th paragraph as follows:—“Prior to the 1st of May, 1875, the plaintiff made application to homestead the lands, and procured proper affidavits, according to the statute, whereby he proved to the satisfaction of the Dominion Lands Agent in that behalf (and the plaintiff charges the same to be true), that the defendant had never settled on or improved the lands assumed to be homesteaded by him, or the lands in question, but had been absent therefrom continuously since his pretended homesteading and pre-emption entries, and thereupon the claim of the defendant under the said entries became and was forfeited, and any pretended rights thereunder ceased, and the plaintiff about the 8th May, 1875, and with the assent and by direction of the Dominion Lands Agent, signed an application for a homestead right to the lands, according to Form A, in 35 Vict. c. 23, s. 33, and made affidavit according to Form B. in s. 33, s.-s. 7 of the Act and paid to the agent the homestead fee of \$10, accepted as the homestead fee, and thereupon plaintiff was informed that he had done all that was necessary or required under the statute and regulations of the department, and that the statute said: Upon making this affidavit and filing it, and on payment of an office fee of \$10, he should be permitted to enter the lands specified in the application; and thereupon and in pursuance thereof, and in good faith, the plaintiff did forthwith enter upon said land and take actual possession, and has ever since remained in actual occupation thereof, and erected a house and buildings thereon, cleared a portion and fenced and cultivated the same, and made valuable improvements. Demurrer for want of equity. Held, reversing the judgment appealed from (Man. L. R. Temp. Wood, 233), Taschereau and Gwynne, JJ., dissenting, and allowing the demurrer, that the plaintiff had no *locus standi* to attack the validity of the patent issued by the Crown to the defendant,*

as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of s. 69 or of s.-ss. 7 & 8 of s. 33 of 35 Vict. c. 23, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the Crown, or a sufficient allegation that the Crown was ignorant of the facts of plaintiff's possession and improvements.—*Per Strong, J.*, that when the Crown had issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot set up equities behind the patent. *Farmer v. Livingstone*, viii., 140.

99. *Lessor and lessee — Estoppel — Injunction — Bill for account — Possession fraudulently obtained — Evidence — Proof of title — Tax sale — Chancery jurisdiction in ejectment—R. S. O. (1877) c. 40, s. 87—33 Vict. c. 23 (Ont.)]—N., as assignee of H., who bought a lot of land from the purchaser at a sale for taxes, filed a bill against W. & O., who were in possession, for possession of the land and an account for value of trees, &c., cut down and removed. W. by his answer adopted O.'s possession, claimed under Crown grant, and impeached the validity of the sale for taxes. O. alleged possession under W. It was proved that H. leased to T. for four years, that O. by fraudulent representations induced T. to leave the place and thereby obtained possession for the benefit of W. The Court of Chancery (29 Gr. 338) held that defendants were obliged to yield up possession before asserting title in themselves. The Court of Appeal for Ontario declared that the decree should be without prejudice to any proceeding W. might be advised to take to establish his title within two months. *Held, per Ritchie, C.J., and Strong, Fournier and Henry, JJ.*, affirming the judgment appealed from, that defendants having gone into possession under T., were estopped in this suit from disputing their landlord's title, and that plaintiff was entitled to an injunction to restrain waste and an account for waste already committed.—*Per Strong, J.* The Chancellor's decree would have constituted no bar to a subsequent action at law or suit in equity by W. to impeach the tax sale, and should not have been varied by the Court of Appeal.—*Per Gwynne, J.* The case should have been disposed of upon the issue as to the validity of title upon which the plaintiff had by his bill rested his case, and as defendants failed to prove that the taxes had been paid before the sale, the statute, 33 Vict. c. 23 (Ont.) removed all defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and pursuant to the provisions of R. S. O. (1877) c. 40, s. 87, plaintiff was entitled to recover possession of the land and have execution therefor, but not to an order for injunction or account, the statute authorizing title to lands to be tried in chancery not justifying a judgment of a more extensive character than would have been pronounced in a court of common law if the action had been brought there. *White v. Nelles*, xi., 587.*

100. *Trespass — Marsh lands — Possession — Evidence — Accretion — Justification as commissioner of sewers—R. S. N. S. (4 ser.) c. 40—“New work”—Sanction of proprietors—Findings of fact.]—The land upon which trespass is alleged to have been committed is*

a salt marsh lying outside of a dyked marsh, between the dykes and the River Avon. It had been formed within 40 years, by an accumulation of mud from time to time, in front of plaintiff's land. It had been staked off for many years on the north-east, designating the division line between that part of it claimed and used for cutting grass by plaintiff, on one side, and his neighbour C. on the other. It is bounded on the N. W. by the running dyke; on the N. E. by the stakes mentioned; and on all the other portions of it by the Avon River, and Windmill Creek. After the mud sufficiently accumulated grass began to grow, which was cut for years by the plaintiff's brother, who died before the suit, having made his will, by which he devised to plaintiff all landed property of which he died possessed. The stakes were there since about 1855 or 1856, one of them being a solid, permanent one, and the others, if carried away, being replaced, from time to time, by new ones, taking the solid stake as a guide. Plaintiff and his brother on one side of these stakes, and C. on the other, cut the grass year after year, or allowed others to do so, although the land does not appear to have yielded grass worth cutting till about 13 years before (one witness said 17). Since that time plaintiff, either for his brother or for himself, cut and took away the grass growing there, or permitted others to do so. Defendant, as commissioner of sewers, undertook to cut a ditch through the property to carry away water from a dyke, alleging that the means formerly used were inadequate for that purpose, and claiming that the work came within the first part of R. S. N. S. (4 ser.) c. 40, s. 4, authorizing a commissioner to build or repair dykes; that it was not new work within the meaning of the last part of that section, and did not require the consent of two-thirds in interest, of the proprietors of the land. In answer to a question submitted the jury found that the work was new work.—A rule *nisi* for a new trial was discharged. Weatherbe and Smith, JJ., dissenting.—*Held*, that there was evidence establishing a continuous exclusive possession by plaintiff, for many years, quite sufficient to enable him to maintain an action of trespass against a wrongdoer who interfered with that possession.—The question of "new work" was purely a question of fact for the jury, and they having found in the affirmative, their finding should not be reversed. The intention of the Legislature would appear to be to empower the commissioners of sewers to act in making ordinary repairs, or in any sudden emergency, without consultation with or the consent of the proprietors, but that these proprietors should not be taxed for the construction of any new work not immediately essential to the preservation or interests of common property, without their consent to such work being first obtained.—As the defendant entered upon plaintiff's property to perform this work, without the sanction of the proprietors first obtained, he could not justify the trespass under his commission.—Appeal dismissed with costs, and the judgment appealed from (5 R. & G. 388) affirmed, Henry, J., dissenting. *Davidson v. Burnham*, Cass. Dig. (2 ed.) 846.

101. *Boundaries — Road allowance — Evidence.*—The action was for possession of land, the parties being at issue as to the boundaries between their adjoining properties. The decision depended upon the existence or non-existence of a road allowance between the lots, and the trial judge held that proof of certain

monuments having been placed on the lots by early surveyors was incompatible with its existence. His decision was reversed by the Court of Appeal for Ontario (21 Ont. App. R. 110).—The Supreme Court of Canada held that the evidence was sufficient to shew that there was a road allowance; that the decision of the trial judge was rightly overruled, and dismissed the appeal with costs. *Caldwell v. Kenny*, xxiv., 699.

102. *Boundaries — Evidence—Prescription.*—The rector and wardens of St. Paul's Church, London, Ont., brought the action for possession of land fenced in by defendants, who pleaded title to part and a right of way over the remainder. The Court of Appeal (21 Ont. App. R. 323) reversed the decision of the Chancery Division and gave judgment for plaintiffs who, however, claimed a greater width of land than the judgment allowed and filed a cross-appeal to defendant's appeal from such judgment.—The Supreme Court of Canada affirmed the judgment appealed from, and appeal and cross-appeal were dismissed with costs for the reasons of Maclellan, J., in the Court of Appeal. *Ferguson v. Innes*, xxiv., 703.

103. *Possession — Crown patent — Prior grant—Prescription.*—The action was for possession of land, plaintiffs claiming title by possession and defendants through a grant from the Crown in 1892, and a conveyance from the owner of adjoining land. It was shewn that the Crown had granted this land before the beginning of the present century, and the courts below held that the Crown had nothing to grant in 1892, having by the prior grant parted with its title and never resumed it, and there was nothing to shew that the owner of the adjoining land had any title to the locus.—The Supreme Court of Canada affirmed the judgment appealed from (27 N. S. Rep. 74), which had affirmed the trial court judgment, dismissing the plaintiff's action. *Chisholm v. Robinson*, xxiv., 704.

104. *Trespass—Cutting timber — Confusion of chattels—Possession—Replevin.*
See ACTION, 130.

105. *Control of insolvent estate — Fraudulent conveyance—Possession—Sale by assignee.*
See No. 133, *infra*.

106. *Encroachment on boundary — Good faith—Common error — Right of accession—Demolition of works—Indemnity.*
See No. 136, *infra*.

107. *Form of deed — Signature by cross—Registry laws—Purchaser of litigious rights—Commencement of proof in writing—Warrant or impeaching title.*
See No. 5, *ante*.

108. *Exercising acts of ownership—Vendor and purchaser—Specific performance—Laches—Waiver.*
See VENDOR AND PURCHASER, 33.

109. *Location of railway — Boundary—Riparian rights—Fencing—Location of permanent way—Conduct of parties — Estoppel by deed—Construction of deed.*
See No. 8, *ante*.

7. REGISTRATION.

110. *Registry law—Registration of tax deed—Certificate of title—Priority over earlier certificate—R. S. B. C. c. 111.*]—Section 13 of the B. C. Land Registry Act (R. S. B. C. c. 111) provides that a person claiming ownership in a fee of land may apply for registration thereof, and the registrar, on being satisfied after examination of the title deeds, that a *prima facie* case is established shall register the title in the "Register of Absolute Fees." Section 19, which authorizes the registrar to issue a certificate of title to the person so registering, contains the provision: "Every certificate of title shall be received as *prima facie* evidence in all courts of justice in the province, of the particulars therein set forth." And by s. 23 "the registered owner of an absolute fee shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he may possess." . . . *Held*, affirming the judgment appealed from (7 B. C. Rep. 12, *sub nom. Kirk v. Kirkland*), that a certificate of title issued on registration of a deed from the assessor of taxes issued to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with. *Johnson v. Kirk*, xxx., 344.

111. *Interdiction—Marriage laws—Authorization by interdicted husband—Dower—Registry laws—Sheriff's sale—Warranty—Succession—Renunciation—Donation by interdict—Arts. 1467, 2116 C. C.—44 & 45 Vict. c. 16—46 Vict. c. 25—47 Vict. c. 15 (Que.)*]—The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed and must also contain a description sufficient to identify the lands sought to be affected.—A sale by the sheriff under execution against a debtor in possession of an immoveable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of art. 2116 of the Civil Code.—*Per Taschereau, J.* Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which such vendor has given warranty.—*Semble*, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization. *Rousseau v. Burland*, xxxii., 541.

112. *Estate tail—Mortgage in fee—Statutory discharge—Conveyance of legal estate of mortgagee—Bar of entail—R. S. O. (1877) c. 111, ss. 9, 67.*]—The execution and registration, in accordance with the R. S. O. (1877) c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail re-conveys the land to the mortgagor barred of the entail. Judgment of the Court of Appeal for Ontario (6 Ont. App. R. 312) reversed, Henry, J., dissenting. *Lawlor v. Lawlor*, x., 194.

113. *Equitable title—Registered deed—Constructive notice—Actual notice—Parol agreement.*

See MORTGAGE, 34.

114. *Trespass—Damages—Easement—Equitable interest—Municipal by-law—Notice—Registration—R. S. O. (1877) c. 114.*

See MUNICIPAL CORPORATION, 89.

115. *Real Property Act—Registration—Unregistered transfers—Equitable rights—Sales under execution—R. S. C. c. 51; 51 Vict. (D.) c. 20.*

See REGISTRY LAWS, 31.

116. *Life estate—Substitution—Privileges and hypothecs—Mortgage by institute—Preferred claims—Prior incumbrance—Registry laws—Sheriff's sale—Chose jugée—Estoppel—Grosses réparations.*

See No. 35, ante.

8. TRUSTS.

117. *Purchase of land—Joint negotiations—Deed to one only—Evidence—Resulting trust.*]—M. & S. jointly negotiated for the purchase of land, and a deed was given to S. alone, a portion of the purchase money being secured by the joint notes of M. & S. In an action by S. to have it declared that M. had no interest in the property; *Held*, reversing the judgment appealed from (13 Ont. App. R. 561), and affirming the judgment of the trial judge, Henry, J., dissenting, that the evidence greatly preponderated in favour of the contention of M. that the purchase was a joint one by himself and S. *Held*, also, that S. being liable for an ascertained portion of the purchase money there was a resulting trust in his favour for his interest in the land. *McKercher v. Sanderson*, xv., 296.

118. *Judgment against estate for debt of executor—Sheriff's sale—Purchase by executor—Trust—Possession by devisee—Statute of Limitations—Evidence.*]—Judgment was recovered against executors of an estate on a note made by D. M., one of the executors, and indorsed by testator for his accommodation. In 1849 land devised by testator to A. M., another son, was sold under execution issued on said judgment and purchased by D. M. who, in 1853, conveyed it to another brother, W. M. In 1865 it was sold under execution issued on a judgment against W. M., and again purchased by D. M. In 1888 A. M., the devisee of the land under the will, took forcible possession thereof and D. M. brought an action against him for possession. *Held*, affirming the judgment appealed from (17 Ont. App. R. 192), Strong, J., dissenting, that the sale in 1849 being for his own debt D. M. did not acquire title to the land for his own benefit thereby, but became a trustee for A. M., the devisee, and this trust continued when he purchased it the second time in 1865. *Held*, also, that if D. M. was in a position to claim the benefit of the Statute of Limitations the evidence did not establish the possession necessary to give him a title thereunder. *McDonald v. McDonald*, xxi., 201.

119. *Conveyance to trustee—Legal estate—Cloud on title—Agreement for sale by holders of equity—Party entitled to price.*]—R. devised all his estate to his widow and, in event

of her death without having disposed thereof, to his surviving children. The estate having become involved, an absolute deed of all the real estate was executed to one of testator's children by the widow and other children, the grantee undertaking to pay off the liabilities and improve the estate, and on being re-paid, to re-convey to all the heirs in equal proportions. The grantee managed the estate for several years, but was obliged to surrender it to trustees for benefit of creditors, when it was owing her \$18,000.—A portion of the estate was sold for taxes, and the purchaser at the tax sale obtained quit claim deeds from the heirs to perfect his title, and also to obtain title to 100 acres of timber land belonging to the estate which was not included in the assignment for benefit of creditors. Similar quit claim deeds had previously been given for portions of the lands, and the moneys paid for the same distributed in equal proportions among the surviving children and grandchildren. Before payment by the tax sale purchaser, the deed by the widow and children (which had been mislaid for several years, the grantee under it having died) was discovered, and the children of the grantee claimed the whole of the money. Action was brought by the other heirs for their respective shares and they obtained a judgment, the trial judge holding that an agreement was proved between the parties that the money should be equally divided. This decision was affirmed by the Divisional Court, but reversed on appeal. Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the purchaser at the tax sale paid the money in order to obtain a perfect title, and as the defendants were the only persons who could give such title, the legal estate being in them, the plaintiffs could not claim any part of the money, no agreement with the defendants to apportion it being proved, and any agreement made by the plaintiffs with the purchasers not being binding on the defendants. *Draper v. Radenhurst*, xxi., 714.

120. *By estate — Contract by trustee — Lands set out for canal purposes — Compensation for lands taken — Statutes respecting Rideau Canal lands — Statute of Limitations.*

See RIDEAU CANAL LANDS, 1.

121. *Charitable trust — Grant of school lands — Discretion of trustees — Cy-près doctrine.*

See TRUSTS, 3.

122. *Ordinance lands — Limitation of actions — Reversion — User by Crown — Public policy.*

See RIDEAU CANAL LANDS, 2.

123. *Lost grant — Joint interests — Statute of Frauds — Parol evidence — Rents, issues and profits.*

See No. 28, ante.

AND see TRUSTS.

9. WARRANTY.

124. *Sale of land — Warranty — Special agreement — Knowledge of cause of eviction — Damages.*—Art. 1512 C. C.]—A warranty of title accompanying a sale of lands does not constitute the special agreement mentioned in art.

1512 of the Civil Code of Lower Canada in respect to liability to damages for eviction. *Allen v. Price*, xxx., 536.

125. *Legal warranty — Description — Plan of subdivision — Change in street line — Accession*—Arts. 1506, 1508, 1520 C. C. — Arts. 1, 86, 187, 168 C. P. Q. — *Troubles de droit — Eviction — Issues on appeal — Parties.*]—A vendor of land, described according to an existing plan of subdivision, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently, by municipal authorities, of powers in respect to the alteration of the street line. — A party called into a petitory action, to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments maintaining both the principal action, and the action in warranty, although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. Judgment appealed from (Q. R. 10 Q. B. 245), affirmed. *Monarque v. Banque Jacques-Cartier*, xxxi., 474.

126. *Sale of land — Warranty — Construction of deed — Sheriff's deed — Sale of rights in lands — Eviction by claimant under prior title.*]—By deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff in the lands therein mentioned and of which he was actually in possession, and that the immovable belonged to him as having been acquired at the sheriff's sale. Held, reversing the judgment appealed from, the Chief Justice and Taschereau, J., dissenting, that the warranty covenanted by the vendor had reference merely to the rights he may have acquired in the lands under the sheriff's deed and did not oblige him to protect the purchaser against eviction by a person in possession claiming under prior title to a portion of the lands. *Ducondou v. Dupuy* (9 App. Cas. 150) followed. *Drouin v. Morissette*, xxxi., 563.

127. *Form of deed — Signature by cross — Registry laws — Purchaser of litigious rights — Commencement of proof in writing — Warrantor impeaching title.*]—The grantees of the warrantors of a title cannot avail themselves of technical objections thereto in a suit with the person to whom the warranty was given. *Powell v. Watters*, xxviii., 133.

See No. 5, ante.

10. OTHER CASES.

128. *Injunction — 41 Vict. c. 14 (Que.) — Sale of Crown lands — Current timber license.*]—Under 41 Vict. c. 14 (Que.), the company, in November, 1881, as proprietors in possession of lands, obtained an *ex parte* injunction, restraining appellant from prosecuting lumbering operations begun in virtue of a license from the Government, dated 3rd May, 1881, which was a renewal of a former license. By order-in-council, dated 7th April, 1884, the Commissioner of Crown Lands was authorized to sell the lands in question to the company, and the company deposited \$12,000 on account of the intended purchase. On 9th May the

company gave a contract for the clearing of a portion of the land, and on 19th July, the commissioner executed a grant in favour of the company, subject "to the current licenses to cut timber on the lots." The Superior Court dissolved the injunction. The Queen's Bench reversed the Superior Court judgment and the injunction was made absolute. The Supreme Court reversed the judgment of the Court of Queen's Bench and *Held*, (Henry and Gwynne, JJ., dissenting), that the company had not acquired title to the lands in question prior to the 19th July, 1881; that by the grant of that date their rights were subordinated to all current licenses, and appellants having established their right to possess the lands for the purposes of their lumbering operations under the license from the Crown, the injunction had been properly dissolved by the Superior Court. *Hall v. Dominion of Canada Land and Colonization Co.*, viii., 631.

129. *Riparian rights—Registration of plan of subdivision—Subsequent grant—Description according to plan—Evidence—Grant by specific name—Boundaries.*—The defendant was proprietor of a piece of land on the side of a river, the boundary on the river side being high water-mark: *Held*, that the lateral or riparian contact of the land with the water would suffice to entitle the appellant to object to any unauthorized inference with the flow of the river in its natural state.—In 1859 the owners of a portion of the land had a plan of subdivision thereof prepared and registered, and in 1871 conveyed a parcel described as block "F." *Held*, that it must be presumed they intended to convey the same parcel of land shewn on said plan as block "F." with the same natural boundaries as those therein indicated; and that the evidence of professional draughtsmen was properly admitted to shew what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plans were intended to indicate.—When a close or parcel of land is granted by a specific name, and it can be shewn what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not shew the whole contents of the land as included in the designation by which it is known. *Attrill v. Pratt*, x., 425.

130. *Crown lands—Setting aside letters patent—Error and improvidence—Superior title—Evidence—Res judicata—Estoppel against the Crown.*—Letters patent issued to F. of lands claimed by him under The Manitoba Act (35 Vict. c. 3, as amended by 35 Vict. c. 52), and an information was filed under R. S. C. c. 54, s. 57, at the instance of a relator claiming part of said lands, to set aside letters patent as issued in error or improvidence. *Held*, reversing the judgment appealed from (5 Man. L. R. 173, 1. That a judgment avoiding letters patent upon such an information could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by *scire facias*. 2. The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are in-

juriously affected by the letters patent; and F.'s title having been recognized by the Government as good and valid under the Manitoba Act and the lands granted to him in recognition of that right, the letters patent could not be set aside as having been issued improvidently except upon the ground that some other person had a superior title also valid under the Act. 3. Letters patent cannot be judicially pronounced to have been issued in error or improvidence when lands have been granted upon which a trespasser, having no colour of right in law, has entered and was in possession without the knowledge of the Government officials upon whom rests the duty of executing and issuing the letters patent, and of investigating and passing judgment upon the claims therefor; or when such trespasser, or any person claiming under him, has not made any application for letters patent; or when such an application has been made and refused without any express determination of the officials refusing the application, or any record having been made of the application having been made or rejected.—*Per Patterson, J.* In the construction of the statute effect must be given to the term improvidence as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the court to form a definite opinion as to the relative strength of opposing claims.—*Semble, per Gwynne, J.* There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as an individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca v. Atty.-Gen. of Canada* xvii., 612.

131. *Escheat—Failure of heirs—Tierce-opposition to judgment—Interest of opposant—Intervention—Sale of litigious rights—Fraud—Champerty—Arts. 989, 990, 1485, 1583, 2187, 2216, 2243, 2265 C. C.—Arts. 154, 510 C. C. P.—Judgment—Limitation of action.*—Appellant filed a *tierce-opposition* to a judgment obtained by the Attorney-General of Quebec in 1884, in a suit commenced by information in 1790 against the succession of one M. P. to have the judgment set aside on the ground that it declared escheated to the Crown a part of the Seignior of Grondines, of which appellant had been in possession for many years, and which judgment, it was alleged, had been obtained illegally and by fraud and collusion. M., an advocate who had purchased all the rights of the Crown in the succession, intervened and asked for the dismissal of the *tierce-opposition*. The Attorney-General and the curator to the succession of M. P., the only parties to the judgment sought to be set aside, in answer to the *tierce-opposition* merely appeared and declared "*ils s'en rapportent à justice*." The Superior Court dismissed M.'s intervention and maintained the *tierce-opposition*. On appeal by the Crown and M. jointly, this judgment was reversed, and the *tierce-opposition* dismissed. *Held*, reversing the judgment appealed from, 1. That M. had no *locus standi* to intervene, the sale to him of the Crown's right being void (a) because it was a sale of

litigious rights to an advocate prohibited by arts. 1485 and 1583 C. C., and therefore null under arts. 14 and 990 C. C.; (b) because it was tainted with champerty; (c) because M. admitted he had no interest in the case. 2. That appellant, being in possession of the property declared escheated to the Crown in a proceeding to which he was not a party, had a sufficient interest under the circumstances in the case to file a *tierce-opposition*, and that the judgment of 1884 should be set aside because *inter alia*, (a) it was obtained by fraud and collusion; (b) the action being prescribed in 1884 appellant, under art. 2187, C. C., had the right to avail himself of this prescription.—Fournier, J., dissented on the ground that as the appellant had not alleged or shewn a right superior to that of the Crown to serve as a basis for prescription his *tierce-opposition* should be dismissed. *Price v. Mercier*, xviii., 303.

132. *Crown property*—*B. N. A. Act, 1867—Foreshore of harbour—Grant from Provincial Government—Conveyance by grantee—Dower—Pleading—Estoppel—Act confirming title.*—After the B. N. A. Act, 1867, came into force the Government of Nova Scotia granted to S. part of the foreshore of the harbour of Sydney, C. B. S. conveyed this lot through the C. B. Coal Co. to defendant. S. having died, his widow brought action for dower, to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government. *Held*, affirming the judgment appealed from (23 N. S. Rep. 214), Strong and Gwynne, JJ., dissenting, that the company having obtained title to the property from S. they were estopped from saying that his title was defective. — *Per* Strong and Gwynne, JJ., dissenting. The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped and, as estoppel must be mutual, his grantees would not. There were no recitals in the deed that would estop them and estoppel could not be created by the covenants.—After the conveyance to defendant an Act was passed by the Legislature of Nova Scotia ratifying and confirming the title of defendant to all property of the C. B. Coal Co. *Held*, that if the legislature could by statute affect the title to this property which was vested in the Dominion Government it had not done so by this Act in which the Crown is not expressly named. Moreover the statute should have been pleaded by defendant. *Sydney and Louisburg Coal and Ry. Co. v. Sward*, xxi., 152.

133. *Control of insolvent estate—Insolvent Act, 1875, ss. 68-75—Fraudulent conveyance—Possession—Sale by assignee.*—The plaintiff claimed title under F., a grantee of S., the assignee in insolvency of P. D., who formerly owned the land, and who some years before his insolvency had conveyed the land to his brother L. D. Under the advice of the inspectors of the estate S. refused to take proceedings to set aside the conveyance to L. D. as fraudulent, and two of the creditors, under the provisions of s. 68 of the Insolvent Act, having obtained leave from a judge instituted a suit in the name of S., and procured a decree declaring the conveyance fraudulent, and, as against S., void. The decree did not direct a sale of the land, as was prayed. The land was, however, advertised for sale, the period of advertisement being shortened by the judge, and was sold to F. Under instructions from the general body of creditors S. at first re-

fused to convey to F., but subsequently conveyed upon an order being obtained from the judge directing him to do so.—In an action of ejectment it was held by the Court of Appeal for Ontario, affirming the decision of the Common Pleas Division (9 O. R. 89), that the sale was not one subject to the control of the general body of creditors, and therefore the restrictions of s. 75 of the Insolvent Act were inapplicable and the sale was valid. Further, that the defendant failed to establish his claim of title by possession.—The Supreme Court of Canada affirmed the judgment appealed from. *Herbert v. Donovan*, Cass. Dig. (2 ed.) 653.

134. *Municipal corporation—Ownership of roads and streets—Rights of private property owners—Ownership ad medium flum viæ—R. S. N. S. (5 ser.) c. 45—60 Vict. c. 22 (N. S.)*—That the ownership of lands adjoining a highway extends *ad medium flum viæ* is a presumption of law only which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway. *Gwynne, J., contra*. Judgment appealed from (23 N. S. Rep. 509) reversed. *O'Connor v. Nova Scotia Telephone Co.*, xxii., 276.

135. *Action en bornage—Surveyor's report—Judgment on—Acquiescence in judgment—Chose jugée.*—In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review claiming that the report gave B. more land than he claimed, and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements shewed that the line indicated was not the line of the old fence, and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor having been homologated by the court, was final as to the location of the fence, and that the judgment had been properly executed. The Court of Queen's Bench reversed the judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence. *Held*, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them, not only that the division line between the properties must be located on the line of the old fence, but also that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point. *Mercier v. Barrette*, xxv., 94.

136. *Appeal—Jurisdiction—Petitory action—Encroachment—Constructions under mistake of title—Good faith—Common error—Demolition of works—Right of accession—*

Indemnity—Res judicata—Arts. 412, 413, 429 et seq., 1047, 1241 C. C.—An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line and for the demolition and removal of the walls and the eviction of the defendant involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.—Where, as the result of a mutual error respecting the division line, a proprietor had in good faith and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.—In an action for revendication under the circumstances above mentioned, the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.—An owner of land need not have the division line between his property and contiguous lots of land established by regular *bornage* before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary. Judgment appealed from (Q. R. 6 Q. B. 202), reversed. *Delorme v. Cusson*, xxviii., 66.

137. *Acts of owner in possession—Waiver—Objections to title.*—A purchaser who takes possession of the property and exercises ownership by making repairs and improvements will be held to have waived any objections to the title.—Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution for the purpose of carrying out the purchase. Judgment appealed from, (29 N. S. Rep. 424) affirmed. *Wallace v. Hesseim*, xxix., 171.

138. *Lease — Transfer of lease — Alienation for rent — Emphyteusis — Bail à rente — Bail à longues années—Droit mobilier—Cumulative demand—Incompatible pleadings—Action pétitoire—Arts. 567, 572, 1593 C. C.—Arts. 176, 177 (b), 1064, 1066 C. P. Q.—Possessory action—Réintégrande — Dénonciation de nouvel œuvre.*—An instrument by which lands were leased for sixteen years at an annual rental, subject to renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. The leased premises were transferred by the lessee by deed of sale, and on disturbance an action, with both petitory and possessory conclusions, was brought by the transferee against an alleged trespasser, who pleaded title and possession in himself without taking objection to the cumulative form of the action by the transferee. *Held*, affirming the judgment appealed from, that under the circumstances the action should be treated as petitory only; that the contract under the instru-

ment described was neither emphyteusis nor a *bail à rente* (lease in perpetuity), but merely an ordinary contract of lease which did not convey a title to the land nor real rights sufficient to confer upon the transferee the right of instituting a petitory action in his own name. *Held*, also, that the transfer by the deed of sale of such leased premises would not support the petitory action, as the lessee could not convey proprietary rights which he did not himself possess. *Price v. LeBlond*, xxx., 539.

139. *Mining claim — Registered description — Error — Certificate of improvements — Adverse action—R. S. B. C. c. 135, s. 28.*—If the description of a mining claim as recorded is so erroneous as to mislead parties locating other claims in the vicinity, the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims. *Colpen v. Callahan*, xxx., 555.

The Supreme Court affirmed the judgment appealed from which had reversed the trial court judgment (6 B. C. Rep. 523).

140. *Crown lands — Timber licenses—Sales by local agent — Location ticket — Suspensive condition — Title to lands — Art. 1085 C. C.—Arts. 1269 et seq. and 1309 et seq. R. S. Q.*—During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown Lands Agent made a sale of a part of the lands covered by the license, and issued location tickets or licenses of occupation therefor under the provisions of arts. 1269 et seq. of the Revised Statutes of Quebec, respecting the sale of Crown lands. Subsequently the timber license was renewed, but, at the time the renewal license was issued, there had not been any express approval by the Commissioner of Crown Lands of the sales so made by the local agent as provided by art. 1269 R. S. Q. *Held*, affirming the judgment appealed from, *Taschereau and Davies, JJ.*, dissenting, that the approval required by art. 1269 R. S. Q. was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown for which the timber license had been validly issued. *Leblanc v. Robitaille*, xxxi., 582.

141. *Indian lands—Treaties with Indians—Surrender of Indian rights—Mines and minerals—Crown grant — Constitutional law—43 Vict. c. 28 (D.)*—The Indian treaty of 1873 provided that certain reserves surrendered were to be administered by the Dominion of Canada for the benefit of the Indians. In 1886, part of one of these reserves was surrendered to the Queen under the Indian Act of 1880 in trust for sale on such terms as the Dominion might deem conducive to the benefit of the Indians and, from this surrendered portion of the reserve, the lands in question were granted by the Dominion to the plaintiff company, including the precious metals therein. Defendants asserted title under grant from the Ontario Government in 1899. At the treaty of 1873 the commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on the reserves then surrendered. The judgment appealed from (32 O. R. 301) affirmed the Chancellor's judgment

(31 O. R. 386), which held that, after the surrender in 1886, the title to the land and minerals could only be obtained from the Government of Ontario; that with the royal mines and minerals, the Indians had no concern; that the Dominion could make no valid stipulation with them affecting the rights of Ontario and further, *semble*, that a province is not to be held bound by alleged acts of acquiescence of officials not brought home to nor authorized by the provincial executive and manifested by order-in-council or other authentic testimony. This decision was affirmed by the Supreme Court of Canada, Gwynne, J., dissenting. *Ontario Mining Co. v. Seybold*, xxxii., 1.

Affirmed on appeal by the Privy Council, [1903] A. C. 73).

142. *Vendor and purchaser — Principal and agent — Sale of land — Authority to agent — Price of sale.*—M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place, "Sell if possible, writing particulars; will give you good commission." C. agreed to purchase it for \$600 and the solicitor telegraphed M., "Will you sell three-quarter interest sixty-seven acre parcel, Korah, for six hundred, half cash, balance year? Wire stating commission." M. replied, "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor, "Telegram received. I will accept \$600, \$300 cash and \$300 with interest at one year. This payment I may say must be a marked cheque at par for \$300, minus your commission \$15, and balance \$300 secured." The property was incumbered to the extent of over \$300 and the solicitor deducted this amount from the purchase money and sent M. the balance which she refused to accept. He also took a conveyance to himself from the former owner paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell: *Held*, affirming the judgment of the Court of Appeal, that the only authority the solicitor had from M. was to sell her interest for \$585 net and the attempted sale for a less sum was of no effect. *Held*, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. *Clergue v. Murray*, xxxiii., 450.

The Privy Council refused leave for an appeal from this decision and, in doing so, referred specially to the case of *Prince v. Gagnon*, (8 App. Cas. 103).

143. *Beds of public harbours — Grant of foreshore*—25 *Vict. c. 19 (P. E. I.)*—B. N. A. Act, 1867, s. 108.1—Under s. 108, B. N. A. Act, 1867, the soil and bed of the foreshore in the harbour of Summerside, P. E. I., belongs to the Crown, as representing the Dominion of Canada, as it is comprised in and forms part of a public harbour and, therefore, a grant of foreshore lands between high and low water mark therein made by the Province of Prince Edward Island is void and inoperative. *Holman v. Green*, vi., 707.

[NOTE.—Followed in *Re Provincial Fisheries* (26 Can. S. C. R. 444.)]

144. *Halifax Harbour—Unauthorized grant—Trespass.*—Action of tort by E. against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in to be used as supports to an extension of E.'s wharf, built on land obtained by a Crown grant to E. in August, 1861. W.

pleaded that "he was possessed of a wharf and premises in said harbour, in virtue of which possession he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax Harbour, to and from said wharf, with steamers, &c., and because piles, placed by plaintiffs in said waters, interfered with his rights, he removed the same." There was evidence that the erections E. was making for the extension of his wharf obstructed access by vessels to W.'s wharf. A verdict against W. was upheld by the full court. *Held*, reversing the judgment appealed from (4 R. & G. 276), that, as the Crown could not, without legislative sanction, grant to E. the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as W. had shewn special injury, he was justified in removing the piles, which was the trespass complained of. *Wood v. Esson*, ix., 239.

145. *Railway belt — Reserve in British Columbia—Provincial grant*—47 *Vict. c. 14, s. 2 (B. C.)*—By s. 11 of the order-in-council admitting the Province of British Columbia into confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the Governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on 19th December, 1883, the legislature of British Columbia passed the statute 47 *Vict. c. 14*, by which:—"From and after the passing of this Act there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the main land of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the order-in-council, s. 11, admitting the Province of British Columbia into confederation." On 20th November, 1883, by public notice the Government of British Columbia reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, E., to comply with the provincial statutes, filed a survey of land within said belt which was finally accepted on 13th January, 1885, and letters patent under the great seal of the province issued to F. The Attorney-General of Canada by information of intrusion sought to recover possession of the land, and the Exchequer Court dismissed the information with costs. *Held*, reversing the judgment of the Exchequer Court, Henry, J., dissenting, that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the Crown for the use and benefit of Canada. *The Queen v. Farwell*, xiv., 392.

See No. 147, *infra*.

146. *Tenant for life—Conveyance to railway company by—Railway Acts—C. S. C.*

66, s. 11, s.-s. v.—24 Vict. c. 17, s. 1 (O.)—By C. S. C. c. 66, s. 11 (Railway Act), all corporations and persons whatever, tenants in tail or for life, *grévés de substitution*, guardians, &c., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent . . . seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company), all or any part thereof; and any contract, &c., so made shall be valid and effectual in law. *Held*, affirming the decision appealed from (19 Ont. App. R. 265), that a tenant for life is authorized by this Act to convey to a railway company in fee, but the company must pay to the remainderman or into court the proportion of the purchase money representing the remainderman's interest. *Midland Ry. of Canada v. Young*, xxii., 190.

147. *Railway belt in British Columbia—Unsurveyed lands—Pre-emption—Federal and provincial rights.*—On 10th September, 1883, D. et al. obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20 mile belt south of the Canadian Pacific Railway, reserved 29th November, 1883, under agreement between the Governments of the Dominion and of the Province of British Columbia, and which was ratified by 47 Vict. c. 14 (B.C.). On 29th August, 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters patent under the great seal of British Columbia were issued to respondents. By the agreement ratified by 47 Vict. c. 6 (D.), it was also agreed that three and a half million additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by Crown grant. On an information by the Attorney-General for Canada to recover possession of the 640 acres: *Held*, affirming the Exchequer Court (3 Ex. C. R. 293) that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the preemption right granted to D. et al. being subsequently abandoned or cancelled, the land became the property of the Crown in right of the province, and not in right of the Dominion. *The Queen v. Demers*, xxii., 482.

See No. 145, *ante*.

148. *Riparian proprietors—Right of fishing—Fishery licenses*—31 Vict. c. 60 (D.)

See FISHERIES, 2.

149. *Matter in controversy—Church rates—Hypothec—Future rights.*

See APPEAL, 21.

150. *Church lands—Interest of vestry—Rector and wardens—Rectory lands*—29 & 30 Vict. c. 16—*Right of appeal.*

See APPEAL, 311—CHURCH LANDS.

151. *Exchange—Time of essence of contract—Notice—Rescission.*

See SPECIFIC PERFORMANCE, 4.

152. *Survey—Agreement as to boundary—Signed plan—Statute of Frauds—Court of Equity—Discretionary jurisdiction.*

See BOUNDARY, 2.

153. *Misrepresentations—Vendor and purchaser—Rescission of deed—Recovery of price.*

See SALE, 75.

154. *Constitutional law—Province of Canada—Treaties with Indians—Surrender of Indian lands—Charge upon lands*—B. N. A. Act, s. 109—*Annuity to Indians—Revenue from lands—Increase of annuity.*

See CONSTITUTIONAL LAW, 4.

155. *Constitutional law—Navigable waters—Title to alveus—Crown—Dedication of public lands—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.*

See CONSTITUTIONAL LAW, 81.

156. *Canadian waters—Property in beds—Public harbours—Erections in navigable waters—Interference with navigation—Right of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation.*

See FISHERIES, 5.

157. *Appeal—Jurisdiction—Matter in controversy—Interest of second mortgagee—Surplus on sale of mortgaged lands*—60 & 61 Vict. c. 34, s. 1 (D.)—*Construction of statute—Practice.*

See APPEAL, 84.

158. *Mortgage—Sale of mortgaged lands for taxes—Purchase by mortgage—Action to foreclose—Pleading.*

See MORTGAGE, 35.

159. *Appeals to Supreme Court of Canada from Ontario—Jurisdiction—Injunction—Ditches and watercourses—Title to land*—60 & 61 Vict. c. 34, s. 1 (a) (D.)

See APPEAL, 85.

160. *Cancellation of lease—Amount in dispute—Appellate jurisdiction.*

See APPEAL, 92.

161. *Crown lands—Timber licenses—Sales by local agents—Location tickets—Suspensive conditions.*

See CROWN, 95.

162. *Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence—Territories Real Property Act—Unregistered transfers—Charging lands—Levy under execution—Indemnity to sheriff—Tort.*

See SHERIFF, 13.

TOLLS.

1. *Toll bridge—38 Vict. c. 97 (Que.)—Ferry—Interference—Damages.*—By 38 Vict. c. 97 (Que.), plaintiffs were authorized to build and maintain a toll bridge, and if it should by accident or otherwise be destroyed, become unsafe or impassable, plain-

tiffs were bound to rebuild within fifteen months next following its giving way, under penalty of forfeiture of the advantages granted by this Act; and during any time that the bridge should be unsafe or impassable they were bound to maintain a ferry across the river, for which they might recover the tolls. The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within 15 months. During the re-construction, although plaintiffs maintained a ferry across the river, the defendant built a temporary bridge within the limits of plaintiffs' franchise and allowed it to be used by parties crossing the river. In an action by plaintiffs, claiming \$1,000 damages, and praying that defendant be condemned to demolish the temporary bridge, *Held*, reversing the Court of Queen's Bench, Ritchie, C.J., and Patterson, J., dissenting, that the exclusive statutory privilege extended to the ferry, and while maintained by the plaintiffs the defendant had no right to build the temporary bridge, but as the bridge had since been demolished the court would merely award nominal damages and costs. *Galarneau v. Guilbault*, xvi., 579.

2. Franchise — Toll-bridge—Free bridge—Interference—Injunction—44 & 45 Vict. c. 90 (Que.)—44 & 45 Vict. (Que.) c. 90, s. 3, granting respondent a privilege to construct a toll-bridge across the Chaudière River, in the Parish of St. George, enacted that "So soon as the bridge shall be open to the public as aforesaid, during 30 years no person shall erect, or cause to be erected, any bridge or bridges, or works, or use or cause to be used any means of passage for the conveyance of any persons, vehicles, or cattle, for lucre or gain across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll-bridge or toll-bridges, or who shall use or cause to be used for lucre or gain, any other means of passage across the said river, for the conveyance of persons, vehicles, or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present Act for the persons, cattle or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall at any time, for lucre or gain, convey across the river any person or persons, cattle, or vehicles, within the above mentioned limits, such offender shall incur a penalty not exceeding \$10 for each person, animal or vehicle which shall have passed the said river; provided always that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles, or loads from crossing such river within the said limits by a ford, or in a canoe or other vessel, without charge."—After the bridge had been used for several years, the appellant municipality passed a by-law to erect a free bridge across the Chaudière River in close proximity to the toll-bridge in existence. The respondent prayed injunction to restrain the municipality from the erection of the bridge: *Held*, affirming the Court of Queen's Bench, that the erection of the free bridge would be an infringement of the respondent's franchise of a toll-bridge, and an injunction should be granted. *Municipality of Aubert-Gallion v. Roy*, xxi., 456.

3. Road Companies Act—R. S. O. (1887) c. 159—53 Vict. c. 42 (Ont.)—Special charter s. c. d.—46

—Collection of tolls—Maintenance of road—Injunction.] — The provisions of the general Road Companies Act of Ontario, R. S. O. (1887) c. 159, as amended by 53 Vict. c. 42, relating to tolls and repair of roads, apply to a company incorporated by special Acts, and, on the report of an engineer as provided by the General Act that the road of such company is out of repair, it may be restrained from collecting tolls until such repairs have been made.—Judgment appealed from reversed; order on motion for interim injunction (19 Ont. App. R. 234) overruled, and order for interim injunction (21 O. R. 607) approved. *Attorney-General v. Vaughan Road Co.*, xxi., 631.

4. Company—Forfeiture of charter—Estoppel—Compliance with statute — Action—*Res judicata*.]—In an action against a river improvement company for re-payment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, &c., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that the works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands, upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters, contrary to the provisions of the Timber Slide Companies Act, and could not exact tolls in respect of such works. By a consent judgment in a former action between the same parties, it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the commissioner in fixing the schedule of tolls. *Held*, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment, and were *res judicata*. *Held*, further, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited. — By R. S. O. (1887) c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its "corporate and other powers" unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works.—*Semble*, The non-completion of the works within two years would not *ipso facto*, forfeit the charter but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared.—Another ground of objection to the imposition of tolls was that the commissioner, in acting on the report of the valuator appointed under the consent judgment, erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a new scale of tolls fixed. *Held*, that under the statute the schedule could only be altered or varied by the commissioner, and the court could not interfere, especially as no application for relief had been made to the commissioner. *Hardy Lumber Co. v. Pickerel River Improvement Co.*, xxix., 211.

5. *Constitutional law — Administration of Yukon — Franchise over Dominion lands — Tolls.*] — The Executive Government of the Yukon Territory may lawfully authorize the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority. *O'Brien v. Allen*, xxx., 340.

6. *License — Construction — Disturbance — Long user — Establishment of limits.*] — The Crown granted a license to the Town of Belleville (in 1858), to ferry "between the Town of Belleville and Ameliasburg." *Held*, a sufficient grant of a right of ferrage to and from the two places named. — Under this license the Town of Belleville leased to the plaintiff granting the franchise "to ferry to and from the Town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side, and a ferry was established within the limits of Belleville on the one side, to a point across the Bay of Quinté, in Ameliasburg, within an extension of the east and west limits of Belleville. The defendants established another ferry across another part of the Bay of Quinté, between Ameliasburg and a place in the Township of Sidney, which adjoins Belleville, the termini being on the one side two miles from the western limits of Belleville, and on the Ameliasburg shore about two miles west from the landing place of the plaintiff's ferry. *Held*, reversing the judgment appealed from (7 Ont. App. R. 341), that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the ferry, and that the defendants' ferry was no infringement of the plaintiffs' right. *Anderson v. Jellett*, ix., 1.

7. *Ferry license — Interference — Tortious breach of contract — Bridges within ferry limits*—*R. S. C. c. 97.*] — On appeal the Supreme Court affirmed the judgment of the Exchequer Court of Canada (6 Ex. C. R. 414), which held that the granting of leases and other privileges by the Crown of land for the purpose of building and utilizing railway bridges and the extension of railway tracks to connect with railways across the Ottawa River, did not constitute a breach of the contract on the part of the Crown arising out of the grant of a ferry license, including within its limits the localities in question, between the City of Ottawa and the City of Hull, and that the construction of the bridges with approaches and track extensions did not constitute an interference with the ferry rights of the suppliant which would entitle him to recover damages against the Crown. *Brigham v. The Queen*, xxx., 620.

8. *Road company — Lease of tolls — Obstruction of highway.*] — A toll-house extended to the edge of a highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain, which was usually carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell, sustaining injuries. — The toll collector was made a defendant but did not enter a defence. It was shewn that he had made an agreement with the company to pay a fixed sum for the privilege of collect-

ing tolls for the year, and was not to account for the receipts. The company claimed that he was lessee of the tolls, and that they were not responsible for his acts. The jury found, however, that in using the chain to fasten the gate as he did, he was only following the practice that had existed for some years previously, and doing as he had been directed by the company. The statute under which the company was incorporated contains no express authority for leasing the tolls, but uses the term "renter" in one section, and in another speaks of a "lease or contract" for collecting the tolls. — The company claimed, also, that C. had no right to use the board walk in walking along the highway, and that the fact of her being there was contributory negligence on her part which relieved them from liability for the accident. *Held*, affirming the judgment appealed from (18 Ont. App. R. 286), Gwynne, J., dissenting, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls, the company, under the finding of the jury, was liable for his acts. *Kingston & Bath Road Co. v. Campbell*, xx., 605.

See NEGLIGENCE, 186.

9. *Constitutional law — Municipal corporation — Powers of Legislature — License — Monopoly — Highways and ferries — Navigable streams — By-laws and resolutions — Intermunicipal ferry — Tolls — Disturbance of license — North-West Territories Act, R. S. C. c. 50, ss. 13 and 24 — B. N. A. Act (1867) c. 92, ss. 8, 10, 16 — Rev. Ord. N. W. Ter. (1888) c. 28 — Ord. N. W. T. No. 7 of 1891-92, s. 4 — Companies, club associations and partnerships.*] — The authority given to the Legislative Assembly of the North-West Territories, by R. S. C. c. 50, and orders-in-council thereunder, to legislate as to "municipal institutions" and "matters of a local and private nature" (and perhaps as to license for revenue), within the Territories, includes the right to legislate as to ferries. — The Town of Edmonton, by its charter, and by "The Ferries Ordinance" (Rev. Ord. N. W. T. [1888] c. 28), can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor-in-Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary. — A "club" or partnership styled "The Edmonton Ferry Company" was formed for the purpose of building, establishing and operating a ferry within the limits assigned in the license by the municipality granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing a list of membership and taking at least one share of \$5 therein, which share entitled the holder to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by further subscriptions for shares *ad infinitum*. The club supplied their ferrymen with a list of membership, and established and operated their ferry, without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights. — *Held*, that the establishment

of the club ferry and the use thereof by members and others under their club regulations was an infringement of the rights under the license, and that the licensee could recover damages by reason of such infringement. *Dinner v. Humberstone*, xxvi., 252.

10. Toll-bridge — 8 Vict. c. 90 (Can.)—*Indemnity — Liability of Province of Canada—Remedial process.*]—A toll bridge with its necessary buildings and approaches was built and maintained by Y., at Chambly, in the Province of Quebec, in 1845, under a franchise granted to him by an Act (8 Vict. c. 90) of the late Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use and that Y., or his representatives, should then be compensated therefor by the Crown, provision being also made for ascertaining the value of the works by arbitration and award. *Held*, affirming the judgment appealed from (6 Ex. C. R. 103), that the claim of the applicants for the value of the works at the time they vested in the Crown on the expiration of the fifty years' franchise was a liability of the late Province of Canada coming within the operation of s 111 of the B. N. A. Act, 1867, and thereby imposed on the Dominion; and that there was no lien or right of retention charged upon the property, and that the fact that the liability was not presently payable at the date of the passing of the B. N. A. Act, 1867, was immaterial. *The Attorney-General of Canada v. The Attorney-General of Ontario* (1897) A. C. 199; 25 Can. S. C. R. 434 followed. *The Queen v. Yule*, xxx., 24.

[The Privy Council refused leave to appeal (34 Can. Gaz. 272).]

TORT.

1. Agreement — Continuous possession of railway — Breach in assertion of supposed rights—Joint misfeasor—Judgment — Reduction of damages — Pleading — 37 Vict. c. 16 (D.)—*Petition of Right.*]—By agreement between the W. & A. Ry. Co. and the Government, the Windsor Branch Railway, with running powers over the Intercolonial Railway, was leased to the suppliants for 21 years from 1st January, 1872. They went into possession and operated it thereunder up to the 1st August, 1877, on which date the Superintendent of Government railways, as authorized by the Government under an Act, 37 Vict. c. 16 (D.), ejected suppliants and prevented them using said Windsor Branch or passing over the trunk line. Four or five weeks afterwards the Government gave over possession of said Windsor Branch to the W. C. Ry. Co., which took and retained possession thereof. — In a suit (see R. E. D. 383; 2 Russ. & Geld. 280), by the W. & A. Ry. Co. against the W. C. Ry. Co. for recovery of possession, the Judicial Committee of the Privy Council held (7 App. Cas. 178), that 37 Vict. c. 16 did not extinguish the right and interest which the W. & A. Ry. Co. had in the Windsor Branch under the agreement.—On petition of right filed by suppliants, claiming damages by the breach of the said agreement, the Exchequer Court of Canada (Gwynne, J.), held that the taking of the road by an officer of the Crown under the assumed authority of an Act of Parliament

was a tortious act for which petition of right did not lie. On appeal to the Supreme Court, *Held*, Strong and Gwynne, JJ., dissenting, that the Crown by the answer of the Attorney-General did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious, they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore the Crown, by its officers, having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach became possessed of the suppliant's property, the petition of right would lie for the restitution of such property and for damages.—Prior to the filing of the petition of right, the suppliants sued the W. C. Ry. Co. for the recovery of the possession of the Windsor Branch, and also by way of damages for moneys received by the W. C. Ry. Co. for freight or passengers on said railway since their possession, and obtained judgment but were not paid. This judgment was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of Canada, to which an appeal had been taken, and which had affirmed the judgment of the Supreme Court of Nova Scotia. *Held*, per Ritchie, C.J., and Taschereau, J., that the suppliants could not recover against the Crown, as damages for breach of contract, what they claimed and had judgment for as damages for a tort committed by the W. C. Ry. Co., and in this case there was no necessity to plead the judgment.—*Per* Fournier and Henry, JJ., that the suppliants were entitled to damages for the time they were, by the action of the Government, deprived of possession and use of the road to the date of the filing of their petition of right. *Windsor and Annapolis Ry. Co. v. The Queen*, x., 335.

On appeal to the Privy Council the judgment was reversed in so far as it adjudged that the suppliants were entitled to damages for loss of profits from the time they were deprived of the use and possession of the Windsor Branch by the action of the Government, up to the filing of the petition of right (55 L. J. P. C. 41), otherwise the decision was affirmed.

2. Railways — Subway — 46 Vict. c. 45 (Ont.)—46 Vict. c. 24 (D.)—*Principal and agent — Injury to property — Misfeasance—Municipal institution.*]—The Act, 46 Vict. c. 45 (Ont.), authorized the City of Toronto and the Village of Parkdale, jointly or separately, and the railway companies whose lines ran into Toronto, to agree as to the construction of subways; provision was made for the issue of debentures for the cost of the work, without submitting the by-law to the ratepayers; also for compensation to owners of property injuriously affected by such work, on arbitration under the Municipal Act, if not mutually agreed upon. The Village of Parkdale and the companies agreed to construct a subway at their joint expense, under the direction of the municipality and its engineer and, on their application, an order-in-council was passed, under 46 Vict. c. 24 (D.), authorizing the work to be done in accordance with such agreement. The municipality contracted

with G. for the work and a by-law to raise the Village of Parkdale's share of the cost was submitted and approved by the rate-payers. In an action by an owner of property injuriously affected the plaintiff recovered and the judgment (7 O. R. 276) was affirmed by the Divisional Court (8 O. R. 59), but reversed by the Court of Appeal for Ontario (12 Ont. App. R. 393). On appeal to the Supreme Court, *Held*, reversing the judgment appealed from (Taschereau, J., dissenting), that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and it was therefore liable as a wrongdoer.—*Per* Gwynne, J. That the work should be considered as having been done under the special Act, and that plaintiff was entitled to compensation thereunder. — *Per* Taschereau, J., dissenting, that the work was done by the municipality as the agent of the railway companies and it was therefore not liable. *West v. Village of Parkdale*, xii., 250.

[Affirmed by the Privy Council, 12 App. Cas. 602.]

3. *Injury by vicious dog — Ownership — Scienter—Evidence for jury.* — W. brought action for injuries to her daughter by a dog owned or harboured by V. Defence that V. did not own the dog, and had no knowledge that he was vicious. The dog was formerly owned by a man in V.'s employ, who lived and kept the dog at V.'s house, and went away leaving the dog behind with V.'s son, to be kept until sent for, and afterwards the dog lived at the house, going every day to V.'s place of business with him or his son, who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial judge ordered a nonsuit, which was set aside by the full court, and a new trial ordered. *Held*, affirming the Supreme Court (N. B.) (28 N. B. Rep. 472), that there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities, and the nonsuit was rightly set aside. *Vaughan v. Wood*, xviii., 703.

4. *Arrest under by-law — Transient merchants and traders—29 & 30 Vict. c. 57, ss. 20, 21 (Que.) — Commercial traveller — Selling without license — Action for illegal arrest—Evidence — Amendment of pleadings.* — On 12th October, 1866, under 29 & 30 Vict. c. 57, s. 20, the corporation of the City of Quebec passed the following by-law:—"1. That no person shall hereafter follow the occupation of a transient merchant or trader, or agent, clerk, or employee of a transient merchant or trader, in the City of Quebec, or shall sell in the said city by samples, without having previously taken out from the clerk of the said city a license for which there shall be paid to the treasurer of the said city the sum of \$60; the said license shall not be valid for any longer period than one year from the date thereof." "2. That any person contravening the present by-law shall, on conviction before the Recorder's Court, pay a fine not exceeding \$200, and in default of immediate payment of the said fine and of the costs, shall be imprisoned and detained in the common gaol of the District of Quebec, for a period not exceeding two months, unless the said fine and costs, together with those of imprisonment, be

sooner paid." — The plaintiff, a commercial traveller for a firm in Montreal, was in a store in Quebec, writing down an order for his firm, and had a small screw in his hand as a sample when he was arrested by a policeman, and brought to the station. He subsequently paid the license, and brought an action against the city for illegal arrest and imprisonment. The plea justified the arrest upon the ground of open breach of by-laws and municipal regulations in force, by selling by sample, and without having first obtained a license. *Held*, affirming the judgment appealed from (11 Q. L. R. 249), Henry, J., dissenting, that plaintiff's acts were of such a nature that there was probable cause under the statute and by-law for the arrest, which, therefore, was not a tort by the corporation.—*Per* Strong and Fournier, JJ. The evidence fell short of establishing the plea that plaintiff was actually engaged in selling, there being no proof of any actual sale, but did shew that he was openly pursuing the occupation of a transient merchant or trader, without license, and the court would permit of an amendment of the pleadings, which would adapt the allegations of the parties to the case as disclosed by the evidence. *Piché v. City of Quebec*, Cass. Dig. (2 ed.) 497; Cass. S. C. Prac. (2 ed.) 85.

5. *Charging lands under execution — Levy on requisition by solicitor — Territories Real Property Act.* — Neither a solicitor nor a sheriff is a tortfeasor as against a transferee, whose transfer is unregistered, by registering in the discharge of their respective duties, an execution of a judgment against lands of a judgment debtor. *Taylor v. Robertson*, xxxi., 615.

6. *Action against the Crown—Fraud or misconduct by public servants.*

See CONTRACT, 90.

7. *Délit — Moral wrong — Assessment of damages—Consolation for bereavement—Misdirection—New trial—Art. 1056 C. C.*

See DAMAGES, 2.

8. *Access to navigable stream—Obstruction—Expropriation for railway—Damages.*

See EXPROPRIATION OF LANDS, 21.

9. *Joint tortfeasors — Obstructing navigation—Evidence—Assessment of damages.*

See DAMAGES, 61.

10. *Lawful use of land—Damage to adjoining property—Right of action.*

See NONSUIT, 1.

11. *Commencement of prescription of action—Continuing damages—Liability of employer for act of contractor.*

See MASTER AND SERVANT, 3.

12. *Bodily injuries—Prescription—Reservation in judgment — Future damages — Arts. 2188, 2262, 2267 C. C.*

See ACTION, 47.

13. *Ferry license—Interference — Tortious breach of contract — Bridges within ferry limits—R. S. C. c. 97.*

See FERRIES, 2.

14. *Contract—Shipping receipt—Carriers—Liability limited by special conditions—Negligence—Connecting lines of transportation—Wrongful conversion—Sale of goods for non-payment of freight—Principal and agent—Varying terms of contract.*

See CARRIERS, 2.

15. *Negligence—Driving timber—Servitude—Watercourses—Floatable streams—Riparian right—Statutory obligations of lumbermen using streams in Quebec—Sudden freshets—Vis major—Joint liability.*

See RIVERS AND STREAMS, 7.

TRADE AND COMMERCE.

1. *Legislative jurisdiction—Restraint of trade—Prohibitory clauses of License Act—Sale of liquors.*

See CONSTITUTIONAL LAW, 67.

2. *Restraint of trade—Foreign telegraph company—Monopoly—Public policy.*

See COMITY.

3. *Market by-law—Business tax—Prohibitory license fee—Legislative jurisdiction.*

See CONSTITUTIONAL LAW, 54.

4. *Partial prohibition—By-law of municipal council—Power to license, regulate and govern—Ontario Municipal Act, R. S. O. (1887) c. 184.*

See MUNICIPAL CORPORATION, 48.

5. *Constitutional law—Powers of Provincial Legislatures—Direct taxation—Manufacturing and trading licenses—Distribution of taxes—Uniformity of taxation—Quebec statutes 55 & 56 Vict. c. 10 and 56 Vict. c. 15—British North America Act, 1867.*

See CONSTITUTIONAL LAW, 56.

TRADE COMBINATION.

Contract—Unlawful consideration—Répétition de l'indu—Account—Public policy—Monopoly—Trade combination—Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Arts. 989, 1000, 1067, 1077, 2188 C. C.—Matters judicially noticed.—In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract. *Held, per Sedgewick, King and Girouard, JJ.*, that the evidence disclosed a conspiracy and that, although under the provisions of the Civil Code the moneys so advanced could be recovered back, yet no interest before action could be allowed thereon, as the law merely requires that the parties should be replaced in the position they respectively occupied before the illegal transactions took place. *Rolland v. Caisse d'Economie de Québec* (24 S. C. R. 405) discussed, and *L'Association St. Jean-Baptiste de Mon-*

tréal v. Brault (30 S. C. R. 598) referred to. *Held*, also, that laws of public order must be judicially noticed by the court *ex proprio motu*, and that, in the absence of any proof to the contrary, the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu*.—*Per Taschereau, J.* (dissenting). 1. A new point should never be entertained on appeal, if evidence could have been brought to affect it, had objection been taken at the trial. 2. In the present case the concurrent findings of both courts below amply supported by evidence ought not to be disturbed, and as the company itself prevented the performance of the condition of the agreement in question requiring the assent of the Government to the transfer of the binder twine manufacturing contract, its non-performance cannot be admitted as a defence to the action upon the executed contract.—Gwynne, J., also dissented on the ground that the judgment appealed from proceeded upon wholly inadmissible evidence and that, therefore, the action should have been dismissed and further, that the evidence which was received and acted on, though inadmissible for the purposes for which it was intended, shewed that the action was based upon a contract between the plaintiffs and defendant for the commission of an indictable offence; that neither party could recover either by action or by counterclaim upon such a contract and, therefore, that the incidental demand, as well as the action, should be dismissed. *Consumers' Cordage Co. v. Connolly*, xxxi., 244.

[On appeal to the Privy Council this decision was reversed, the order set aside and a new trial ordered upon terms or, alternatively, that the judgment of the Court of Review should be restored. See *Can. Gaz.*, vol. xli., p. 440.]

TRADE CUSTOM.

1. *Shipping—Bill of lading—Ship's agent—Mandate—Custom of port—Delivery—Carriers.*—A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests required them to have knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. Judgment appealed from reversed, the Chief Justice dissenting. *Parsons v. Hart*, xxx., 473.

2. *Sale of goods—Terms of delivery—Reasonable time—Contract made abroad—Inspection—Mercantile usage—Measure of damages.*—Evidence of mercantile usages will not be allowed to add to or affect the construction of a contract for sale of goods unless such custom is general. Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by parties domiciled there, unless the latter are shewn to have been cognizant of it, and can be presumed to have made their contract with reference to it. Judgment appealed from (20 Ont. App. R. 673) affirmed. *Trent Valley Woollen Mfg. Co. v. Oelrichs*, xxiii., 682.

See CONTRACT, 211.

AND see CUSTOM OF TRADE—EVIDENCE.

TRADE MARK.

1. *Similar device — Infringement—Injunction.* — B. manufactured and sold cakes of soap, having stamped thereon a registered trade mark: A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the reverse side. D. manufactured cakes of soap similar in shape and general appearance, having stamped thereon an imperfect unicorn's head, being a horse's head, with a stroke on the forehead to represent a horn; the words "Very Best" were stamped, one on each side of the head, and the words "A. Bonin, 145 St. Dominique St." and "Laundry" over and under the head. At the trial it was shewn that the plaintiff's soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap." *Held*, Henry, J., dissenting, reversing the judgment appealed from and restoring that of the Superior Court, that there was such an imitation of B.'s trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain D. from using the device adopted by them. Judgment appealed from (1 Dor. Q. B. 218) reversed. *Barsalou v. Darling*, ix., 677.

2. *Right to use one's own name—Goods designated by one's own name sold to deceive public.* — G. carried on business in partnership with Beatty, a valuable asset being a series of copy-books, designed by B., sold under the name of "Beatty's Headline Copy-books." B. retired from the firm, receiving \$20,000 for his share of the business, and G. subsequently registered as a trade mark the word "Beatty" in connection with the copy-books. After dissolution B., under agreement with the Canada Publishing Co., prepared a series of copy-books which were sold under the name of "Beatty's New and Improved Headline Copy-Books." Suit was brought by G. against the company and B. for infringement of his trade mark and to restrain them from selling said books, claiming exclusive right of sale under purchase at the dissolution of the partnership. *Held*, affirming the judgment appealed from (11 Ont. App. R. 402), Henry and Taschereau, JJ., dissenting, that appellants had no right to sell "Beatty's New and Improved Headline Copy-Books," with the name "Beatty" on the cover in such a position, or with such prominence of colour or form, as might deceive purchasers into the belief that they were purchasing Gage's books. *Canada Publishing Co. v. Gage*, xi., 306.

3. *Infringement — Registration — Exclusive right of user—Property in descriptive words—Rectification of registry — 42 Vict. c. 22.* — It is only a mark or symbol in which property can be acquired, and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered as a trade mark under the Trade Mark and Design Act, 1879.—A person accused of infringing a registered trade mark may shew that it was in common use before such registration and, therefore, could not properly be registered, notwithstanding the provision in s. 8 of the Act that the person registering shall have the exclusive right to use the same to designate articles manufactured by him. (Taschereau, J., dissenting.)—Where the statute prescribes no means of rectification of a trade mark im-

properly registered, the courts may afford relief by way of defence to an action for infringement.—*Per* Gwynne, J. Property cannot be acquired in marks, &c., known to a particular trade as designating quality merely and not, in themselves, indicating that the goods to which they are affixed are the manufacture of a particular person. Nor can property be acquired in an ordinary English word expressive of quality merely though it might be in a foreign word or word of a dead language. Judgment appealed from (14 Ont. App. R. 444) affirmed. *Partlo v. Todd*, xvii., 196.

4. *Infringement — Similarity of name — Device — Resemblance unlikely to deceive — 42 Vict. c. 22, s. 4—Use prior to registration.* — Appellant manufactured a stove-polish put up in small oblong cubical blocks, encased in wrappers of red paper, on which was printed a vignette of an orb rising above a body of water, and across the picture were the words "The Rising Sun Stove Polish." This comprised the appellant's trade mark, and was registered in the United States patent office, about 8th July, 1870. Ever since then appellant used in the United States and in parts of Canada the trade mark in the form described, and on 20th December, 1879, registered it in Canada.—About 22nd October, 1876, defendant registered a trade mark for stove polish, called by him "The Sunbeam Stove Polish," without any cut or device resembling sunbeams or rays.—About 1877, he put an indication of sunbeams upon his labels and upon boxes containing packages of his stove polish.—This placing of the device of sunbeams upon the packages was the subject matter of complaint. The action was to recover damages from defendant, and for an injunction restraining him from placing the device of sunbeams upon his stove polish.—The defence amounted to a denial that he took any portion of appellant's trade mark as a device.—It was not pretended by the appellant that the packages in which the stove polish was put by the defendant, resembled those in which the appellant's stove polish was put up, but it was urged that the appellant's stove polish was known throughout Canada and the United States as "The Rising Sun Stove Polish," that persons hearing of "Rising Sun Stove Polish," and inquiring thereof, could be deceived into taking "The Sunbeam Stove Polish" in lieu thereof, owing to the imitation of part of the device forming a portion of the appellant's trade mark, and that the device upon the boxes containing the defendant's packages of stove polish was even a greater infringement of the appellant's trade mark than was the device upon the packages themselves.—The Superior Court dismissed the action on the ground that plaintiff failed to shew any infringement since the date of registration of his trade mark, the 20th December, 1879, and that for any infringement prior to that date he was prevented from recovering by 42 Vict. c. 22, s. 4. The Court of Queen's Bench concurred in dismissing the action, but upon the merits. *Held*, affirming the Court of Queen's Bench (28 L. C. Jur. 236; 5 Legal News, 99), that the trade mark used by the defendant did not resemble that of the plaintiff, nor a substantial part of it, and was not calculated to lead a purchaser to believe that the goods on which it was placed were manufactured by plaintiff, in other words, to deceive ordinary purchasers by enabling defendant to pass his goods as those of the plain-

tiff. *Morse v. Martin*, 12th January, 1885, Cass. Dig. (2 ed.) 839.

5. *Jurisdiction of court to restrain infringement — Effect of order—Device — Shape of label — Prior use—Rectification of register.*—In the certificate of registration the plaintiffs' trade mark was described as consisting of "the representation of an anchor, with the letters 'J. D. K. & Z.' or the words 'John DeKuyper & Son, Rotterdam, &c.,' as per the annexed drawings and application." In the application the trade mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J. D. K. & Z." or the words "John DeKuyper, &c., Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels and other packages containing Geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac-simile* of which was attached to the application, but there was no express claim of the label itself as a trade mark. This label was white and in the shape of a heart, with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K. & Z." and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which it was admitted were common to the trade. The defendants' trade mark was, in the certificate of registration, described as consisting of an eagle having at the feet "V. D. W. & Co.," above the eagle being written the words "Finest Hollands Geneva;" on each side are the two faces of a medal, underneath on a scroll the name of the firm "Van Dulken Weiland & Co.," and the word "Schiedam," and lastly at the bottom the two faces of a third medal, the whole on a label in the shape of a heart (*le tout sur une étiquette en forme de cœur*). The colour of the label was white. *Held*, affirming the judgment of the Exchequer Court, that the label did not form an essential feature of the plaintiff's trade mark as registered, but that in view of the plaintiffs' prior use of the white heart-shaped label in Canada, the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade mark should be so rectified as to make it clear that the heart shaped label formed no part of such trade mark. *Taschereau and Gwynne, JJ.*, dissenting on the ground that the white heart-shaped label with the scroll and its constituents was the trade mark which was protected by registration, and that the defendants' trade mark was an infringement of such trade mark. Judgment appealed from (4 Ex. C. R. 71) affirmed. *DeKuyper v. Van Dulken; Van Dulken v. DeKuyper*, xxiv., 114.

6. *Trade mark — Infringement — Use of corporate name — Fraud and deceit — Evidence.*—The plaintiffs, incorporated in the United States of America, have done business there and in Canada manufacturing and dealing in India rubber boots and shoes under the name of "The Boston Rubber Shoe Company," having a trade line of their manufactures marked with the impression of their corporate name, used as a trade mark, known as "Bostons," which had acquired a favourable reputation. This trade mark was registered in Canada in 1897. The defendants were incorporated in Canada in 1896, by the name of

"The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods to those manufactured and sold by the plaintiffs, on one grade of which was impressed the defendants' corporate name, these goods being referred to in their price lists, catalogues and advertisements as "Bostons," and the company's name frequently mentioned therein as the "Boston Rubber Company" without the addition "Montreal." In an action to restrain defendants from the use of such mark or any similar mark on the goods in question, as an infringement on the plaintiffs' registered trade mark. *Held*, reversing the judgment appealed from (7 Ex. C. R. 187), that under the circumstances, defendants' use of their corporate name in the manner described was a fraudulent infringement of plaintiffs' registered trade mark calculated to deceive the public and so to obtain sales of their own goods as if they were plaintiffs' manufactures, and, consequently, that the plaintiffs were entitled to an injunction restraining the defendant from using their corporate name as a mark on their goods manufactured in Canada. *Boston Rubber Shoe Co. v. Boston Rubber Shoe Co. of Montreal*, xxxii., 315.

TRADE UNION.

Cause of action — Combination in restraint of trade — Strikes — Social pressure.—Workmen who in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation or other illegal means, take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not hereby incur liability to an action for damages.—Judgment of the Court of Queen's Bench (Q. R. 6 Q. B. 65) affirmed. *Perrault v. Gauthier et al.*, xxviii., 241.

TRAMWAY.

1. *Negligence — Electric car — Excessive speed—Prompt action — Contributory negligence.*—A cab driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the tramway company for damages it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking out more sharply for the car; and that notwithstanding such negligence on the part of the driver the accident could have been averted by the exercise of reasonable care. *Held*, affirming the judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 117), Gwynne, J., dissenting, that the last finding neutralized the effect of that of contributory negligence; that as the car was on a down grade and going at an excessive rate of speed it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to

control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run. *Halifax Electric Tramway Co. v. Inglis*, xxx., 256.

Cf. No. 4, *infra*.

2. *Negligence — Electric railway—Motor-man—Workmen's Compensation Act—Injury to conductor.*—The motorman of an electric car may be a "person who has charge or control" within the meaning of s. 3 of the Workmen's Compensation Act (R. S. O. [1897] c. 160) and if he negligently allows an open car to come in contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured, the electric company is liable in damage for such injury.—Judgment appealed from (27 Ont. App. R. 151) affirmed. *Toronto Ry. Co. v. Snell*, xxxi., 241.

3. *Nuisance — Operation of electric railway — Power house machinery — Vibrations, smoke and noise — Injury to adjoining property.*—Notwithstanding the privileges conferred by its Act of incorporation upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rental and value thereby occasioned. *Drysdale v. Dugas* (26 Can. S. C. R. 20) followed. *Gareau v. Montreal Street Ry. Co.*, xxxi., 463.

[*Cf. Montreal Street Ry. Co. v. Gareau* (Q. R. 10 Q. B. 417), to which reference is made in the report of above case.]

4. *Operation of street railway—Speed of tram car—Street crossings—Injuries to person —Negligence—Findings of jury—Contributory negligence.*—In an action to recover damages on account of personal injuries caused by a street car the jury found the defendants' negligence was the cause of the accident and also that plaintiff had been negligent in not looking out for the car. *Held*, reversing the judgment of the Court of Appeal (2 Ont. L. R. 43) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover. *London Street Ry. Co. v. Brown*, xxxi., 642.

Cf. No. 1, *ante*.

5. *Railways — Construction of statute — Tramway for transportation of materials — Expropriation*—51 Vict. c. 29, s. 114 (D.)—2 Edw. VII. c. 29 (D.)—The place where materials are found referred to in the one hundred and fourteenth section of "The Railway Act" means the spot where the stone, gravel, earth, sand or water required for the construction or maintenance of railways are naturally situated, and not any other place to which they may have been subsequently transported.—*Per Taschereau and Girouard, JJ.* The provisions of the one hundred and fourteenth section of "The Railway Act" confer upon railway companies a servitude consisting merely in the right of passage and do not

confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction. *Quebec Bridge Co. v. Roy*, xxxii., 572.

6. *Municipal corporation — Tramway — Operation of railway — Use of streets — Regulations — Crossings — Powers—By-law or resolution*—63 Vict. c. 176 (N. S.)—R. S. N. S. (1900) c. 71, ss. 263, 264—*Construction of statute.*—By the Nova Scotia statute, 63 Vict. c. 176, the tramway company was granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property. *Held*, reversing the judgment appealed from, *Davies, J.*, dissenting, that such regulations could only be made by by-law and that the by-law making such regulations would be subject to the provisions of s. 264 of "The Towns Incorporation Act." (R. S. N. S. [1900] c. 71.) *Liverpool & Milton Ry. Co. v. Town of Liverpool*, xxxiii., 180.

7. *Street railway company — Agreement with municipality — Ea majori cautela—Permanent pavements—Construction of contract.*—The Toronto St. Ry. Co. was incorporated in 1861, and its franchise was to last 30 years, at the expiration of which period the city could assume the ownership of the railway and property of the company on payment of the value thereof, to be determined by arbitration. The company was to keep the roadway between the rails, and for 18 inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation the company was not bound to construct a like pavement between the rails, &c., but was only to pay the cost price of the same, not to exceed a specified sum per yard. The city laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with its portion of such cost in the manner and for the period that adjacent owners were assessed, under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, but refused to pay for subsequent years, on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the company was only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance, and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets now extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the

city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends." This agreement was ratified by an Act of the Legislature passed in 1890, which also provided for the holding of the said arbitration, which having been entered upon, the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim, an action was brought by the city to recover the said amount.—*Held*, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance, and repair of the said streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, &c., must be considered to have been inserted *ex majori cautela* and could not do away with the express contract to relieve the company from liability.—*Held*, further, that by an Act passed in 1877, and a by-law made in pursuance thereof, the company was only assessable as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon the owners or occupiers after they have ceased to be such; therefore after the termination of the franchise the company would not be liable for these rates. *City of Toronto v. Toronto Street Ry. Co.*, xxiii., 198.

8. *Defective appliances — Absence of buffers on tram cars.*] — The plaintiff was a motorman in the employ of the company and sued under the Workman's Compensation Act to recover damages for injuries sustained while coupling a street car and trailer. The main negligence charged was the absence of buffers to protect the employees from injury in the coupling of cars. Plaintiff had recovered a verdict at the trial which was sustained on appeal. *Held*, affirming the judgment appealed from (22 Ont. App. R. 78), that there was negligence on the part of the company in not having proper appliances to prevent injury, and that a new trial had been properly refused. *Toronto Ry. Co. v. Bond*, xxiv., 715.

9. *By-law — Agreement—Municipal ownership — Eminent domain — Notice — Refusal to name arbitrator.*

See MUNICIPAL CORPORATION, 116.

10. *Improper construction — Bad order of tract—Elevated rails—Negligence.*

See APPEAL, 220.

11. *Accident to workman on the line of railway — Contributory negligence—Looking out for the cars—New trial—Consent order.*

See NEGLIGENCE, 42.

12. *Customs duties—Exemptions from duty —Steel rails for use on railways.*

See CUSTOMS DUTIES, 3.

13. *Negligence — Findings of jury — New trial—Contributory negligence—Evidence.*

See NEGLIGENCE, 48.

14. *Negligence — Damages — Evidence — Misdirection—60 Vict. c. 24, s. 570 (N.B.)*

See NEW TRIAL, 80.

15. *Operation of tramway — Contributory negligence — Pleadings — Issues — Evidence —Verdict — New trial—Objections taken on appeal.*

See NEW TRIAL, 82.

TRANSACTION.

1. *Arts. 1918, 1920 C. C.—Demolition of dam—Report of expert—Motion to hear further evidence—C. S. L. C. c. 51.]—In an action by a riparian proprietor against L. to compel him to demolish a dam he had erected on the River Mille Isles, and to pay damages for injury caused by said dam, judgment ordered demolition of the dam and payment of damages. While in appeal an agreement for settlement was arrived at between the parties by which the dam should be demolished by a certain day, failing which the judgment for demolition should be carried out. The property was subsequently sold to defendant who bought with full knowledge of this agreement, and agreed to be bound by it and the judgment as if he had been a party thereto. Defendant, however, did not completely demolish the dam, but used a portion at one end and the foundation of it throughout for a new dam. Plaintiff then brought the present action for the demolition of this second dam and for damages. The Superior Court, after hearing a number of witnesses, appointed as expert an engineer and gave effect to his report that the dam caused no injury to plaintiff's property, refusing a motion by plaintiff for leave to examine the expert and other witnesses to shew the incorrectness of the report, and dismissed the action with costs on the ground that defendant had only exercised the rights given him by C. S. L. C. c. 51, and plaintiff had suffered no damage. *Held*, per Fournier, Gwynne and Patterson JJ., reversing the judgment appealed from (17 Rev. de Leg. 27), that C. S. L. C. c. 51, had no application, the rights of the parties being regulated by the agreement for settlement arising out of the first action, which was a "transaction" within the meaning of arts. 1918, 1920 C. C.—*Per Fournier and Gwynne, JJ.* On the whole evidence plaintiff was entitled to judgment and the appeal should be allowed.—*Per Ritchie, C.J., and Taschereau, J.* The appeal should be dismissed, but in any event all plaintiff could ask was to have the case remitted to the court of first instance to take further evidence, which was the principal ground of his appeal to the Court of Queen's Bench as stated in his factum.—*Patterson, J.*, while of opinion the law and evidence would have warranted a judgment for the plaintiff, concurred in the view that under the circumstances all the plaintiff could ask was to have the case remitted. *Hardy v. Filiatrault*, xvii., 292.*

2. *Compromise to prevent litigation — Nullified instruments — Estoppel — Evidence — Admission — C. C. arts. 311, 1243-1245 and 1918 et seq.]—Where a deed entered into by the parties to a lawsuit in order to effect a compromise of family disputes and prevent litigation, failed to attain its end, and was annulled and set aside by order of the court as being in contravention of art. 311 of the Civil*

Code of Lower Canada, no allegation contained in the deed so annulled can subsist even as an admission. *Durocher v. Durocher*, xxvii., 363.

3. *Payment under threat of criminal prosecution — Error as to fact—Duress—Ratification.*

See MISTAKE, 3.

TREATIES.

1. *Construction of — Convention of 1818 — Fisheries — Statute, construction of—59 Geo. III., c. 38 (Imp.)—R. S. C. cc. 94 & 95—Three mile limit — Foreign fishing vessels—“Fishing.”*—Where fish has been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursued up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of baling the fish out of the seine:—*Held*, (the Chief Justice and Gwynne J., dissenting), affirming the decision of the court below (5 Ex. C. R. 164), that the vessel when so seized was “fishing” in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act, 59 Geo. III., c. 38, and the Revised Statutes of Canada, c. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited. *The Ship “Frederick Gerring, Jr.” v. The Queen*, xxviii., 271.

2. *Treaties with Indians — Constitutional law — Province of Canada — Indian treaties —Surrender of Indian lands—Annuity to Indians — Revenue from Indian lands — Increase of annuity — Charge upon lands — British North America Act, 1867, s. 109.*

See CONSTITUTIONAL LAW, 4.

3. *Indian lands — Surrender of Indian rights — Mines and minerals — Crown grant —Constitutional law—43 Vict. c. 28 (D.).*

See TITLE TO LAND, 141.

AND see INDIAN AFFAIRS—INDIAN LANDS.

TREATING.

See ELECTION LAW, 56-58.

TRESPASS.

1. *Expropriation of land — Public work — Government railway—Eminent domain—Setting apart of land required—44 Vict. c. 25, s. 109—Conditions precedent—Entry by contractor.*—The compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds and a plan or description filed; if these provisions are not complied with, and there is no order-in-council authorizing land to be taken when an order-in-council is necessary for that purpose, a contractor with the Crown who enters upon the land to construct such public work thereon is liable to the owner in

trespass for such entry.—*Per Fournier and Patterson, JJ. Kearney v. Oakes*, xviii., 148.

2. *Construction of telegraph line —Destroying trees — Justification by statute — Pleading — Necessity of act complained of—Construction of statute—34 Vict. c. 52 (D.).*—The Act incorporating the Dominion Telegraph Company declares (s. 4) that the company may enter upon lands or places, and survey, set off and take such parts thereof as may be necessary for such line, &c., and, in case of disagreement between the company and owners of lands so taken, or in respect of any damage done to the same, the dispute may be settled by arbitration in the mode therein described. By s. 20 the company is authorized to enter upon the lands of any person or persons, and survey and take levels, and to set out and ascertain such parts thereof as they shall think necessary and proper for making such works, matters and conveniences as they shall think proper and necessary for the making, effecting, preserving, &c., the telegraph, and to build and set upon such lands, such station houses and observatories, watch-houses and other works, &c., as and where the company shall think requisite and convenient, &c. Provided always, that the company shall not cut down or mutilate any tree planted or left standing for shade or ornament, or any fruit tree, unless it be necessary so to do, for the erection, use or safety of any of its lines. —In an action for damages for cutting down ornamental trees, the company pleaded that the trees were standing by the side of a public highway; that it was erecting lines of telegraph along the highway, and because the trees were in the way and obstructed the passage of the line of the telegraph, and because it was deemed necessary and advisable to do so, the acts complained of were done by virtue of the statute and not otherwise. The Supreme Court affirmed the judgment appealed from (3 Pugs. & Bur. 553) by which the court below had held, 1. That the arbitration clause in s. 4 did not apply to a case like this, where the complaint was that defendants had wrongfully destroyed plaintiff's trees. 2. That the proviso in s. 20 imposed on defendants, if the ornamental trees should obstruct their line on the side of the highway where they located it, the burthen of shewing that it was necessary for them to take it on that side, and that defendant's pleas were bad for want of an averment that it was necessary to cut the trees, not merely that they deemed it necessary. *Dominion Telegraph Co. v. Gilchrist*, Cass. Dig. (2 ed.) 844.

3. *On public streets—Action by owner of private property—Ornamental shade trees—Ownership ad medium filum viæ — Presumption.*—The charter of the Nova Scotia Telephone Company authorizing the construction and working of lines of telephone along the sides of, and across and under, any public highway or street of the City of Halifax provided that in working such lines the company should not cut down or mutilate any trees. *Held*, reversing the judgment appealed from (23 N. S. Rep. 509), *Taschereau and Gwynne, JJ.*, dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership *ad medium filum viæ*, or to shew that the

street had been laid out under a statute of the province or dedicated to the public before the passing of any expropriation Act. *O'Connor v. Nova Scotia Telephone Co.*, xxii., 276.

4. *Use of dangerous material—Evidence—Trespass.*—Work on the construction of a railway was going on near the unused part of a public cemetery in connection with which were used detonating caps containing fulminate. M., a boy of 15 years of age, in passing through the cemetery, found caps lying in front of a tool box, and, while he was scraping the fulminate, one of them exploded and injured his hand. In an action against the contractors for damages, there was no direct evidence as to how the caps came where they were found, but it was proved that, when blasting, the workmen would hurriedly place explosives under the tool box and run away. Caps of the same kind were kept in the tool box near which those in question were found, and were taken out and put back as occasion might require. *Held*, reversing the judgment of the Court of Appeal for Ontario, that in the absence of evidence leading to a different conclusion, placing these dangerous caps where they were found could fairly be attributed to the workmen, who alone had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M. in exploding the cap did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser, was also a question for the jury. *Makins v. Piggott*, xxix., 188.

5. *Trespasser — Dangerous way — Art. 1053 C. C.—Warning — Imprudence — Arts. 491, 496, 508 C. P. Q.*—A cow-boy aboard a ship on the eve of departure from port, was injured by the falling of a derrick insecurely fastened. He was not in the performance of duty, had been warned to "stand from under," but had not moved away from the dangerous position. *Held*, reversing the Court of Queen's Bench, that the boy's imprudence was not merely contributory negligence but constituted the principal and immediate cause of the accident and that, under the circumstances, neither the master nor the owners of the ship could be held responsible for damages. *Roberts v. Hawkins*, xxix., 218.

6. *Long user — Constructions on public lands — Interference — Damages—Right of action — Nuisance — Suffrage.*—C. built a wharf in the bed of the St. Lawrence River, which communicated with the shore by means of a gangway, and had enjoyed the possession of this wharf and its approaches for many years, when R. claimed that it was a public nuisance, and destroyed the means of communication from the wharf to the shore. C. sued for damages, and to have the works restored. After issue joined, R. filed a supplementary plea, alleging, that since the institution of the action, the person on whose land C.'s bridge rested had erected buildings which prevented the restoration of the bridge and wharf, and further that the wharf had been destroyed by natural causes and abandoned, and that its re-establishment would be a public nuisance without utility. On appeal from the judgment of the Court of Queen's Bench affirming the dismissal of the action, *Held*, reversing the judgment appealed from, that as

it appeared C. had been openly, and with implied consent of public authority, allowed to erect the bridge and wharf on public property and remain in possession of it for over 16 years, the defendant, who had full knowledge of the fact, was estopped and debarred of any right to remove what might have been originally a nuisance to him, and that, notwithstanding any subsequent abandonment of this wharf and bridge, C. was entitled to substantial damages. *Caverhill v. Robillard*, ii., 575.

7. *Trespass by individual corporators—Suit against them by corporation—R. S. N. S. (4th ser.) c. 23, s. 30—Pleading—Stay of proceedings.*—Defendants, while trustees of a school section, entered upon the school plot of their section, removed the school-house from its foundation and destroyed a portion of the stone wall. Subsequently their successors as trustees brought action for trespass *quare clausum fregit* and *de bonis asportatis* against them for injury to the school-house, the property of the section. The defendants pleaded justification, asserting that the acts were legally performed by them in their capacity of trustees. Sub-section 4 of s. 30, c. 23, R. S. N. S. (4 ser.), declares that the sites for school-houses shall be defined by the trustees, subject to the sanction of the three nearest commissioners residing out of the section. In this case the sanction of the three nearest commissioners was not obtained. On appeal from rule of Supreme Court of N. S., setting aside a verdict for plaintiffs: *Held*, reversing the court below, that under c. 23, R. S. N. S. (4 ser.), the defendants were not authorized to remove the school-house from its site in the manner mentioned; that defendants having subsequently abused their right to enter upon the lands of the corporation by an overt act of spoliation, the plaintiffs, who are a corporate body identical with the corporation which existed at the time of the trespass, can maintain trespass against the defendants for the injury done to the corporate property. That when an action is brought in the name of a corporation without due authority, it is not sufficient for the defendants to plead that the plaintiffs did not legally constitute the corporation, but in such a case defendants ought to apply to the summary jurisdiction of the court to stay proceedings. *Pictou School Trustees v. Cameron*, ii., 690.

8. *Assessment and taxes—Arrest on return of nulla bona—Void assessment—Damages — Joint liability of municipal officer and corporation.*—A municipal officer illegally issuing a warrant under which a delinquent ratepayer was arrested was held guilty of trespass, and on the application of the maxim *respondet superior* the municipality was held liable in damages. *McSorley v. City of St. John*, vi., 531.

See MASTER AND SERVANT, 1.

9. *Fishery officer — Riparian owners—31 Vict. c. 60 (D.)*—A fisheries officer who makes an unauthorized seizure is a trespasser and can be held liable in damages. *Venning v. Steadman et al.*, ix., 206.

See FISHERIES, 3.

10. *Halifax Harbour—Obstruction in navigable waters—Unauthorized grant—Removal of piles obstructing access to wharf.*

See NAVIGATION, 1.

11. *Plan of survey — Conventional boundary line — Mistake — Estoppel — Equitable relief.*

See BOUNDARY, 1.

12. *Timber berth—Permit to cut timber—Right of holder—Dominion Lands Act, 1879.*

See CROWN, 85.

13. *Equivocal possession—Right of way—Trespass.*

See ACTION, 125.

14. *Trouble de droit—Lease of telegraph system—Operation of railway telegraph lines.*

See LEASE, 23.

15. *Seizure — Title to goods — Execution against husband—Justification by writ.*

See SHERIFF, 7.

16. *Tenants in common — Non-joinder of parties—Mesne profits.*

See EJECTMENT, 2.

17. *Possession of marsh lands—Accretion—Entry by sewers commissioner—Evidence—R. S. N. S. (4 ser.) c. 40, s. 4—Consent of owners—"New works"—Findings of jury.*

See TITLE TO LAND, 100.

18. *Trespass to mortgaged property—Parties to action for—Owner of equity of redemption—Mortgages out of possession.*

See MORTGAGE, 60.

19. *Railways — Regular depot — Traffic facilities — Railway crossings—Negligence—Walking on the line of railway—Invitation—License—51 Vict. c. 29, ss. 240, 356, 373 (D.)*

See RAILWAYS, 50.

20. *Usurpation by municipal corporation — Widening streets—Illegal detention of lands—Damages.*

See EXPROPRIATION, 11.

21. *Water lots—Navigable waters—Cutting ice.*

See RIVERS AND STREAMS, 5.

22. *Deed of lands—Metes and bounds—Possession beyond boundary.*

See TITLE TO LAND, 87.

23. *Municipal drains—Continuing trespass—Limitation of actions ex delictu—Nova Scotia "Towns' Incorporation Act."*

See MUNICIPAL CORPORATION, 95.

24. *Overhanging roof — Right of view — Boundary line — Evidence — Demolition of works constructed—Waiver.*

See TITLE TO LAND, 41.

25. *Staking mineral claims—Placer mining—Hydraulic concessions—Annulment of prior lease—Volunteer plaintiff—Right of action—Status of adverse claimants.*

See MINES AND MINERALS, 14.

26. *Railway embankment—Trespass—Nuisance—Continuing damages—Right of action.*

See NUISANCE, 7.

27. *Occupation of leased lands—Injury to leased property—Recovery of lands and damages.*

See TITLE TO LAND, 8.

TROVER.

1. *Conversion of vessel — Joint owners — Marine insurance — Abandonment—Salvage.]*

—A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest.—A vessel partly insured, was wrecked and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned and the underwriters notified the ship's husband that she was not a total loss and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The uninsured owner brought an action against the underwriters for conversion of her interest. *Held*, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of her interest by any action of the underwriters, but by the decree of the court under which the vessel was sold for salvage. *Rourke v. Union Ins. Co.*, xliii., 344.

2. *Married woman — Title to goods—Execution against husband—Justification by writ.*

See SHERIFF, 7.

TRUSTEES AND EXECUTORS.

See EXECUTORS AND ADMINISTRATORS.

TRUSTS.

1. *Title to land — Principal and agent — Sale by agent—Fraudulent conveyances—Pre-tended purchase—Laches.]*—In 1874, the plaintiff, W. J. T., before leaving Canada, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, G. T., one of the defendants. In April, 1851, G. T., in anticipation of a suit which was afterwards brought by one C. against W. J. T., in relation to the lands in question, without the knowledge of his brother, re-assigned the property to him, and having paid the balance of the purchase money, a deed of the lot issued at G. T.'s request to W. J. T. as such assignee. In October following a power of attorney was sent to, and executed by, W. J. T. who was then in California, in favour of G. T., to enable him (G. T.) to "sell the land in question, and to sell or lease any other lands he owned in Canada." In 1856, G. T. conveyed the property to W., the respondent, who had acted as solicitor for W. J. T., and had full means of knowing G. T.'s position and powers, for an alleged consideration of \$1,000, and W. immediately re-conveyed to G. T. one-half of the land for an alleged consideration of \$200. In 1873 W. J.

T. returned to Canada, and in January, 1874, filed a bill impeaching the transactions between his brother and W., seeking to have them declared trustees for him. *Held*, reversing the judgment of the Court of Error and Appeal, and affirming the decree of Vice-Chancellor Proudfoot, Strong, J., dissenting, that W. J. T. was the owner of the lands in question; that he had not been debarred by laches or acquiescence from succeeding in the present suit, and that the transactions between G. T. and W. should be set aside. Judgment appealed from, *sub nom. Taylor v. Taylor* (1 Ont. App. R. 245; 23 Gr. 496) reversed. *Taylor v. Wallbridge*, ii., 616.

2. *Pledge — Precarious title — Mandate — Insolvency — Shares held in trust — Banking — Transfer as security — Notice — Action to account — Arts. 1755, 2268 C. C. (P. Q.)* — S. sent her money from England to R. at Montreal, to be invested in Canada for her. R. subscribed for stock in the Montreal Rolling Mills Co. as "J. Rose in trust," without naming for whom, and paid for it with S.'s money. He sent the stock certificates to S., and paid her the dividends received on the stock. R. transferred to the manager of the bank as security for his indebtedness 350 shares of the Montreal Rolling Mills Co., and the transfer shewed on its face that he held these shares "in trust." The bank then received the dividends and credited them to R., who paid them to S. Subsequently R. became insolvent, and S., not receiving her dividends, sued the bank for an account, and to recover the value of the shares. — *Held*, reversing the judgment of the Court of Queen's Bench at Montreal (5 Legal News 66), Strong, J. dissenting, that there was sufficient notice to the bank that R. was acting as agent or mandatary of S., and the bank not having shewn that R. had authority to sell or pledge the stock, S. was entitled to an account from the bank. (Arts. 1755 and 2268 C. C.) *Sweeney v. Bank of Montreal*, xii., 661.

[Privy Council affirmed this decision, 12 App. Cas. 617.]

3. *Grant of land for schools — Charitable trust — Acceptance of by trustees — Discretion of trustees — Doctrine of cy-près*.] — By grant of the Township of Cornwallis, in King's County, N. S., made in 1761, 400 acres of land were declared to be "for the school." By a subsequent grant in 1790, the said 400 acres were declared to be vested in the rector and wardens by name of the church of St. John in the said township, and the rector and wardens of the said church of the time being, in special trust, to and for the use of one or more school or schools, as may be deemed necessary by the said trustees, for the convenience and benefit of all the inhabitants of the said Township of Cornwallis, and in trust that all schools in said township furnished or supplied with masters qualified, agreeably to the laws of this province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct free of expense, such poor children as may be sent them by the said trustees. There were no words in the last mentioned grant which would make the estate thereby conveyed an estate of inheritance. The grantees took possession of the land mentioned in said grant, and they and their successors in office have ever since remained in

possession of it; and until the year 1873, the rents and profits arising from such land, were distributed among the schools of said township, and poor children were sent by the trustees to, and educated in said schools according to the terms of the trust. — In 1873, however, the then trustees discontinued such distribution, and allowed the funds realized from said lands to accumulate, the reason alleged therefor being that the schools of the township had become so numerous that the sum apportioned to each would be too small to be of use, and also that under the free school system all the poor children of the township were educated free of expense, and the object for which such funds had previously been supplied no longer existed. — The defendants were invested with the said trust in 1879, when the revenue of the said lands had accumulated until they amounted to over \$1,200. Shortly after they became such trustees it was determined to build a school house in a certain district in the said township with the money. A meeting of the vestry of the church was held, and a resolution passed authorizing such school house to be built on land leased from the church. The school was non-sectarian, but after school hours any of the children that wished could receive instruction in the doctrines of the Church of England. — In a suit to restrain the defendants from using the trust funds to build such school house, and praying for an account, — *Held*, reversing the judgment appealed from (5 Russ. & Geld. 107), and restoring that of the court of first instance (Russ. Eq. Rep. 429), that the trustees had no discretion as to the application of the trust funds, but were bound to distribute them among all the schools of the township, which would be entitled to participate under the terms of the trust, however wanting in utility such a disposition of said funds might be. *Held*, also, that the Attorney-General of the province was the proper person to bring this suit. — *Held*, per Strong, J., that in interpreting the trust, in order to explain the apparent repugnancy in the grant in providing that the rents were to be distributed among one or more schools, &c., and also among all the schools in the township, the probable condition of the township in respect to the number of schools therein, at the time the grant was made, coupled with the long continued usage which had prevailed in the manner of administering the trust, could be considered as a rule of guidance for such interpretation; and also, that under the doctrine of *cy-près*, a reference might be made to the master to report a scheme for the future administration of the charity. *Attorney-General v. Axford*, xiii., 294.

4. *Presumption — Bank shares held "in trust" — Substitution — Onus probandi — Res judicata — Art. 1241 C. C. — Separate title — Intervention*.] — The fact of bank shares being purchased in trust at a time when the trustee was solvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available to satisfy the demand of his creditors. *Sweeney v. Bank of Montreal* (12 App. Cas. 617; 12 Can. S. C. R. 661) followed. — A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the *corpus* of said shares nor as to the dividends of other shares claimed under a different title. Strong, J., was of opinion, in the case of *Holmes v. Carter*, that upon the

facts shewn the judgment of the Court of Queen's Bench should be affirmed. *Muir v. Carter; Holmes v. Carter*, xvi., 473.

5. *Art. 19 C. C. P.—Suit by trustees—Promissory note—Collateral—Price of sale—Prescription—Estoppel by deed.*]—H. as trustee for creditors of the firm of R. M., sued appellant, a member of the firm, for \$4,720, alleging: 1. A registered transfer from one J. R. M. to him, as trustee, of a similar sum with all rights, mortgages, &c., thereunto appertaining, due by the said appellant to J. R. M. for the price of lands. 2. A transfer of promissory notes signed by appellant for the same amount and representing the price of sale of said property, but which were to be in payment thereof only if paid at maturity. Appellant was a party and intervened to the deed of transfer and declared himself satisfied and subject to its conditions.—Appellant pleaded that H. had no action as trustee (art. 19 C. C. P.) and that the price had been paid by the promissory notes which were now prescribed. *Held*, affirming the Court of Queen's Bench, that art. 19 C. C. P. was not applicable. The appellant, having become a party to the registered transfer, which gave the respondent as trustee all mortgagee's rights, was estopped from denying the efficacy of such deed or of the right of the plaintiff to sue thereunder in his quality of trustee. *Burland v. Moffatt* (11 Can. S. C. R. 76); *Browne v. Pinsonneault* (3 Can. S. C. R. 103); and *Porteous v. Keynar* (13 App. Cas. 120) distinguished. 2. That the notes having been given as collateral for the price of the property, and the property not having been paid for, the plea of prescription as to the notes could not avail against an action for the price. Judgment appealed from (15 R. L. 214) affirmed. *Mitchell v. Holland*, xvi., 687.

6. *Administration of estates—Remuneration for services—Trustees—Commission—Rule of law.*]—In the Province of Nova Scotia prior to the passing of 51 Vict. c. 11, s. 69, the rule of English law relating to commission to trustees was in force, and no such commission could be allowed unless provided by the trust. Judgment appealed from (21 N. S. Rep. 184) reversed. *Power v. Meagher*, xvii., 287.

7. *Minority—Sale of minor's stock—Commercial company—Shares held "in trust"—Arts. 297, 298, 299 C. C.—Arts. 1351, 1353 C. P. Q.—Purchaser for value—Notice—Account.*]—Where a father, acting generally in the interest of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for shares in a commercial company on behalf of the minor and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favour of the minor without any acceptance by or on behalf of the minor being necessary.—Such shares could not be sold or disposed of without complying with the requirements of arts. 297, 298, 299 C. C.; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares.—The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to shew that the title of the seller was not absolute and to put the purchaser on inquiry as to the right to sell the shares. *Sweeney*

v. Bank of Montreal (12 Can. S. C. R. 661; 12 App. Cas. 617) referred to and followed. Judgment appealed from (M. L. R. 5 Q. B. 273) reversed, *Taschereau, J.*, dissenting. *Raphael v. McFarlane*, xviii., 183.

8. *Mortgagor and mortgagee—Mortgage by trustee—Personal liability—Right of mortgagee to enforce equities between trustee and cestui que trust.*]—Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his *cestui que trust*. *Fourmier and Taschereau, J.J.*, dissenting. *Williams v. Balfour*, xviii., 472.

9. *Testamentary executor—Administration by agent—Mandate—Fit and proper person—Misappropriation—Negligence—Art. 1711 C. C.*]—A testamentary executrix who employs an agent in the administration of her trust, is bound to supervise his management and to take all due precautions and she cannot escape liability for the misappropriation of funds by such agent, although he was a notary public of previously excellent standing. Judgment appealed from (M. L. R. 5 Q. B. 186) affirmed. *Low v. Gemley*, xviii., 685.

10. *Partnership—Dissolution—New partnership by continuing partner—Assets of old firm—Liability of new firm—Action—Trust—Novation.*]—A firm consisting of two persons dissolved, the retiring partner receiving a number of promissory notes in payment of his share in the business, which notes he indorsed to plaintiff H. The continuing partner afterwards entered into a partnership with O., defendant, and transferred to the new firm all the assets of his business, his liabilities, including the above mentioned notes, being assumed by the co-partnership and charged against him. The new firm paid two of the notes and interest on others, and made a proposal for an extension of time to pay the whole which was not entertained. *Held*, reversing the decision appealed from (17 Ont. App. R. 456, *sub nom. Henderson v. Killey*), *Fourmier, J.*, dissenting, that the agreement between the continuing partner and defendant did not make defendant a trustee of the former's property for the payment of his liabilities, and the act of the defendant in paying some of the notes did not amount to a novation as it was proved that plaintiff had obtained and still held a judgment against the maker and indorser of the notes in an action thereon and there was no consideration for such novation. *Osborne v. Henderson*, xviii., 698.

11. *Condition precedent—Non-performance—Revocation by grantor—Re-conveyance.*]—By deed between B., grantor, of the first part, certain named persons, trustees, of the second part, and P., grantee, of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B., and performed certain conditions intended for the support or advantage and security of B. which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be re-conveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside, the trial judge held that B. when he executed it was ignorant of its nature and

effect and set it aside on that ground. The full court dissented from this finding of fact, and varied the judgment by directing that the trustees should re-convey the property to B. on the ground that P. had failed to perform the conditions he had agreed to by the deed. *Held*, affirming the Supreme Court (B. C.), that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property; that by failure to perform them the trust in his favour lapsed, and B., the grantor, being the only person to be benefited by the trust, could revoke it at any time and demand a re-conveyance of the property. *Poirier v. Brulé*, xx., 97.

12. *Trusts—Will—Executors and trustees—Breach of trust—Presumption—Constructive notice—Inquiry—Liability of assignee.*—After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing *quâ* trustee and not as executor, to shift the burden of proof. *Ewart v. Gordon* (13 Gr. 40) discussed.—W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned the mortgages which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same. *Held*, reversing the judgment of the Court of Appeal (19 Ont. App. R. 447), that in taking and assigning said mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds. *Cumming v. Landed Banking and Loan Co.*, xxii., 246.

13. *Trustee—Administrator of estate—Release to, by next of kin—Rescission of release—Laches.*—The appeal was from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial for the defendants. E. M. died in 1871, and his brother and partner, H. M., obtained from his widow and his father, as next of kin, a release of their respective interests in all real and personal property of the deceased. In getting this release he represented that the estate would be sacrificed if sold at auction, and the most could be made of it by letting him have full control of the property. He then took out letters of administration to E. M.'s estate, but took no further proceedings in the Probate Court, and managed the property as his own until he died in 1888. During that time he wrote several letters to the widow of E. M., in most of which he stated that he was dealing with the property for her benefit, and would see that she lost nothing by giving him control of it. After his death the widow brought an action against his executors, asking for an account of the partnership between her hus-

band and H. M., and of his dealings with the property since her husband's death and payment of her share; she also asked to have the release set aside. The defendants relied on the release as valid, and also pleaded that plaintiff by delay in pressing her claims was precluded from maintaining her action.—The Supreme Court of Canada held, Gwynne, J., dissenting, that the release should be set aside; that it was given in ignorance of the state of the partnership business and E. M.'s affairs, and the plaintiff was dominated by the stronger will of H. M.; that the latter had divested himself of his legal title by admitting in his letters a liability to the plaintiff, and must be treated as a trustee; that as a trustee lapse of time would not bar plaintiff from proceeding against him for breach of trust; and that the delay in pressing plaintiff's claim was due to H. M. himself, who postponed from time to time the giving of a statement of the business when demanded by the plaintiff. The appeal was dismissed with costs. *Mack v. Mack*, xxiii., 146.

14. *Executors and trustees—Accounts—Jurisdiction of Probate Court—Res judicata—Misconduct—Judicial discretion—Misconduct—Threats of disclosures—Removal of trustee.*—A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court.—The Supreme Court of Canada, on appeal from the judgment of the Supreme Court of New Brunswick, which decided that the said charges were properly disallowed, will not reconsider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved.—A letter written by a trustee under a will to the *cestui que trusts* threatening in case proceedings are taken against him to make disclosures as to malpractices by the testator, which might result in heavy penalties being exacted from the estate, is such an improper act as to call for his immediate removal from the trusteeship. *Grant v. MacLaren*, xxiii., 310.

15. *Trust under will—Infancy—Disclaimer—Possession of land—Statute of Limitations.*—A son of the testator and one of the executors and trustees named in the will was a minor when his father died, and after coming of age he never applied for probate, though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate and remained in possession over twenty years, and until the period of distribution under the clause above set out arrived, and then claimed to have a title under the Statute of Limitations. *Held*, affirming the decision of the Court of Appeal (18 Ont. App. R. 25, *sub nom. Wright v. Bell*), that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute. *Houghton v. Bell*, xxiii., 498.

16. *Joint stock company—Shares paid for by transfer of property—Adequacy of consideration—Secret profits—Fully paid-up shares—Promoter selling property to company—Fiduciary relation—Winding-up—*

Contributory.—There is a distinction between a trust for a company of property acquired by promoters and afterwards sold to the company and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed.—A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter and if he sells to them must not violate any of the duties devolving upon him in respect to such relationship.—If he sells, for instance, through the medium of a board of directors who are not independent of him the contract may be rescinded, provided the property remains in such a position that the parties may be restored to their original status.—There may be cases in which the property itself may be regarded as being bound by a trust either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profits consists of paid-up shares of the company issued as part of the purchase price of the property such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares, for which the promoter may be made a contributory. Judgment appealed from (21 Ont. App. R. 66) affirmed. *In re Hess Mfg. Co.; Edgar v. Sloan*, xxiii., 644.

17. *Power to borrow money — Promissory note—Charge on estate—Exercise of power.*—The defendant was trustee of the estate of one Simonds, and the action was brought to recover money lent to a former trustee, one Lee. The trust deed to Lee gave him power to borrow money on mortgage. He obtained \$2,000 from the plaintiff, which he represented was for the use of the estate, giving him a promissory note signed "G. H. Lee, trustee of E. I. Simonds," and indorsed by G. H. Lee. The Judge in Equity gave judgment for the plaintiff, holding that Lee having power to borrow on mortgage, was acting within his powers in borrowing from plaintiff, but if not he got the money on the promise that he would exercise the power. The Supreme Court of New Brunswick reversed this judgment, holding that there was no evidence of such promise, and the estate never having had the benefit of the money the trustee would not have been entitled to indemnity, and the plaintiff's right was only to be placed in the same position as the trustee. On further appeal the Supreme Court of Canada, after hearing counsel for appellant, affirmed the judgment of the Supreme Court of New Brunswick, and dismissed the appeal without calling upon counsel on the other side. *Connor v. Vroom*, xxiv., 701.

18. *Trustee — Account of trust funds—Abandonment of *cestui que trust*—Evidence.*—The holder of two insurance policies, one in the Providence Washington Insurance Company, and the other in the Delaware Mutual Insurance Company, on which actions were pending, assigned the same to M. as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became

entitled to the balance of said insurance moneys after M.'s claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M., and for a defect in the other policy the plaintiff in the action thereon was nonsuited. In 1886 M. wrote to J. informing him that a suit in equity had been instituted against the Delaware Mutual Insurance Company and its agent, for reformation of the policy and payment of the sum insured and requesting him to give security for costs in said suit, pursuant to a judge's order therefor. J. replied that as he had not been consulted in the matter and considered the success of the suit problematical he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again saying, "As I understand it, as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which J. made no reply. The solicitor of M. provided the security and proceeded with the suit, which was eventually compromised by the company paying somewhat less than half the amount of the policy. Before the above letters were written J. had brought suit against M. for an account of the funds received under the assignment, and in 1887, more than a year after they were written, a decree was made in said suit referring it to a referee to make an account of trust funds received by M., or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof, which decree was affirmed by the full court and by the Supreme Court of Canada. On the taking of said account M. contended that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report the same was disallowed. *Held*, reversing the judgment of the Supreme Court of New Brunswick, that the sum paid by the Delaware company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established as the proceedings against the Delaware company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M., and not of the original holder. *Held*, further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to same fixed date, had not proceeded upon a wrong principle. *Jones v. McKean*, xxvii., 249.

19. *Powers of liquidators to buy or sell property of which they are administrators—Art. 1484 C. C.*—In an action where no special demand has been made to that effect, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of art. 1484 of the Civil Code of Lower Canada, prohibiting administrators and trustees from purchasing property in their charge as such. Judgment appealed from (Q. R. 3 Q. B. 344) affirmed on

this question, but reversed in the general result of the appeal. *Guertin v. Sansterre*, xxvii., 522.

See BUILDING SOCIETY, 3.

20. *Conveyance of land in the name of third person—Debtor and creditor—Fraud—Declaration of trust—Parties in pari delicto.*—In 1875 G. M. entered into an agreement for the purchase of a parcel of land in Halifax and entered into possession and commenced to build a house on one of the lots. In 1877 he was called upon to carry out his agreement, and to pay the purchase money, but being then financially embarrassed, he could not make the payment. The house was not then completed although he was able to occupy it. He applied to a building society for a loan, but, as there were judgments recorded against him, which would have a priority, he caused the deed for the land to be executed in the name of W. M., his nephew, and then procured the loan upon it as security. W. M. afterwards took possession of the property, and an action was brought against him by G. M. to compel him to execute a conveyance, and for an account of rents and profits. The trial judge held that the deed had been taken in the name of the nephew for the purpose of hindering, delaying and defrauding creditors and refused the relief asked for. The court *en banc* reversed this judgment and ordered W. M. to convey the property to G. M. *Held*, affirming the decision of the Supreme Court of Nova Scotia (29 N. S. Rep. 231), that it did not appear from the evidence that G. M., in having the deed made in the name of his nephew, had the intent to defraud his creditors, who were not prejudiced, and had not complained; that the parties were not in *pari delicto*, and G. M. was entitled to relief as the more excusable of the two. *Mackenzie v. Mackenzie*, 20th February, 1897.

21. *Trustee—Misappropriation—Surety—Evidence—Knowledge by cestui que trust—Estoppel—Parties.*—Funds held by F. as trustee for C., were misappropriated by being deposited with the firm of F. F. & Co., of which F. was a member, and after being so kept on deposit for a period of upwards of six years, were lost in consequence of the failure of the firm. In an action against the defendants, who were sureties for F., to compel them to make good the funds so misappropriated and lost, the defence relied upon the knowledge of the misappropriation on the part of C., which knowledge was sought to be shewn by the fact that payments of interest were made to C., from time to time, by cheque of the insolvent firm.—The Supreme Court of Nova Scotia *en banc* held, that the manner in which these payments were made was not evidence of knowledge on the part of C., that she was bound to communicate to the sureties; that at most it shewed nothing more than assent by C. to the deposit of the income to which she was entitled with the firm of which her trustee was a member. The court also held, that the trial judge could have disposed of the contention raised on behalf of the defendants without making C. a party to the suit. And it also seemed to the court, that knowledge on the part of C. that some part of the trust fund had been placed by the trustee temporarily with F. F. & Co., awaiting investment on good security, would not be held to be knowledge, assent or acquiescence by C. in the misconduct of the trustee which led to the loss of the funds. (30 N. S. Rep. 173, s. C. D.—47

sub nom. Eastern Trust Co. v. Forrest et al.)—On appeal, the Supreme Court of Canada affirmed the decision of the Supreme Court of Nova Scotia, *en banc*, and dismissed the appeal with costs. *Bayne v. Eastern Trusts Co.*, xxviii., 606.

22. *Construction of statute—20 & 21 Vict. c. 54, s. 12 (Imp.)—Application—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.*—The Imperial Act, 20 & 21 Vict. c. 54, s. 12, provides that "Nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon, against any person under this Act, shall prevent, lessen or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed. . . and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or re-payment of any trust property misappropriated."—*Held*, affirming the judgment of the Supreme Court of British Columbia (5 B. C. Rep. 571), that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts.—*Semble*, That the section only covered agreements or securities given by the defaulting trustee himself.—*Quære*, Is the said Imperial Act in force in British Columbia?—If in force it would not apply to a prosecution for an offence under R. S. C. c. 264 (The Larceny Act), s. 58.—An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 264, s. 58, which was not re-enacted by the Criminal Code, 1892. *Held*, that the alleged criminal act, having been committed before the Code came into force, was not affected by its provisions, and the covenant was illegal at common law. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act. *Major v. McCraney*, xxix., 182.

23. *Insolvency—Purchase by inspector—Mandate—Arts. 1484, 1706 C. C.—Art. 748 C. P. Q.*—An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto and he cannot be allowed to become a purchaser, on his own account, of any of the estate of the insolvent. *Davis v. Kerr* (17 Can. S. C. R. 235) followed. *Gastonguay v. Savoie*, xxix., 613.

24. *Trustees—Powers—Party wall—Tenants in common.*—M., owner of two warehouses, Nos. 5 and 7 (the dividing wall being necessary for the support of both), executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation to the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was claimed by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M. to have it declared that the wall in question was a party wall; *Held*, reversing the judgment of the Court of Appeal, that the trustees of the will and marriage settlement were bound by the trust declared in the instruments under which they derived their powers, and even if it could be shewn that the confirmation deed had the effect of conveying a greater

quantity of land than the deed from the trustees of the marriage settlement, such a voluntary conveyance in favour of one beneficiary, which would operate prejudicially to the interests of the other beneficiaries would be a breach of trust and consequently void. *Held*, that upon the execution of the deed by way of marriage settlement of No. 5, the wall common to the two warehouses, Nos. 5 and 7, became a party wall of which the owners of the warehouses were tenants in common. *Leiris v. Allison*, xxx., 173.

25. *Building—Want of repair—Damages—Art. 1055 C. C.—Trustees—Personal liability of — Executors — Arts. 921, 981 (a) C. C.—Procedurc.*—The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use, and management, which reasonable care can guard against.—A. T. sued J. F. and M. W. F., personally as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming \$4,000 damages for the death of her husband who was killed by a window falling on him from the third story of a building, which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F., and his children, for whom the said J. F. and M. W. F. were also trustees. The judgment of the courts below held the appellants liable in their capacity of executors of the general estate and trustees under the wills. *Held*, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d'héritiers fiduciaires*) for the benefit of G. F.'s children, but were not liable as executors of the general estate.—Where parties are before the court *quâ* executors, and the same parties should also be summoned *quâ* trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary. *Ferrier v. Trépannier*, xxiv., 87.

26. *Acceptor of draft for accommodation—Redemption of securities pledged as collateral—Right of action.*

See PRINCIPAL AND AGENT, 19.

27. *Reversion of lands not used for canal purposes—Purchase by fiduciary agent of the Crown.*

See RIDEAU CANAL LANDS, 1.

28. *Clergy reserves — Commutation fund—Stipend—Vested rights.*

See CLERGY.

29. *Powers of executors — Sale of land — Excess of estimate—Specific performance — Breach of trust.*

See SALE, 52.

30. *Purchase of land — Joint negotiations —Decd—Evidence of title—Resulting trust.*

See TITLE TO LAND, 117.

31. *Construction of will—Absolute devise—Repugnant clause.*

See WILL, 11.

32. *Ordinance lands — Laying out and ascertaining—Reversion of lands not used for canal purposes—Conflict with public use—Purchase by fiduciary agent—Estate in lands.*

See RIDEAU CANAL LANDS, 2.

33. *Assignment for benefit of creditors — Unreasonable conditions—Resulting trusts — Fraudulent preferences.*

See ASSIGNMENTS, 3.

34. *Breach — Fraud — Forgery — Ratification.*

See BILLS AND NOTES, 19.

35. *Investment of trust funds—Condition precedent—Recovery of funds—Limitation of action.*

See SALE, 107.

36. *Substitution—Conversion of bank stock —Redemption—Condictio indebiti.*

See REPETITION.

37. *Sheriff's sale — Purchase by executor—Possession—Statute of Limitations—Evidence.*

See TITLE TO LAND, 118.

38. *Legacy — Residuary devise — Claim on assets—Charge on lands—Priority—Notice.*

See EXECUTORS AND ADMINISTRATORS, 4.

39. *Security for advances—Hypothecation of lands—Sale of securities—Rights of mortgagees—Banking.*

See PLEDGE, 6.

40. *Title to land—Sale by holders of equity —Party entitled to price.*

See TITLE TO LAND, 119.

41. *Deed absolute in form—Security for loan—Undisclosed trust—Conveyance in name of third party—Parol testimony—Statute of Frauds.*

See SPECIFIC PERFORMANCE, 2.

42. *Substitution — Purchase by curator — Mandatory—Negotiorum gestor.*

See ACCOUNT, 4.

43. *Transfer of stock—Shares held in trust —Notice—Duty as to inquiry.*

See PLEDGE, 5.

44. *Insolvents' estate — Administration by trustee—Security for advances—Hypothec—Prête nom—Accounts—Payments out of estate —Interest.*

See BANKS AND BANKING, 17.

45. *Executors' will—Carrying on administration — Constructive trust — Account — Interest — Negligence—Contrainte.*

See TUTORSHIP, 2.

46. *Assignment of mortgage—Collateral security—Neglect by assignee in collecting—Accounts.*

See MORTGAGE, 1.

47. *Presbyterian Church in Canada — 38 Vict. c. 72 (Q.)—Recovery of property held in trust—Removal of trustee.*

See ACTION, 119.

48. *For benefit of creditors — Power of attorney to assignor — Sale of goods to assignor —Authority to use trustee's name—Evidence.*

See DEBTOR AND CREDITOR, 46.

49. *Purchase of land by — Mortgage — Indemnity to vendor—Liability of purchaser.*

See MORTGAGE, 61.

50. *Fraudulent appropriation by trustee — Unlawful receiving—Simultaneous acts.*
See CRIMINAL LAW, 13.

51. *Trust imposed on Crown—Railway subsidy—Application—Discretion.*
See CONSTITUTIONAL LAW, 55.

52. *Trust under will—Liability for negligence—Care of estate property.*
See EXECUTORS, 7.

53. *Director of company—Sale to—Fiduciary relationship—R. S. C. c. 129, s. 34.*
See WINDING-UP ACT, 13.

54. *Assignment for benefit of creditors — Inspector of insolvent estate — Guarantee by creditor and inspector on sale of assets—Account for profit.*
See INSOLVENCY, 48.

55. *Trustees and executors—Legacy in trust — Discretion of trustee—Vagueness or uncertainty as to beneficiaries—Poor relatives — Public Protestant charities—Charitable uses—Persona designata.*

See WILL, 47.

56. *Fraudulent conversion — Debentures transferable by delivery — Estoppel—Implied notice—Past due bonds.*

See PLEDGE, 7.

57. *Mortgage of trust estate—Equity running with estate—Equitable recourse — Construction of deed — Description of lands — Falsa demonstratio — Water lots — Accretion to lands — After acquired title—Contribution to redeem—Discharge of mortgage—Parol evidence to explain deed—Estoppel by deed.*

See MORTGAGE, 52.

58. *Constitutional law—Province of Canada—Treaties with Indians—Surrender of Indian lands—Charge upon lands—B. N. A. Act s. 109—Annuity to Indians—Revenue from lands—Increase of annuity.*

See CONSTITUTIONAL LAW, 4.

59. *Mortgage on foreign lands—Action to set aside—Jurisdiction—Secret trust—Lex rei sitæ.*

See LEX REI SITÆ.

60. *Principal and agent — Advances to agents to buy goods—Trust goods mixed with those of agent—Replevin—Equitable title.*

See PRINCIPAL AND AGENT, 51.

61. *Municipal corporation — Railway aid—Debentures — Sale of shares at discount — Trustee — Debtor and creditor — Division of county—Erection of new municipalities — Assessment — Action en reddition de comptes—Arts. 78, 154, 939 Mun. Code Que.—24 Vict. c. 30 (Que.)—20 Vict. c. 50 (Que.)*

See MUNICIPAL CORPORATION, 62.

62. *Trust — Lien for costs — Evidence — Husband and wife.*

See CONTRACT, 162.

63. *Conveyance — Duress — Undue pressure—Creation of trust.*

See DEED, 35.

64. *Donatis mortis causa — Delivery of key to third person.*

See DONATION, 2.

65. *Sale of trust estate — Conveyance in absolute form — Mortgage — Resulting trust — Notice—Estoppel.*

See TITLE TO LAND, 7.

66. *Vendor and purchaser — Principal and agent—Sale of lands — Authority to agent—Price of sale—Resulting trust—Conveyance to agent.*

See TITLE TO LAND, 142.

TURNPIKE.

See HIGHWAY.

TURNPIKE TRUST.

See QUEBEC TURNPIKE TRUST.

TUTORSHIP.

1. *Substitution — Minors — Tutor ad hoc — Intervention — Arts. 269, 945 (C. C.)*—In an action to account and for removal from trusteeship instituted by the party who had appointed the defendant trustee and curator to a substitution created by marriage contract, a tutor ad hoc to the minor children and *appelés* to the substitution has not sufficient quality to intervene in said suit to represent the minors. Art. 269 C. C. provides for the only case where a tutor ad hoc can be appointed to minors. Judgment appealed from (12 Q. L. R. 258) reversed, Strong, J. dissenting, on the ground that an appellate court ought not to interfere as a point of procedure merely was involved. *Rattray v. Larue*, xv., 102.

2. *Appointment of tutor by will — Directions of testator—Trust—Minor discharging tutor—Res judicata—Acquiescence—Executor — Pro-tutor—Action for account—Jurisdiction — Property in Quebec and Ontario—Negligence—Duty to administer en bon père de famille—Interest—Art. 290 et seq. C. C.—Contrainte.*—C., deceased mother of the appellant, was sole executrix of the will of her deceased husband whereby appellant and a sister (since deceased) were constituted sole residuary legatees. By her will, made at her domicile in Montreal, C. bequeathed all her property to her two children, and appointed the defendant and F. M. her executors, authorizing them to continue the execution of the will of her late husband, which had been made in Ontario where part of the lands affected were situate. She also appointed them tutors to her children, to take care of them until their marriage or their age of majority. Both acted accordingly together till F. M. left the country in 1856, after which defendant continued to do so alone. On coming of age in 1868, the plaintiff, as sole surviving legatee under both wills, gave the defendant a full discharge of his administration although he did not produce vouchers and render an account under oath. In an action *en reddition de compte* and for \$41,278, balance due on the administration (as ordered by a judgment in a preceding action to set aside the discharge

and certain sales, &c., for fraud). it was held by the Court of Queen's Bench (2 Dor. Q. B. 33; 25 L. C. Jur. 196) reversing the judgment of the Superior Court, District of Montreal, that C. had no power by her will to appoint administrators to continue the administration of her deceased husband's estate; that though defendant had not been duly appointed tutor he had acted as such and could be held to account; that the discharge was null and void as it had been given without a regular account; that defendant could not charge interest on sums advanced by him for education and maintenance of the minors, but only upon interest bearing debts paid by him in excess of his receipts, and finally adjusted the balance due by defendant on the *débats de compte* at \$590.07.—The Supreme Court held, that the quality of defendant was not only *res judicata* by the judgment condemning the defendant to render an account, but it had not been appealed from and had been acquiesced in by defendant; that the courts below were correct in holding that the action had properly been brought in Quebec; that, while agreeing with the Court of Queen's Bench as to the law respecting the liability of executors, the court was of opinion that there was not sufficient evidence that F. M. had acted otherwise than as agent of defendant, who was therefore properly liable for all the rents of the Belleville property after the death of C.; that the administration of defendant, although begun before the promulgation of the Civil Code, should have been regulated by the principles contained in the Code (art. 290 *et seq.*) which, with a few exceptions introducing new law, are only a *résumé* of the old law on the obligations of a tutor. He should therefore have administered *en bon père de famille*, whereas his own evidence was sufficient to prove negligence on his part. He had allowed the tenants of the Belleville property to make only such repairs as they thought right, and moreover to deduct the cost from the rents, although the leases bound them to keep the property in repair. That the defendant should be charged interest on the price of the Belleville property (\$6,250), and also on that part of the price of the sale of the half of the Drummond street property unaccounted for (\$4,640), from the time of sale (art. 1,534, C. C.), not being entitled to the six months allowed by the Code for investing the moneys of a minor, because he had claimed to appropriate and had used the money as his own; that the charge made for board of C. and "Louisa," allowed by the Queen's Bench, should be deducted, as C. and her daughters were living with the defendant as his relatives, and there was no evidence that defendant had at that time any intention of making them pay board; that the amount of the judgment obtained against C. should be disallowed, together with the interest thereon; and that certain other items (particularly specified) should be disallowed.—The result was that the judgment of the Queen's Bench was varied by condemning defendant to pay to plaintiffs \$12,121.49, but the court did not order a *contrainte par corps*, because it had been admitted that sufficient property belonging to defendant to secure plaintiff had been seized, and because the court not being obliged to pronounce "*la contrainte par corps*" against tutors in every case, did not think it necessary to do so in the present one.—*Per Strong, J.* The Belleville property having been devised by the plaintiff's father to her mother for life, with remainder to the plaintiff and her sister in fee, a trust was created, and upon the death of C. there was

no trustee to execute this trust, and defendant, and F. M., having entered into the estate of the minors and taken the profits were accountable in equity as constructive trustees, and their liability in this respect being entirely a personal one might be enforced in a jurisdiction other than that in which the lands were situated, and the mere pending of a suit in the Ontario Court of Chancery, in which no decree had been made, did not constitute any ground of defence. The defendant ought not to be allowed to claim the amount of the judgment against C., because it was a failure of duty on his part not to see she was protected by accepting her mother's succession under benefit of inventory, and he cannot be allowed to take advantage of his own default by making the plaintiff responsible for her mother's debt to an amount far beyond the value of the succession. Besides, the evidence of a debt was very unsatisfactory, and it was the common practice (so much so that this court might take judicial notice of it) to take judgments in this form in Ontario for the sole purpose of enabling the lands to be sold under execution against the executor or administrator (*Gardiner v. Gardiner*, 2 U. C. O. S. 520), and not with any view of binding the executor to an admission of personal assets, and such a judgment was no evidence as regarded the real representatives of the heir or devisee, but as to them was *res inter alios*, and before lands could be made liable to the satisfaction of the judgment creditor he was bound to prove his original debt as strictly as if no judgment against the executor had ever been obtained, and this the defendant had entirely failed to do. *Coleman v. Müller*, Cass. Dig. (2 ed.) 301.

3. *Appeal — Jurisdiction — Matter in controversy*—*E. S. C. c. 135, s. 29b—Tutorship—Petition for cancellation of appointment—Arts. 249 et seq. C. C.—Tutelle proceedings.*—The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect of the cancellation of the appointment of a tutrix to minor children. *Noël v. Cheverfils*, xxx., 327.

4. *Account of administration — Deed by minor to tutor—Action to annul—Prescription—Arts. 2243, 2253 C. C.*—The right of action to annul a sale made in 1855 by an emancipated minor and her husband to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and deceased mother) of her share in her mother's succession, is prescribed by ten years from the date when the minor became of age. *Moreau v. Motz* (7 L. C. R. 147) followed.—Judgment appealed from (*M. L. R. 2 Q. B. 228*) affirmed, *Fournier and Henry, JJ.*, dissenting. *Gregoire v. Gregoire*, xiii., 319.

5. *Misconduct of tutor — Loan to minor—Ratification — Account — Remedy—Hypothecary action.*—Where a loan of money is improperly obtained by a tutor for his own purposes and the lender, through his agent who was also the subrogate tutor, has acknowledged that the judicial authorization to borrow has been obtained without the tutor having first submitted a summary account as required by art. 298 C. C., and that such authorization is otherwise irregular on its face, the obligation given by the tutor is null and void.—The ratification by the minor after becoming of age of such obligation is not bind-

ing if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor.—If a mortgage, granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action by the lender against a subsequent purchaser of the property mortgaged will not lie.—A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor when of age for the amount so loaned and used. *Davis v. Kerr*, xvii., 235.

See MORTGAGE, 11, note.

6. *Testamentary succession — Executors—Balance due by tutor—Action for account—Provisional possession — Parties to action — Envoie en possession.*—The appeal was from the judgment of the Court of Queen's Bench for Lower Canada (Q. R. 6 Q. B. 34), which reversed the decision of the Superior Court, District of Quebec, and dismissed the plaintiff's action and incidental demand, and held, that on failure of testamentary executors to render an account, the heirs of the testator have no direct action against them for alleged balances in their hands; that their proper recourse would be by an action for account, which should embrace the whole of the administration of the succession of the executors, and could not be restricted to particular or isolated matters; that a demand for provisional possession (*envoi en possession*), of a testamentary succession against an executor who has had the administration thereof should implead all the heirs as plaintiffs, and that failure in the joinder of any one of them would be fatal, and the defendant could not be compelled to call them in as parties to the action, and further, that, in a case where there were several executors, such actions must be brought against them jointly, and could not be validly instituted against one of them even with the extra-judicial consent of the others.—The Supreme Court of Canada affirmed the decision of the Court of Queen's Bench, and dismissed the appeal with costs. *Cream et al. v. Davidson*, 1st May, 1897, xxvii., 362.

7. *Testamentary appointment — Removal—Irregularities in administration — Arts. 282, 285, 917 C. C.*

See EXECUTORS AND ADMINISTRATORS, 3.

8. *Nullified instruments — Evidence — Admissions — Compromise — "Transaction" — Estoppel — C. C. arts. 311 and 1243-1245.*

See DEED, 46.

ULTRA PETITA.

1. *New matter set up in reply—Failure to demur or object to proof—Issues joined—Estoppel.*—Where the plaintiff has supplemented his claim by setting up new matter in reply, and the defendant has failed to demur to the reply or object to evidence being adduced upon the issues generally, it is too late afterwards to take objection on the ground that, if the plaintiff had any other claim than the one sued for, it should have been set forth in the declaration. *Gilbert v. Lionais* (7 R. L. 339) referred to. Judgment appealed from affirmed. *Kingston Forwarding Co. v. Union Bank of Canada*, 9th December, 1895.

ULTRA VIRES.

1. *Joint stock company — Ultra vires contract—Consent judgment on — Action to set aside.*

See COMPANY LAW, 3.

2. *Plea to statute — Action for penalties—Judgment upon other grounds—Appeal to Supreme Court of Canada.*

See PLEADING, 41.

AND see CONSTITUTIONAL LAW.

UPPER CANADA IMPROVEMENT FUND.

See CONSTITUTIONAL LAW, 7.

USAGE.

1. *Construction of policy — Loading port—Deviation—Guano Islands.*

See INSURANCE, MARINE, 19.

2. *Sale of goods by sample—Delivery—Evidence of trade custom.*

See CONTRACT, 211.

3. *Custom of port—Construction of policy—Insurance "at and from" port.*

See INSURANCE, MARINE, 24.

AND see CUSTOM OF TRADE—TRADE CUSTOM.

USE AND OCCUPATION.

See DAMAGES—LANDLORD AND TENANT.

USER.

1. *Title to land—Trespass—Right of way—Easement—Prescription.*—E. and B. owned adjoining lots, each deriving his title from S. Action of trespass by E. against B. for disturbing enjoyment of right of way between said lots and for damages. The fee in this right of way was in S., but E. founded his claim to user by himself and his predecessors in title for upwards of forty years. The evidence shewed it had been used in common by the successive owners of the two lots. *Held*, affirming the judgment appealed from (19 N. S. Rep. 222), Ritchie, C.J., and Gwynne, J., dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action. *Ells v. Black*, xiv., 740.

2. *Trespass—Title to land — Boundaries—Easement — Agreement at trial—Estoppel—Possession.*—In an action for damages by trespass by Mcl. on M.'s land, and by closing ancient lights, defendant claimed title in himself and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor in title of the plaintiff. On the trial the parties agreed to strike out the pleadings in reference to lights and drains and to try the question of boundary only. *Held*, affirming the judgment appealed from (19 N. S. Rep. 419), Ritchie, C.J., and

Gwynne, J., dissenting, that independently of the conventional boundary claimed by the defendant the weight of evidence was in favour of establishing a title to the land in question in the defendant and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over 20 years. *Semble*, that if it was open to him such user was not proved. *Mooney v. McIntosh*, xiv., 740.

3. *Railway crossing—Trestle—Easement—Right of way—Prescription.*]—A railway passed over the northern halves of lots 32, 33 and 34, respectively, 8th concession, North Dumfries, having a trestle bridge over a ravine on 34, near the boundary of 33. G., owner of 33 (except the part owned by the railway company), for a number of years used the passage under the trestle to reach a lane on S. $\frac{1}{2}$ 34 over which he could pass to a village on the west side, his predecessor in title (who owned all these lots) having used the same route for the purpose. The company filled up the ravine. G. applied for injunction to have it re-opened. *Held*, reversing the judgment appealed from (27 Ont. App. R. 64), that such user could never ripen into a title by prescription of the right of way nor entitle G. to a farm crossing on lot 34. *Canadian Pacific Ry. Co. v. Guthrie*, xxxi., 155.

4. *Public assent—Constructions on public property—Long possession—Trespass—Damages—Nuisance—Right of action.*]—Where a bridge and a wharf had been built and openly enjoyed for over sixteen years on public property, the defendant, who had full knowledge of the facts, was held to be estopped of any right of way. *Caverhill v. Robillard*, ii., 575.

See *ESTOPPEL*, 1.

5. *Ferry limits—Disturbance.*

See *FERRIES*, 1, 2.

6. *Easements apparent and non-apparent—Unity of ownership—Separate grants—Implied reservations—Quasi easement.*

See *EASEMENT*, 6.

7. *Expropriation—Presumption—Dedication—Lost record.*

See *HIGHWAYS*, 1.

8. *Crown lands—Laying out and ascertaining ordnance lands—Re-vesting of lands not used—Purchase by fiduciary agent of Crown—Public policy.*

See *RIDEAU CANAL LANDS*, 2.

9. *Established industry—Pollution of stream—Injunction.*

See *NUISANCE*, 1.

10. *Way of necessity—Prescription—License—Adjoining lands.*

See *EASEMENT*, 11.

11. *Constitutional law—Navigable waters—Title to bed of stream—Crown—Dedication of public lands by—Presumption of dedication—Obstruction to navigation—Public nuisance—Balance of conveniences.*

See *CONSTITUTIONAL LAW*, 81.

12. *Roadway—Construction of deed—Servitude—Art. 549 C. C.—Easement appartenant*

—*Necessary way—Implied grant—Obstruction.*

See *EASEMENT*, 12, 13.

13. *Highway—Old trails in Rupert's Land—Necessary way—Substituted roadway—Dedication—Evidence—Reservation in Crown grant—Assessment of way—Plan of subdivision—New street adopted as a boundary.*

See *HIGHWAYS*, 3, 4.

14. *Highway—Old trails in Rupert's Land—Substituted roadway—Dedication by the Crown.*

See *DEDICATION*.

15. *Dedication of highway—Acceptance of way by user.*

See *HIGHWAY*, 5.

16. *Water power—River improvement—Joint user—Estoppel.*

See *SERVITUDE*, 7.

17. *Right of way incidental to specified lands—Easement appartenant.*

See *EASEMENT*, 14.

18. *Municipal corporation—Waterworks—Rescission of contract—Notice—Mise en demeure—Long user—Waiver—Art. 1067 C. C.*

See *CONTRACT*, 29.

19. *Easement—Sale of land—Unity of possession—Severance—Continuous user.*

See *EASEMENT*, 19.

USUFRUCT.

1. *Construction of will—Donation—Substitution—Partition, per stirpes or per capita—Alimentary allowances—Accretion between legatees.*]—The late Joseph Rochon made his will in 1852, by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance, and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared: "Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament."—*Held*, Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate (subject to the usufruct), to their children, which took effect at the death of the testator. *Held*, also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary

executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly subject to the usufruct. *Held*, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*. Judgment appealed from (Q. R. 5 Q. B. 277) affirmed. *Robin v. Duguay*, xxvii., 347.

2. *Conveyance by usufructuary — Sale of lands by sheriff—Discharge of real rights — Estoppel.*]—A will devised lands to H. in usufruct during her life, then absolutely to J., but in case J. predeceased M. then to M. absolutely. The lands were sold in execution under a writ against a hypothecary debtor holding a conveyance from the usufructuary after J. was of full age. *Held*, affirming the judgment appealed from (Q. R. 1 Q. B. 197), that the will did not create a substitution and that, as J. was competent to protect his rights at the time of the sale by the sheriff, it purged all real rights he had under the will and could not be impeached as having been made *super non domino et non possidente*. *Patton v. Morin* (16 L. C. R. 267) followed. *McGregor v. Canada Investment and Agency Co.*, xxi., 499.

See WILL, 12.

USURPATION.

Widening street — Damages to property—Illegal detention—Costs.

See EXPROPRIATION OF LANDS, 11.

USURY.

Building societies — Participating borrowers—Shareholders—C. S. L. C. c. 58—42 & 43 Vict. (Q.) c. 32—Liquidation—Expiration of classes—Assessments on loans—Notice of —Interest and bonus—Usury laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and trustees—Sales to — Prête-nom — Art. 1484 C. C.]—S. applied to a building society for a loan of \$3,500, which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society's method of carrying on its loaning business and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely 70 shares of the nominal value of \$50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the re-payment of the loan. He thereby also agreed to make monthly payments of one per cent. each upon the stock, and that the loan should be re-paid at the expiration of the class, when upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by monthly instalments, and partly by accumulated profits to be derived from whatever moneys had been paid in and

invested for the benefit of that class, at which time whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent. upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of \$420 each until 1st May, 1884, making a total of seventy monthly instalments of \$70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 and 43 Vict. c. 32 (Que.), in January, 1884, prior to A.'s last payment and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in the business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently (in 1892), the plaintiff, as transferee of the society, brought action for the two original instalments remaining unpaid, and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares. *Held*, reversing the judgment of the Court of Queen's Bench (Q. R. 3 Q. B. 344), that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to re-pay the amount advanced with interest and bonuses thereon amounting together to a rate equivalent to interest at twelve per centum per annum, on the amount of his loan; that the contract made by the building society stipulating that they were to receive such rate of interest and bonus, equivalent to rate of twelve per centum per annum on the amount so loaned by the society, was not a violation of any laws respecting usury in force in the Province of Quebec; that the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed; that under the provisions of the statute, 42 & 43 Vict. c. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes, and to declare deficits therein, and to call for further payments to meet the same, as the directors of the society had while it continued in operation; that the notice required by the twenty-first section of the Act, 42 & 43 Vict. c. 32, does not apply to cases where liquidators have determined a loss upon the expiration of a class, and required the full amount exigible upon loans to be paid by borrowers; that, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class, and the exaction of further payments when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class and

requiring full payment of all sums exigible under his deed of obligation was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation. *Held*, further, affirming the decision of both courts below (Q. R. 3 Q. B. 344) that, in an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of art. 1484 of the Civil Code. *Guertin v. Sansterre*, xxvii., 522.

VACATION.

1. *Lapse of time for appeal — Delay in settlement of minutes—Entry of judgment—Special rule in Quebec cases.*—Where any substantial matter remains to be determined on the settlement of the minutes, the time for appealing to the Supreme Court of Canada will run from the entry of the judgment, otherwise it will run from the date on which the judgment is pronounced.—In the Province of Quebec the time runs in every case from the pronouncing of the judgment. *O'Sullivan v. Harty; Kehoe v. Harty*, xiii., 431.

2. *Appeal — Time limit — Commencement of—Pronouncing or entry of judgment—Security—Extension of time—Order of judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46.*—The delay of sixty days for appealing to the Supreme Court of Canada, prescribed by s. 40 to the Supreme and Exchequer Courts Act, is not suspended during the vacation of the court established by the rules. *News Printing Co. v. Macrae*, xxvi., 695.

VALUABLE SECURITY.

Larceny of unstamped note—32 & 33 Vict. c. 21 (D.)

See CRIMINAL LAW, 1.

VENDITIONI EXPONAS.

See EXECUTION—SHERIFF.

VENDOR AND PURCHASER.

1. APPEAL, 1, 2.
2. CONTRACT, 3-17.
3. MISTAKE, 18-20.
4. RESCISSION, 21-29.
5. SPECIFIC PERFORMANCE, 30-36.

1. APPEAL.

1. *Appeal—Vendor and Purchaser Act—Reference to master—Admission of evidence—Appeal from certificate—Final judgment—R. S. C. c. 135, s. 24, (e)*—Where a master, on a reference under the Vendor and Purchaser

Act to settle the title under a written agreement for a lease, ruled that evidence might be given to shew what covenants the lease should contain, an appeal does not lie to the Supreme Court from the judgment affirming such ruling, it not being a final judgment and the case not coming within the provisions of s. 24 (e) of the Supreme and Exchequer Courts Act relating to proceedings in equity. Gwynne, J., dissenting. *Canadian Pacific Ry. Co. v. City of Toronto*, xxx., 337.

See 27 Ont. App. R. 54.

2. *Title to land—Legal warranty—Description—Plan of subdivision—Accession—Troubles de droit—Eviction—Issues on appeal—Parties.*—A party called into a petitory action, to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments maintaining both the principal action, and the action in warranty, although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. (See Q. R. 10 Q. B. 245.) *Monarque v. Banque Jacques-Cartier*, xxxi., 474.

See TITLE TO LAND, 125.

2. CONTRACT.

3. *Specific performance—Contract—Signature of vendor—Subsequent letters—Statute of Frauds.*—Land was sold by auction, the particulars and conditions of sale not disclosing the vendor's name. The contract was signed by the purchaser, but not by the vendor or the auctioneer. Subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued "Re S's purchase we would like to close this." And referring to certain representations in the advertisements of the sale: "They were not made part of the contract of sale. . . . Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and, on a subsequent occasion; "Re S's purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract." *Held*, affirming the judgment appealed from (28 Gr. 207; 8 Ont. App. R. 161), that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds. *O'Donohoe v. Stammers*, xi., 358.

4. *Sale of land—Sale subject to mortgage—Indemnity of vendor—Special agreement—Purchaser trustee for third party.*—L. F. agreed in writing to sell land to C. F. and others subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated and L. F. became a member, re-

ceiving stock as part of the consideration of his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property, C. F. was brought in as third party to indemnify L. F., his vendor, against a judgment in said action. *Held*, reversing the decision appealed from, *Taschereau and King, JJ.*, dissenting, that the evidence shewed that the sale was not to C. F. as a purchaser on his own behalf but for the company, and the company and not C. F. was liable to indemnify the vendor. *Fraser v. Fairbanks*, xxiil, 79.

5. *Sale of timber—Delivery—Time for payment—Premature action.*—By agreement in writing I. agreed to sell and the V. H. L. Co. to purchase several lots of timber to be delivered "free of charge where they now lie within 10 days from the time the ice is advised as clear out of the harbour, so that the timber may be counted Settlement to be finally made inside of 30 days in cash less 2 per cent. for the dimension timber which is at John's Island." *Held*, affirming the decision appealed from, that the last clause did not give the purchaser 30 days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within 30 days from date of contract; and that if purchasers accepted the timber after expiration of 30 days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance. *Victoria Harbour Lumber Co. v. Irwin*, xxiv., 607.

6. *Special tax—Ex post facto legislation—Warranty—Double tax.*—Assessment rolls were made by the City of Montreal under 27 & 28 Vict. c. 60 and 29 & 30 Vict. c. 56, apportioning the cost of local improvements on lands benefited. One of the rolls was set aside as null and the other was lost. The corporation obtained power by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed by a deed with warranty containing a declaration that all taxes both special and general had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid. *Held*, affirming the judgments appealed from, *Gwynne, J.*, dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequently to the sale. *Banque Ville Marie v. Morrison*, xxv., 289.

7. *Agreement for sale of land—Assignment by vendee—Principal and surety—Deviation from terms of agreement—Giving time—Creditor depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.*—An agreement for sale of specified lots of land in consideration of a price payable partly in cash and partly by deferred instal-

ments on dates specified was subject to payments being made in advance of those dates under a proviso that "the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The vendee assigned all his interest in the agreement to a third party by assignment registered in the vendors' office and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to the schedule and not in the ratio of the full number of lots to the unpaid balance of the price and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest and also allowed the assignee an extension of time for payment of interest overdue and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers. *Held*, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement. *Held*, also, that although the course of dealings did not change the relation of the parties to that of principal creditor, debtor and surety, that notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security.—In a suit by vendor against vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot, and as having received on each transfer all arrears of interest.—In the absence of any sure indication in the agreement, the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein. Judgment appealed from (22 Ont. App. R. 151) affirmed. *Wilson v. Land Security Co.*, xxvi., 149.

8. *Unpaid vendor—Conditional sale—Suspensive condition—Moveables incorporated with freehold—Immoveables by destination—Hypothecary charges—Arts. 375 et seq. C. C.*—An agreement for sale of moveables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid suspensive condition.—In order to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveables with the immoveables should be, at the time, owner both of the moveables and

of the real property with which they are so incorporated. *Lainé v. Bêland* (26 Can. S. C. R. 419); and *Filiatrault v. Goldie* (Q. R. 2 Q. B. 368) distinguished.—Judgment appealed from (Q. R. 5 Q. B. 125) affirmed, Girouard, J., dissenting. *Banque d'Hochelaga v. Watrous Engine Works Co.*, xxvii., 406.

9. *Materials for railway—Rolling stock—Immoveables by destination—Priority of mortgage—Privileged claim—Unpaid vendor—Immoveables by destination—Arts. 1973, 1996, 1998, 2009, 2017 C. C.—Current earnings—Current expenses.*—In virtue of a trust conveyance granting a first mortgage executed under 43 & 44 Vict. c. 49, and 44 & 45 Vict. c. 43 (Que.), the trustees took possession of a railway. In actions against the trustees in possession, by appellants for the price of cars and rolling stock used for operating the road, and for work done, and materials delivered to the company after the trust deed, but before trustees took possession. *Held*, 1. affirming the judgments appealed from (M. L. R. 6 Q. B. 77, 91), that the trustees were not liable. 2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when moveables become immoveables by destination, as was the result with regard to the cars and rolling stock in this case, and the immoveable to which the moveables are attached is in the possession of a third party or is hypothecated. 3. But even considered as moveables such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder as security to the bondholders, with priority over all other creditors, including the privileged unpaid vendors.—*Per Gwynne, J.*, the appellants might be entitled to an equitable decree, framed with due regard to other necessary appropriations of income in accordance with the provision of the trust indenture, authorizing payment by the trustees "of all legal claims arising from the operation of the railway including damages caused by accidents and all other charges," but such a decree could not be made in the present action.—*Per Strong, J.*, *Quære*. Whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the court, by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by courts in this country? *Wallbridge v. Farwell; Ontario Car and Foundry Co. v. Farwell*, xviii., 1.

10. *Construction of deed—Title to lands—Ambiguous description—Evidence to vary or explain deed—Possession—Conduct of parties—Presumptions from occupation of premises—Arts. 1019, 1238, 1242, 1473, 1599 C. C.—47 Vict. c. 87, s. 3 (D.); 48 & 49 Vict. c. 58, s. 3 (D.).—45 Vict. c. 20 (Q.).*—By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immoveable described as part of lot No. 1937, in St. Peter's Ward in the City of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the River St. Charles, with the wharves and buildings thereon erected. The respondents entered into possession of the lands by virtue of said deeds and remained

in possession for twelve years, without objecting to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882. *Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada, the Chief Justice and King, J., dissenting, that the words "Henderson street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shewn to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusions at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors. *City of Quebec v. North Shore Ry. Co.*, xxvii., 102.

11. *Delivery—Retention by grantor—Presumption—Rebuttal.*—The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument.—The evidence in favour of the due execution of such a deed is not rebutted by the facts that it compromised all the grantor's property, and that while it professed to dispose of such property immediately the grantor obtained the possession and enjoyment of it until his death. Judgment appealed from (31 N. S. Rep. 333) reversed. *Zwicker v. Zwicker*, xxix., 527.

12. *Legal warranty—Description—Plan of subdivision—Change in street line—Accession—Arts. 1506, 1508, 1520 C. C.—Arts. 1, 86, 187, 168 C. P. Q.—Troubles de droit—Eviction.*—A vendor of land, described according to an existing plan of subdivision, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently, by municipal authorities, of powers in respect to the alteration of the street line. (See Q. R. 10 Q. B. 245.) *Monarque v. Banque Jacques-Cartier*, xxxi., 474.

13. *Consignment of goods—Condition as to payment—Breach—Purchaser for value.*

See SALE, 33.

14. *Contract of sale—Contre lettre—Absolute sale—Deed for security—Principal and agent.*

See CONTRACT, 227.

15. *Purchaser of lease for lives—Registry Act—Protection.*

See LEASE, 31.

16. *Property, real and personal — Immoveables by destination—Moveables incorporated with freehold — Severance from realty—Contract—Resolatory condition—Conditional sale—Hypothecary creditor — Unpaid vendor—C. arts. 379, 2017, 2083, 2085, 2089.*

See CONTRACT, 66.

17. *Deed of lands—Riparian rights—Building dams—Penning back water—Warranty—Improvement of watercourses — Art. 5535 R. S. Q.—Arbitration—Condition precedent.*

See RIVERS AND STREAMS, 6.

3. MISTAKE.

18. *Sale of lands—Mortgage—Verbal agreement—Subsequent deed — Misrepresentation by vendor — Procedure—Refusal to postpone hearing—Absence of material witness.]—W. entered into negotiations with S. to purchase a house which defendant was then erecting, and alleged that the agreement was that he should take the land at the market price and the materials and work done at its value. A deed and mortgage were subsequently executed, the consideration being stated in both at \$5,926. The bill charged that S., in bad faith, and taking advantage of W.'s ignorance of such matters, and misplaced confidence, inserted in the mortgage a larger sum than a fair and reasonable market value of the lands, and of materials used and work done to house and premises, and he prayed for an account. S. was unable to be present at the hearing, and applied for a postponement, on an affidavit that he was a material witness on his own behalf, and that it was not safe for him, in his state of health, to travel from Ottawa to Winnipeg. Dubuc, J., refused postponement, on the ground that the court was only asked now to decree that the account should be openly and properly taken, and the amount ascertained, which would be done by the master if the court should so decide, and that defendant would then have an opportunity of being present, and that he was not necessarily wanted at the hearing; and, upon hearing evidence, made a decree in favour of the plaintiff, and directed an account to be taken.—Under s. 6, Supreme Court Amendment Act, 1879, an appeal was allowed direct as there were then only two judges on the bench in Manitoba, the plaintiff (Chief Justice of Manitoba) and Dubuc, J., from whose decree the appeal was sought. (See PRACTICE OF SUPREME COURT, No. 184, col. 1124, ante.) Held, that under the circumstances the case ought not to have been proceeded with in absence of appellant, and without allowing him the opportunity of giving his evidence. — Per Ritchie, C.J., and Strong and Gwynne, J.J., that on the merits there was no ground shown to entitle the plaintiff to relief. —Per Ritchie, C.J., and Strong, J., that the bill upon its face alleged no ground sufficient in equity for relief, and was demurrable. *Schultz v. Wood*, vi., 585.*

19. *Mortgage — Description of property—Omission by mistake—Rectification — Subsequent purchase—Conditions—Notice — Purchaser for valuable consideration — Equitable charges — Chattel real — Estoppel.]—M. & B., owners of village lots, were in possession of an adjoining water lot in a lake, the title being in the Crown and to which, according to the practice of the Crown*

Lands Department, they had a right of pre-emption. On it they erected a mill on crib-work built on the bottom of the lake. A mortgage to R. of the village lots and other lands was intended to comprise the water lot and mill which were omitted by mistake of the solicitor who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mortgage purporting to mortgage chattel property and the mill to other persons.—M. & B. became insolvent, assigned for the benefit of creditors and the assignee sold at auction all their property including the mill, by sale subject to printed conditions, one of which was that as all the information relating to title was set out in the schedules, stock list and inventory, the vendor would not warrant the correctness of the same and that no other claims existed "but the purchaser must take subject to all claims thereon, and whether herein mentioned or not, and subject to all exemptions in law." These conditions were signed by the purchasers, to whom the assignee executed a conveyance. Before the sale the assignee had procured the two last above mentioned mortgages executed by M. & B. to be paid off by a person who advanced the money and he took an assignment to himself after the sale paying the amount of the purchase money. The conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mortgages.—R., mortgagee of the village lots, brought action to have his mortgage rectified so as to include the water lot and mill property omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice. *Held*, affirming the judgment appealed from, Gwynne and Patterson, J.J., dissenting, that there being ample evidence to establish, and the trial judge having found, that the mortgage was intended to cover the water lot and mill, and that the purchasers had notice of R.'s equity before paying the purchase money and taking a conveyance, these facts must be taken to be established and the findings deemed final on this appeal. *Held*, per Strong, J. 1. The water lot and mill thereon were capable of being mortgaged as real estate and might, in equity, be dealt with by an instrument in form of a chattel mortgage if sufficiently described, and the description "mill property" in the mortgages in question would pass the land covered with water on which the mill was erected. 2. In the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such charges take rank according to priority in point of time, but R., not having an actual charge but merely an equitable claim for rectification such defence was not precluded. 3. The purchasers at the sale could not set up want of notice in themselves and their immediate grantors without shewing that the original mortgagees, in whose shoes they stood, were also purchasers for valuable consideration without notice. 4. By the condition of sale which they signed the purchasers incapacitated themselves from setting up this defence. *Utterson Lumber Co. v. Rennie*, xxi., 218.

20. *Principal and agent—Mistake — Contract — Agreement for sale of land — Agent exceeding authority — Specific performance—Findings of fact.]—Where the owner of lands was induced to authorize the acceptance of*

an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her and under the mistaken impression that the offer was for the purchase of certain swamp lots only whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her and was set aside by the court on the ground of error, as the parties were not *ad idem* as to the subject matter of the contract and there was no actual consent by the owner to the agreement so made for the sale of her lands.—Judgment appealed from (31 N. S. Rep. 172) reversed. *Murray v. Jenkins*, xxviii., 565.

4. RESCISSION.

21. *Sale of land — Representations as to boundaries — Description—Executed contract—Deficiency—Fraud — Compensation.*—The plaintiff filed a bill in which it was prayed

(1) That a contract be rescinded on the ground of fraud; or (2) compensation awarded for alleged deficiency in the quantity of land. The Vice-Chancellor found no fraud proved as against the vendor, and refused to set aside the contract, but thought that the vendor had agreed to sell an acre to be measured from a travelled road and did not own part of the land which he agreed to convey, and he decreed compensation for the deficiency.—The Court of Appeal for Ontario agreed so far as fraud was concerned, but differed as to compensation, holding that after a contract had been perfected by conveyance a bill for compensation on account of defects could not be maintained; that after conveyance the purchaser is confined to his remedy upon the covenants, or, in a proper case, where he applies promptly, to a rescission of the contract (*Follis v. Porter*, 11 Gr. 442). If, therefore, it would be inequitable to decree rescission, the bill ought to have been dismissed. But such a decree was not warranted by the evidence.—The Supreme Court of Canada affirmed the judgment appealed from, Henry, J., dissenting. *Penrose v. Knight*, Cass. Dig. (2 ed.) 776.

22. *Sale of land—Sale by auction—Breach of agreement as to title — Determination of contract.*—W. bought property at auction signing an agreement to pay 10 % of price down and balance on delivery of deed. The auctioneer's receipt for the 10 % so paid stated that the sale was on the understanding that a good title in fee simple clear of all incumbrances up to the first of the ensuing month was to be given to W., otherwise his deposit to be returned. After the date so specified, W., not having been tendered a deed which he would accept, caused vendor to be notified that he considered the sale off and demanded re-payment of his deposit. In reply vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it and had made arrangements to assume it; that a deed of the equity of redemption had been tendered to W.; and he was required to complete his purchase.—In an action to recover the deposit, *Held*, reversing the decision appealed from (26 N. S. Rep. 472), that the vendor having repudiated the agreement, W. being entitled to a title in fee clear of incumbrance, and not

bound to accept the equity of redemption, he could at once treat the contract as rescinded and sue to recover his deposit. *Wrayton v. Naylor*, xxiv., 295.

23. *Sale of leased premises—Termination of lease — Damages — Art. 1663 C. C.*—The Court of Queen's Bench reversed the trial court, and held, that the purchaser of real estate, to be delivered forthwith, could not require the vendor to eject the tenants, the existence of leases being no impediment to immediate delivery of the premises sold, and every sale being subject to existing leases up to the time of the expiration of the current term, and further, that, if the purchaser refused to carry out the agreement for sale on the ground of the existence of such leases, he could not have the sale set aside (*resciliée*), with damages against the vendor.—The Supreme Court of Canada affirmed the judgment appealed from for the reasons stated (Q. R. 7 Q. B. 293), and dismissed the appeal with costs. *Alley v. Canada Life Assur. Co.*, 14th June, 1898; xxviii., 608.

24. *Contract — Rescission—Innocent misrepresentation—Common error—Sale of land —Failure of consideration.*—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation.—But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud. Judgment appealed from (6 B. C. Rep. 205) affirmed. *Cole v. Pope*, xxix., 291.

25. *Sale of land—Misrepresentation by vendor—Estoppel.*—A vendor of land who willfully mis-states the position of the boundary line and thereby leads the purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards claiming such strip as his own property. Judgment appealed from (31 N. S. Rep. 232) reversed. *Zwicker v. Feindel*, xxix., 516.

26. *Artifice — Misrepresentation — Consideration of contract — Error — Laches — Possession and administration—Ratification—Waiver—Estoppel—Arts. 992, 993, 1053, 1054 C. C.*—B. having a hotel scheme under promotion, agreed to purchase an old building from R. in order to prevent it falling into the hands of persons who might use it for a brewery and thereby cause a nuisance and ruin his enterprise. R. by falsely representing that he had a serious offer for the purchase or lease of the property for the purpose of a brewery, induced B. to close on his agreement and take a deed of the property, the payment of the price being deferred. On discovery of the falsity of these representations B. notified R. that he repudiated the contract and invited him to bring an action to test its validity if he was unwilling to give a release and take back the property. The vendor delayed some time in taking action for the recovery of the price and, in the meantime, B. remained in possession and collected the rents. *Held*, that, under the provisions of the Civil Code, as the

vendor had made false representations which deceived the purchaser as to the principal consideration for which he contracted, he could not recover; that the purchaser had a right to have the contract rescinded on the ground of error; that, under the circumstances, the delay in bringing the action could not be imputed as laches of the defendant, nor waiver of his right to have the contract set aside, and that defendant's administration of the property in the meantime could not be construed as ratification of the contract. *Barnard v. Rieudeau*, xxi., 234.

27. *Provincial grant—Foreshore of harbour—Conveyance by grantee—Dower—Traverse of vendor's title—Act confirming title—Estoppel—Pleading.*—After the B. N. A. Act, 1867, came into force the Government of Nova Scotia granted to S. part of the foreshore of the harbour of Sydney, C. B. S. conveyed this lot through the C. B. Coal Co. to defendant. S. having died, his widow brought action for dower, to which the company pleaded that the grant to S. was void, the property being vested in the Dominion Government. *Held*, affirming the judgment appealed from (23 N. S. Rep. 214), Strong and Gwynne, JJ., dissenting, that the company having obtained title to the property from S. they were estopped from saying that his title was defective.—*Per* Strong and Gwynne, JJ., dissenting. The conveyance by S. to the C. B. Coal Co., was an innocent conveyance by which S. himself would not have been estopped and, as estoppel must be mutual, neither would his grantees. There were no recitals in the deed that would estop them and estoppel could not be created by the covenants. — After the conveyance to defendant an Act was passed by the Legislature of Nova Scotia ratifying and confirming the title of defendant to all property of the C. B. Coal Co. *Held*, that if the legislature could by statute affect the title to this property which was vested in the Dominion Government it had not done so by this Act in which the Crown is not expressly named. Moreover the statute should have been pleaded by defendant. *Sydney and Louisburg Coal and Ry. Co. v. Sword*, xxi., 152.

28. *Misrepresentations—Rescission of deed—Recovery of price—Joint liability.*—May filed a bill to set aside a sale of land described in the deed to him as block No. 55, containing 52 lots according to plan registered, alleging conspiracy and false and fraudulent misrepresentations effected under the following circumstances:—McL. and McA. were interested in a contract for the purchase of 3 blocks of land containing 52 lots each, and McL. with McA.'s consent and sanction came to Toronto to sell the land. In Toronto G. met McL. and agreed to find purchasers, G. to get any money over \$100 per lot. G. solicited May to purchase, stating that he had secured the lots for a very short time at \$150 per lot, but that right was contingent upon his taking all the lots contained in 3 blocks offered, and represented that one block faced McPhillips street. May said he would purchase provided G., D. and he were co-partners or joint investors in the three blocks. An agreement was signed to that effect, but it was ultimately agreed that May should pay for and take the conveyance to himself of block 33 at \$150 per lot. G. filled up a conveyance which had been signed in blank by McL. of lot 35 from McA. to May, and

induced him to accept it without further inquiry by producing and delivering a guarantee from McL., that he had a power of attorney from McA., and that the plan was registered and title perfect. May paid \$5,200 cash and gave a mortgage for \$2,500. G. got \$2,500 of this money. May subsequently ascertained that the block in question did not front on McPhillips street, and that G. and D. were not joint investors with him, and that statements in the guarantee were false. May prayed that the sale be set aside, the portion of the purchase money already paid be re-paid to him, and that the mortgage given to secure payment of the remainder be cancelled. *Held*, reversing the Court of Queen's Bench for Manitoba, that the false and fraudulent representations made by G. and McL. entitled May to the relief prayed for against McA., McL. and G. jointly and severally. *May v. McArthur*, 20 C. L. J. 248; 4 C. L. T. 336; Cass. Dig. (2 ed.) 779.

29. *Interdiction—Marriage laws—Authorization by interdicted husband—Dower—Registry laws—Sheriff's sale—Warranty—Succession—Renunciation—Donation.*

See TITLE TO LAND, 111.

5. SPECIFIC PERFORMANCE.

30. *Agreement to pay interest—Delay—Default of vendor.*—Where the contract is that "if from any cause whatever," the purchase money was not paid at a specified time, interest should be paid from date of contract, the vendor is relieved from payment of such interest while the delay is caused by wilful default of the vendor in performing obligations imposed upon him. — A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor.—A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for rescission of the contract which the court refused, on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from date of contract was paid. In action by vendee for specific performance, *Held*, reversing the judgment appealed from (19 Ont. App. R. 291), that the vendee was not obliged to pay interest from the time the suit for rescission was begun as, until it was decided, the vendor was asserting the failure of the contract, and insisting that he had ceased to be bound by it, and after the decision in that suit he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money.—By the terms of contract, vendor was to remain in possession until the purchase money was paid and receive the rents and profits. *Held*, that, up to the time the vendor became in default, vendee, by his agreement, was precluded from claiming rents and profits and was not entitled to them after that time as he had been relieved from payment of interest and the purchase money had not been paid.—(In the result the judgment appealed from (19 Ont. App. R. 291, affirming 21 O. R. 562) was varied and the appeal was allowed with costs). *Hayes v. Himsley*, xxiii., 623.

31. *Contract of sale—Interest payable by purchaser—Delay—Duty to prepare convey-*

ance.]—A person in possession of land under a contract for purchase by which he agreed to pay as soon as the conveyances were ready for delivery and interest thereon from the date of the contract is not relieved from liability for such interest unless the vendor is in wilful default in carrying out his part of the agreement and the purchase money is deposited by the vendee in a bank or other place of deposit in an account separate from his general current account.—The vendor is not in wilful default where delay is caused by the necessity to perfect the title owing to some of the vendors being infants nor by tendering a conveyance to which the vendee took exception, but which was altered to his satisfaction while still in the hands of the vendors' agent as an escrow and before it was delivered. *Fournier and Taschereau, J.J.*, dissenting.—A provision that the price is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser. *Fournier and Taschereau, J.J.*, dissenting. (19 Ont. App. R. 591 reversed). *Stevenson v. Davis*, xxiii., 629.

32. *Agreement for sale of land—Objection to title—Waiver—Lapse of time—Will—Devise—Defeasible title—Rescission.*]—An agreement for sale of land provided that the vendee should examine title at his own expense and have 10 days from date of agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time." Upon investigation of title by purchaser it appeared that the vendors derived title through one P., a purchaser from one B. S., a devisee under a will by which the land in question was devised by the testatrix to her daughter, the said B. S., and other land was devised to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue. At the time of the agreement B. S. was alive and had children. Objection was taken to the title but not within 10 days from date of agreement. Purchasers sued for specific performance. *Held*, reversing the judgment appealed from (21 Ont. App. R. 183), that although B. S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement. *Armstrong et al. v. Nason; Armstrong et al. v. Wright; Armstrong et al. v. McClelland*, xxv., 263.

33. *Specific performance—Laches—Waiver.*]—The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time even though time was not of its essence; nor when he has declared his inability to perform his share of the contract.—The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements. (29 N.

S. Rep. 424 affirmed). *Wallace v. Hesslein*, xxix., 171.

34. *Specific performance—Principal and agent—Sale of land—Authority to agent—Price of sale.*]—M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place, "Sell if possible, writing particulars; will give you good commission." C. agreed to purchase it for \$600 and the solicitor telegraphed M., "Will you sell three-quarter interest sixty-seven acre parcel, Korah, for six hundred, half cash, balance year. Wire stating commission." M. replied, "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor, "Telegram received. I will accept \$600, \$300 cash and \$300 with interest at one year. This payment I may say must be a marked cheque at par for \$300, minus your commission \$15, and balance \$300 secured." The property was incumbered to the extent of over \$300 and the solicitor deducted this amount from the purchase money and sent M. the balance which she refused to accept. He also took a conveyance to himself from the former owner paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell; *Held*, affirming the judgment of the Court of Appeal, that the only authority the solicitor had from M. was to sell her interest for \$585 net and the attempted sale for a less sum was of no effect. *Held*, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. *Clergue v. Murray*, xxiii., 450.

[Leave to appeal refused, 21st July, 1903. In refusing the application for leave to appeal, the Privy Council referred to *Prince v. Gagnon* (8 App. Cas. 103).]

35. *Title to land—Agreement to convey land—Title under will—Restriction—Part performance—Special legislation—Compliance with terms of.*]—The appeal was from a decision of the Court of Appeal for Ontario, affirming the judgment of the Queen's Bench Division in favour of the plaintiff. Land was devised to Northcote with a provision in the will that he should not sell or mortgage it during his life, but might devise it to his children. Northcote agreed in writing to sell the land to Vigeon, who was not satisfied as to Northcote's power to give a good title, and the latter petitioned under the Vendors and Purchasers Act for a declaration of the court thereon. The court held that the will gave Northcote the land in fee with a valid restriction against selling or mortgaging. [*In re Northcote*, 18 O. R. 107]. Northcote then asked Vigeon to wait until he could apply for special legislation to enable him to sell, to which Vigeon agreed, and thenceforth paid interest on the proposed purchase money. Northcote applied for a special Act which was passed giving him power, notwithstanding the restriction in the will, to sell the land and directing that the purchase money should be paid to a trust company. Prior to the passing of this Act Northcote, in order to obtain a loan on the land, had leased it to a third party, and the lease was mortgaged, and Northcote afterwards assigned his reversion of the land.—In an action by Vigeon for specific performance of the contract with her, defendant claimed that the contract was at an end when the judgment on the petition was given, and that if performance were decreed

the amount due on the mortgage should be paid to him and only the balance to the trust company. — The Supreme Court held, affirming the decision of the Court of Appeal, that it was not open to Northcote to attack the decision of the Chancellor on the petition under the Vendors and Purchasers Act; that if it were, and that decision should be overruled, Vigcon would be all the more entitled to specific performance; that the evidence shewed the lease granted by Northcote to have been merely colourable and an attempt to raise money on the land by indirect means; and that the decree should go for specific performance, the whole purchase money to be paid in to a trust company. *Northcote v. Vigcon*, xxii., 740.

36. *Sale of land—Agreement for sale—Mutual mistake—Reservation of minerals.*—The E. & N. Ry. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept as it reserved the minerals on the land while the agreement was for an unconditional sale. In and action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals. *Held*, reversing the judgment of the Supreme Court of British Columbia (6 B. C. Rep. 228), Taschereau, J., dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance. *Hobbs v. Esquimalt and Nanaimo Ry. Co.* xxix., 450.

[Leave was granted for an appeal to the Privy Council and, subsequently, on a compromise between the parties, the appeal was dismissed for want of prosecution. (See Can. Gaz. vol. xxxiii., p. 393).]

VENTE A REMERE.

Scire facias—Title to land—Annulment of letters patent—Tender—Sale or pledge—Concealment of material facts — Arts. 1274-1279 R. S. Q.—*Registration—Transfer of Crown lands*—Art. 1007 C. P. Q.—Art. 1553 C. C.]—A sale of land subject to the right of redemption (*vente à réméré*), transfers the title in the lands to the purchaser in the same manner as a simple contract of sale. *Salvas v. Vassal* (27 Can. S. C. R. 68) followed. The locatee of certain Crown lands sold his rights therein to B., reserving the right to redeem the same within nine years, and subsequently sold the same rights to M., subject to the first deed. These deeds were both registered in their proper order in the registry office for the division and in the Crown Lands Office at Quebec. M. paid the balance of Crown dues remaining unpaid upon the land and made an application for letters patent of grant thereof in which no mention was made of the former sale by the original locatee. In an action by *scire facias* for the annulment of the letters patent granted to M.; *Held*, Taschereau, J., dissenting, that the failure to mention the *vente à réméré* in the application for the letters patent was a misrepresentation and concealment which entitled the Crown to have the grant declared void and the

letters patent annulled as having been issued by mistake and in ignorance of a material fact notwithstanding the registration of the first deed in the Crown Lands Office. *Fonseca v. Attorney-General for Canada* (17 Can. S. C. R. 612) referred to. *Held*, further, Taschereau, J., dissenting, that it is not necessary that such an action should be preceded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent. *The Queen v. Montminy*, xxix., 484.

VENUE.

Change of—Increased expenses—Criminal trial—Pleading to indictment—Conviction.

See HABEAS CORPUS, 2.

VERDICT.

1. *Appeal—Question of procedure—Verdict of jury—Weight of evidence.*—The Supreme Court of Canada refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, namely, whether a verdict of a jury was a general or special verdict.—The court also refused to disturb the verdict on the ground that it was against the weight of evidence after it had been affirmed by the trial judge and the Court of Appeal. *Toronto Ry. Co. v. Balfour*, xxxii., 239.

2. *Negligence—Railway—Sparks from engine—Evidence—Findings of jury—Defective construction.*—Fire was discovered on J.'s farm a short time after a train of the Grand Trunk Railway had passed it drawn by two engines, one having a long, and the other a short, or medium, smoke-box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a larger smoke-box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine and they believed it was from that with the short smoke-box; and that the use of said box constituted negligence in the company which had not taken the proper means to prevent emission of sparks. *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 639), that the latter finding was not justified by the evidence and the verdict for plaintiff at the trial was properly set aside. *Jackson v. Grand Trunk Ry. Co.*, xxxii., 245.

3. *Negligence—Machinery in mine—Defective construction—Proximate cause of injury—Fault of fellow-workman—Defective ways, works and machinery—Verdict—Findings of fact—Practice.*—An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable which ran over a sheave-wheel at the top of the shaft, and, to prevent accidents, guide-rails were placed along the elevator shaft and the cage was fitted with automatic dogs or safety-clutches intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were con-

tinued only to a point about twenty feet below the sheave-wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave-wheel with such force that the cable broke and the safety-clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred foot level and injured the plaintiff who was engaged at the work for which he was employed by the defendants about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the immediate cause of the injury was "the non-continuance of the guide-rails" which, in their opinion, "caused the safety-clutches to fail in their action, and therefore allowed the cage to fall." *Held*, reversing the judgment appealed from (9 B. C. Rep. 62), that the verdict rendered in favour of the plaintiff ought not to have been disregarded, as there was sufficient evidence to support the finding of fact by the jury. *McKelvey v. LeRoi Mining Co.*, xxxii., 664.

4. Slander — Discretion of trial judge — Special vindictive damages — Assessment of damages—Interference on appeal.

See APPEAL, 205.

5. Setting aside — Entering new verdict—New trial—37 Vict. c. 7, ss. 32, 33 (Ont.)—38 Vict. c. 11, ss. 20, 22, 33 (D.)—Jurisdiction of appellate courts.

See APPEAL, 130.

6. Findings of fact—Judge's charge—Answers by jury—Negligence—Evidence sufficient, on the whole, to warrant verdict.

See RAILWAYS, 101.

7. Irregularity at trial—R. S. C. c. 174, s. 246—Cured by verdict—Personation of juror.

See CRIMINAL LAW, 7.

8. Damages—Evidence—New trial—Public bridge—Repairs.

See NEGLIGENCE, 189.

9. New trial—Damages—Evidence—Special injury—Remote or excessive damages—Negligence in care of streets.

See NEGLIGENCE, 188.

10. Proof of accidental death—Waiver of condition in policy—Finding of jury—Verdict.

See INSURANCE, ACCIDENT, 7.

11. Operation of railway—Defective ways or plant—Lock on switch—Negligence—Evidence of facts—Findings of jury—Common law liability—Employer and employee—Assessment of damages.

See RAILWAYS, 113.

12. Operation of tramway — Contributory negligence—Pleadings — Issues—Evidence — Verdict—New trial—Objections taken on appeal.

See NEW TRIAL, 82.

13. Evidence of possession — Finding of jury—Statute of Limitations.

See TITLE TO LAND, 88.

AND see FINDINGS OF FACT—JUDGE—JURY.

VICE-ADMIRALTY.

See ADMIRALTY LAW.

VIEW.

1. Windows overlooking neighbour's property—Light and air—Long user—Prescription.

See EASEMENT, 4.

2. Trespass—Windows overlooking adjoining land—Boundary line—Evidence—Waiver.

See TITLE TO LAND, 41.

VIOLENCE.

See DURESS.

VIS MAJOR.

1. Fortuitous event—High wind — Negligence—Fall of wall after fire—Arts. 17, s.s. 24, 1053, 1055, 1071 C. C.]—Where fire destroyed his house, leaving walls dangerous and defendant, knowing the fact, neglected to secure or support a wall or take it down, and some days after the fire it was blown down by a high wind and damaged plaintiff's house, defendant cannot shield himself under plea of *vis major*. Judgment appealed from (M. L. R. 6 Q. B. 402) affirmed. *Nordheimer v. Alexander*, xix., 248.

2. Negligence — Driving timber — Servitude — Watercourses — Floatable rivers — Statutory duty — 53 Vict. c. 37 (Que.) — Riparian rights — Joint tort-feasors.] — The Rouge River, in the Province of Quebec, is floatable but not navigable, and is used by lumbermen for bringing down sawlogs to booms in which the logs are collected at the mouth of the river and distributed among the owners. The plaintiff constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The River Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back to the jam and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally. *Held*, affirming the judgment appealed from, the Chief Justice and Sedgewick, J., dissenting, that, irrespectively of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused. *Held*, further, that the right of lumbermen to float

timber down rivers and streams is not a paramount right but an easement which must be enjoyed with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses. *Ward v. Township of Grenville*, xxxii., 510.

VOTE, VOTER, VOTING.

See ELECTION LAW—MUNICIPAL CORPORATION.

WAIVER.

1. *Illegal assessment—Disputed tax—Payment under protest to avoid process—Estoppel.*—Payment under protest of disputed taxes in order to avoid summary execution does not preclude the party from afterwards taking proceedings to have the assessment quashed. Judgment appealed from (23 N. B. Rep. 591) reversed. *Ex parte Lewin*, xi., 484.

2. *Condition in policy—Short prescription—Pleading—Appeal.*—The plaintiff cannot on appeal rely upon a waiver of a condition in a policy of insurance shortening the time limited for action on claims arising thereunder unless it has been specially pleaded. Judgment appealed from (M. L. R. 3 Q. B. 298) affirmed. *Allen v. Merchants' Marine Ins. Co.*, xv., 488.

See No. 4, *infra*.

3. *Title to land—Objections to title.*—A purchaser who takes possession of the property and exercises acts of ownership by making repairs and improvements, will be held to have waived any objections to the title. Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution for the purpose of carrying out the purchase. Judgment appealed from (29 N. S. Rep. 424) affirmed. *Wallace v. Hesslein*, xxix., 171.

4. *Life insurance—Benefit association—Payment of assessments—Forfeiture—Waiver—Pleading.*—A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived. *Held*, reversing the judgment of the Court of Appeal, that the waiver not having been pleaded it could not be relied on as an answer to the plea of non-payment. *Allen v. Merchants Marine Insurance Company*, (15 Can. S. C. R. 488) followed. *Knights of Maccabees v. Hiltiker*, xxix., 397.

See No. 2, *ante*.

5. *Fire insurance—Conditions of policy—Time limit for delivering proofs—Condition precedent—Authority of agent.*—Compliance with conditions precedent to liability cannot be waived unless such waiver be clearly expressed in writing signed as required by conditions in the policy. Judgment appealed from (31 N. S. Rep. 348) reversed. *Atlas Assur. Co. v. Brownell*, xxix., 537.

s. c. d.—48

6. *Municipal corporation—Waterworks—Rescission of contract—Notice—Mise en demeure—Long user—Waiver—Art. 1067 C. C.*—A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract. *Held*, that after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks and it would, under the circumstances, be inequitable to rescind the contract. *Town of Richmond v. Lafontaine*, xxx., 155.

7. *Revocation of judgment—Cross-demand—Art. 1164 C. P. Q.—Pleading—Declinatory exception.*—A cross-demand filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court. In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. Judgment appealed from, affirming Q. R. 16 S. C. 22, reversed. *Magann v. Auger*, xxxi., 186.

8. *Mortgaged premises—Assignment by lessee—Payment of rent to mortgagee—Forfeiture—Payment of accelerated rent.*—The assignee of a lessee held possession of the leased premises for three months and the lessors accepted rent from him for that time and from sub-lessees for the month following. *Held*, reversing the judgment appealed from (1 Ont. L. R. 172), that as the lessors had claimed six months' accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; as the assignee had a statutory right to remain in possession for the three months and collect the rents; as the evidence shewed that the receipt by the lessors of the three months' rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the month's rent from the sub-tenants was only for compensation by the latter for being permitted to use and occupy the premises and for their accommodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease. Mortgagees of the leased premises having notified the sub-tenants to pay rent to them the assignee paid them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged. *Held*, that this also was no waiver of the lessors' right to claim a forfeiture. *Soper v. Littlejohn*, xxxi., 572.

9. *Fire insurance—Condition of policy—Proof of loss—Waiver—Acts of officials.*—An insurance company cannot be presumed to have waived a condition precedent to action

on a policy on account of unauthorized acts of its officers.—Judgment appealed from reversed, *Girouard, J.*, dissenting. *Hyde v. Lefavre*, xxxii., 474.

10. *Part execution of judgment—Reference to experts—Loss of right to appeal—Res judicata.*

See APPEAL, 162.

11. *Winding-up insolvent bank—Priority of Crown claims—Acceptance of dividends—Notice—Estoppel—45 Vict. c. 23 (D.).*

See CROWN, 73.

12. *Policy of insurance—Conditions—Proofs of loss—Waiver in writing—Wrongful withholding of policy—Estoppel.*

See INSURANCE, FIRE, 82.

13. *Promotion of joint stock company—Subscription for shares—Misrepresentation—Concealment—Bonâ fides—Action ex delicto—Damages—Waiver.*

See COMPANY LAW, 11.

14. *Foreclosure and sale—Purchase by trustee—Fraud—Possession—Statute of Limitations—Redemption.*

See LIMITATIONS OF ACTIONS, 24.

15. *Policy of insurance—Condition—Written notice—Adjustment—Estoppel—Powers of inspector or agent.*

See INSURANCE, FIRE, 20.

16. *Policy of insurance—Error in describing risk—Reference of claim to arbitration—Contract—Representation by insured.*

See INSURANCE, FIRE, 93.

17. *Seizure of lands—Alias writ—Opposition to annul.*

See PRACTICE AND PROCEDURE, 131, 132.

18. *Application in chambers—Form of appeal bond—Objections—Practice—Failure to move for dismissal of appeal.*

See APPEAL, 2.

19. *Dissolution of partnership—Expulsion of member—Breach of terms—Misconduct—Notice.*

See PARTNERSHIP, 23.

20. *Public works contract—Condition precedent—Extras—Reference by Crown—Waiver of legal rights—Costs withheld.*

See ARBITRATIONS, 20.

21. *Acceptance of fees by Crown Lands Commissioners—Registration of transfer of rights—Cancellation.*

See CROWN, 87.

22. *Accident policy—Condition precedent—Immediate notice—Claim contested on other grounds.*

See INSURANCE, ACCIDENT, 2.

23. *Contract for exchange of lands—Conduct of person seeking relief—Time of essence of contract—Extension—Notice—Rescission.*

See SPECIFIC PERFORMANCE, 4.

24. *Creditor's lien—Materials supplied to contractor—Settlement by note—Suspension of lien.*

See LIEN, 6.

25. *Application for insurance—Concealment—Material facts—Receipt of premium and issue of policy after knowledge by insurer.*

See INSURANCE, MARINE, 48.

26. *Irregular appearance—Disavowal of attorney—Long delay—Estoppel.*

See REQUETE CIVILE, 1.

27. *Life insurance—Condition in policy—Payment of premium by note—Renewal of note—Demand of payment after dishonour.*

See INSURANCE, LIFE, 29.

28. *Insurance against fire—Mutual Insurance Company—Contract—Termination of—Notice—Statutory conditions—R. S. O. (1887) c. 167—Estoppel.*

See INSURANCE, FIRE, 45.

29. *Debtor and creditor—Composition and discharge—Acquiescence in—New arrangement of terms of settlement—Waiver of time clause—Principal and agent—Deed of discharge—Notice of withdrawal from agreement—Fraudulent preferences.*

See DEBTOR AND CREDITOR, 6.

30. *Fire insurance—Conditions of policy—Breach—Recognition of existing risk after breach—Agent's authority.*

See INSURANCE, FIRE, 26.

31. *Vendor and purchaser—Specific performance—Laches.*

VENDOR AND PURCHASER, 33.

32. *Fire insurance—Construction of contract—"Until"—Condition precedent—Waiver—Estoppel—Authority of agent.*

See INSURANCE, FIRE, 42.

33. *Insurance policy—Allegation and proof of performance of condition precedent to action—Ontario Judicature Act.*

See PRACTICE AND PROCEDURE, 8.

34. *Forfeiture of right to appeal—Condition precedent—Ouster of jurisdiction—Objection raised by court.*

See APPEAL, 432.

35. *Error—Misrepresentation—Consideration of contract—Delaying action—Laches—Ratification—Estoppel.*

See VENDOR AND PURCHASER, 26.

36. *Condition of policy of fire insurance—Breach—Further insurance—Interest of insured—Mortgagor as owner—Pleading—Practice—Estoppel.*

See INSURANCE, FIRE, 29.

37. *Arbitration—Condition precedent—New grounds on appeal—Assessment of damages—Interference by appellate court.*

See RIVERS AND STREAMS, 6.

38. *Proof of accidental death—Waiver of condition in policy—Finding of jury—Verdict.*

See INSURANCE, ACCIDENT, 7.

WALLS.

See PARTY WALL.

WAREHOUSEMEN.

1. *Warehouse-receipt — Banking Act—Indorsement as security—34 Vict. c. 5 (D.)—Right of property.*—At the request of the Consolidated Bank, to whom the C. C. Co. owed a large sum of money, M. consented to act as warehouseman to the company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse-receipts upon which to raise money. The company granted M. a lease for a year of the premises, upon which the wheels and iron were situate, in consideration of \$5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming when required, and he issued a warehouse-receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which was paid to the Consolidated Bank. It appeared that M. was a warehouseman carrying on business in another part of the city; that he acquired the lease for the purpose of giving warehouse-receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had sent his foreman to examine it before giving the receipt. An attachment in insolvency issued against the company, and K. as assignee took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. M. then sued K. in trespass and trover for the taking. *Held, per Strong, Taschereau and Gwynne, JJ.,* affirming the Court of Appeal for Ontario (3 Ont. App. R. 35), that M. never had any actual possession, control, or property in, the goods so as to make the receipt given, under the circumstances, a valid warehouse-receipt within the meaning of the clauses in that behalf in the Act 34 Vict. c. 5 (D.) relating to banks and banking.—*Per Ritchie, C.J., and Fournier and Henry, JJ., contra,* that M. *quoad* these goods was a warehouseman within the meaning of 34 Vict. c. 5 (D.), so as to make his receipt indorsed effectual to pass the property to the Standard Bank for the security of the loan made to the company in the usual course of its banking business. *Milloy v. Kerr*, viii., 474.

2. *Wharfinger—Indorsement of warehouse-receipt—Banks and banking—Owner acting as warehouseman—Constitutional law—34 Vict. c. 5 (D.)—Jurisdiction of Parliament of Canada.*—The appellants discounted for a trading firm on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal as having been deposited by them, which was done, and the following receipt was given: "Received in store in Big Coal House warehouse at Toronto, from Merchants Bank of Canada (at Toronto), 1458 tons stove coal, and 261 tons chestnut coal, per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter,' and 'Annie Mulvey,' to be delivered to the order of the said Merchants Bank to be indorsed hereon. This is to be regarded as a receipt under the provisions of statute 34 Vict. c.

5—value \$7,000. The said coal in sheds facing Esplanade is separate from and will be kept separate and distinguishable from other coal." The firm became insolvent and the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt. The Chancellor found that the receipt given was valid within the Act 34 Vict. c. 5 (D.) relating to banks and banking, that it was given by a warehouseman, and that the bank was entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for Ontario. *Held, reversing the judgment appealed from* (8 Ont. App. R. 15), *Ritchie, C.J., and Strong, J., dissenting,* that it is not necessary to the validity of the claim of a bank under a warehouse-receipt, given by an owner who is a warehouseman and wharfinger and has the goods in his possession, that the receipt should reach the hands of the bank by indorsement, and that the receipt given was a receipt within the meaning of 34 Vict. c. 5 (D.)—*Held, per Ritchie, C.J., and Strong, J. (dissenting).* That the finding of the Chancellor as to the fact of the partner who signed the receipt being a person authorized by the statute to give the receipt in question should not have been reversed, as there was evidence that he was a wharfinger and warehouseman.—*Per Fournier, Henry and Taschereau, JJ.* That ss. 46, 47 and 48 of 34 Vict. c. 5 (D.) are *intra vires* of the Dominion Parliament. *Merchants Bank of Canada v. Smith*, viii., 512.

2a. *Bill of lading—Conditions—Connecting lines—Carriage beyond terminus—Contract for whole transit—Loss after transit—Warehousemen—Bailment—Notice in writing—Statutory liability—Joint tortfeasors—Partial loss—Release—Estoppel—R. S. C. c. 109—Pleading—Res judicata.*—Where a railway company undertakes to carry goods to a point beyond the terminus of its own line its contract is for carriage of the goods over the whole transit, and the other companies over whose lines they must pass are merely agents of the contracting company for such carriage, and in no privity of contract with the shipper. *Bristol & Exeter Ry. Co. v. Collins* (7 H. L. Cas. 194) followed.—Such a contract being one which a railway company might refuse to enter into, s. 104 of the Railway Act (R. S. C. c. 109) does not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they had left its own line. The decision in *Vogel v. G. T. R. Co.* (11 Can. S. C. R. 612) does not govern such a contract.—One of the conditions in a contract to carry goods to P., a place beyond the terminus of the company's line, provided that the company "should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by them, if such loss, misdelivery, damage or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits." *Held,* that this condition would not relieve the company from liability for loss or damage occurring during transit, even if such loss occurred beyond the limits of the company's own line. *Held, per Strong and Taschereau, JJ.,* that the loss having occurred after transit was over, and the goods delivered at P., and the liability of the company as carriers having ceased, this condition reduced the

contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from time to time in custody of the company on whose line P. was situate, as bailees for the shipper. Fournier and Gwynne, J.J., dissenting.—Another condition provided that no claim for damage, loss, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within 36 hours after delivery of the goods in respect to which the claim was made. *Held, per Strong, J.*, that a plea setting up non-compliance with this condition having been demurred to, and plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*. *Held, also, per Strong, J.*, (Gwynne, J., *contra*) that part of the consignment having been lost, such notice must be given in respect to the same within 36 hours after delivery of those which arrive safely.—*Quare*, In the present state of the law is a release to, or satisfaction from, one of several joint tortfeasors, a bar to an action against the others?—Judgment appealed from (15 Ont. App. R. 14) reversed. *Grand Trunk Ry. Co. v. McMillan*, xvi., 543.

[Leave to appeal to the Privy Council was refused on the ground that the case did not affect considerable value and was not of very substantial character, and the judgment did not determine a question of great public interest nor of legal importance. *Gagnon v. Prince* (8 App. Cas. 103) approved, 17th May, 1889. See Cass. Dig. (2 ed.) 741; Wheeler, P. C. Law, 982.]

3. *Placing wet grain in elevator — Negligence — Damages — Responsibility.*—[On appeal the Supreme Court affirmed the judgment of the Court of Appeal for Ontario (26 Ont. App. R. 389).—The negligence charged was that the owners of the elevator had taken in grain from a ship while rain was falling and the vessel's hatches unprotected. It was held by the judgment appealed from that defendant's liability did not begin till the grain was delivered; that they were not obliged to protect the grain while unloading, and, as a general assessment of damages had been made on this and other grounds of negligence, a new trial was ordered. *Dunn v. Prescott Elevator Co.*, xxx., 620.

4. *Railways — Carriers — Special instructions — Acceptance by consignee — Negligence — Amendment.*—[F. Bros., dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a rolling mills company at Sunnyside in Toronto West. The G. T. R. Co. had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the rolling mills company had a siding capable of holding three or four cars. In 1897 F. Bros. instructed the G. T. R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the rolling mills company, and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to 2nd January, 1900, five cars, one addressed to the company and the others to themselves at Sunnyside. On 10th January the company notified F. Bros. that previous shipments had contained iron not suitable for their business and not of the kind contracted for, and refused to ac-

cept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On 4th February the cars were placed on a siding to be out of the way, and were there frozen in. On 9th February F. Bros. were notified that the cars were there subject to their orders, and two days later F., one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were, and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills by teams. The cars could not be moved until the end of April when the price of the iron had fallen and F. Bros. would not accept them, but after considerable correspondence and negotiation they took them away in the following October and brought an action against the G. T. R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefrom from the company, but sometimes they were sent without instructions, and on 3rd February the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the rolling mills. *Held*, affirming the judgment of the Court of Appeal, that the rolling mills company were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive them.—The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen and ordered a reference to ascertain the damages on that head. *Held*, reversing such decision, Mills, J., dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence and the question of negligence had never been raised nor tried the action must be dismissed *in toto*, with reservation of the right of F. Bros. to bring another action should they see fit. *The Grand Trunk Ry. Co. v. Frankel*, xxxiii., 115.

AND see BAILMENT.

WARRANT.

1. *Criminal Code, s. 575—Persona designata—Officers de facto and de jure—"Chief constable"—Confiscation of gaming instruments, moneys, &c.—Ministerial officer.*—[A warrant issued under s. 575 of the Criminal Code to seize gaming instruments would be good if issued on the report of a person who filled *de facto* the office of "deputy high constable," though he was not such *de jure*. *O'Neil v. Attorney-General of Canada*, xxvi., 122.

2. *Illegal assessment—Several rates included in one warrant—Cause of nullity.*—[Where the warrant for the collection of a single sum for rates of several years, included the amount of an assessment which did not appear to be against either the owner or the occupier of the property: *Held*, affirming the judgment appealed from, that the inclusion of such assessment would vitiate the warrant. *Flanagan v. Elliott*, xii., 435.

See ASSESSMENT AND TAXES, 20.

3. *Form in statute — Canada Temperance Act—Search warrant — Magistrate's jurisdiction — Constable—Justification of ministerial officer — Judgment inter partes.*—A judgment on *certiorari* quashing a warrant does not estop a constable from justifying under it in proceedings to replevy goods seized under such warrant where he was not a party to the proceedings to set the warrant aside and such judgment was a judgment *inter partes* only. *Taschereau, J.*, dissented. *Sleeth v. Huribert*, xxv., 620.

See CANADA TEMPERANCE ACT, 6.

WARRANTY.

1. *Sale of land — Account stated—Charges and incumbrances — Promise to pay without reserve, by subsequent deed — Knowledge of assessments—Agreement as to interest.*—On 28th June, 1877, the company entered into an agreement, by which, without any reserve, they acknowledged to owe, and promised to pay certain sums of money to L., transferee of one of the vendors, who, in 1875, sold lands to the company and by the same deed L. agreed to assist the company in obtaining a loan of \$350,000, and to relinquish priority of her hypothec for her share on the property, to extend to six years the period for the payment of the balance due her, waiving also any right to interest until the company had an available surplus after paying interest and insurance in connection with the new loan. Subsequently, on 15th June, 1880, L. transferred to C. the balance alleged to be due her under the deed of the 28th June, 1877, and he sued for this balance with interest from 1st July, 1877. The company pleaded that under the deed of 28th June, 1877, interest could be demanded only from the 1st July, 1881, the date when for the first time there was an available surplus; and also that both principal and interest were compensated by \$1,901.70 paid the city for assessments imposed for the cost of public improvements prior to the sale of the property to the company in 1875. The assessment rolls originally made for these improvements were set aside by two judgments in 1876 and 1879. *Held*, affirming the judgment appealed from (4 Dor. Q. B. 280) that under the circumstances the respondent could not be said to be the *garant* of the purchasers of the property, and therefore he was entitled to the payment of the balance alleged to be due under the deed of the 28th June, 1877, notwithstanding any claim the appellants might have against their vendors under the general warranty stipulated in the deed of purchase of 1875. *Held*, also, that by the terms of the deed of 28th July, 1877, interest could be recovered only from 1st June, 1881. *Windsor Hotel Co. v. Cross*, xii., 624.

See M. L. R. 2 Q. B. 8 and M. L. R. 1 S. C. 137.

2. *Action in warranty — Proceedings taken by warrantee before judgment on principal demand.*—It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdic-

tion arises and he suffers no prejudice thereby.—But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences. *Archbald v. DeLisle*; *Baker v. DeLisle*; *Mowat v. DeLisle*, xxv., 1.

3. *Proceedings en garantie — Assessment of damages—Questions of fact.*—The Supreme Court will not interfere with the amount of damages assessed by a judgment appealed from if there is evidence to support it.—In cases of *delit* or *quasi-delit* a warrantee may before condemnation take proceedings *en garantie*, and the warrantor cannot object to being called into the principal action as a defendant *en garantie*. *Archbald v. DeLisle*, etc. (25 Can. S. C. R. 1) followed. *Montreal Gas Co. v. St. Laurent*; *City of St. Henri v. St. Laurent*, xxvi., 176.

4. *Suretyship—Recourse of sureties inter se — Ratable contribution — Action of warranty — Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts. 1156, 1959 C. C.*—Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself, if the creditor has already been paid by him.—When a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. *Macdonald v. Whitfield*; *Whitfield v. The Merchants Bank of Canada*, xxvii., 94.

5. *Title to lands — Impeachment by warrantor.*—The grantee of the warrantors of a title cannot be permitted to plead a technical objection thereto in a suit with the person to whom the warranty was given. *Powell v. Watters*, xxviii., 133.

6. *Sale of land—Special agreement—Knowledge of cause of eviction — Damages — Art. 1512 C. C.*—A warranty of title accompanying a sale of lands does not constitute the special agreement mentioned in art. 1512 of the Civil Code of Lower Canada in respect to liability to damages for eviction. *Allan v. Price*, xxx., 536.

7. *Title to lands — Legal warranty — Description—Plan of subdivision—Change in street line—Accession—Arts. 1506, 1508, 1520 C. C.—Arts. 186, 187, 188 C. P. Q.—Troubles de droit—Eviction—Issues on appeal — Parties.*—A vendor of land, described according to an existing plan of subdivision, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line.—A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments main-

taining both the principal action and the action in warranty although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. Judgment appealed from (Q. R. 10 Q. B. 245) affirmed. *Monarque v. Banque Jacques-Cartier*, xxxi., 474.

8. *Title to land—Warranty—Construction of deed—Sheriff's deed—Sale of rights in lands—Eviction by claimant under prior title.*—By the deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff in the lands therein mentioned and of which he was actually in possession, and that the immovable belonged to him as having been acquired at the sheriff's sale. *Held*, reversing the judgment appealed from, the Chief Justice and Taschereau, J., dissenting, that the warranty covenanted by the vendor had reference merely to the rights he may have acquired in the lands under the sheriff's deed and did not oblige him to protect the purchaser against eviction by the person so in possession and claiming the same under prior title to the disputed portion of the lands. *Ducondu v. Dupuy* (9 App. Cas. 150) followed. *Drouin v. Morissette*, xxxi., 563.

See SALE, 103, and note in *pede*.

9. *Interdiction—Marriage laws—Dower—Registry laws—Sheriff's sale—Succession—Renunciation—Donation.*—*Per* Taschereau, J. Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which such vendor has given warranty. *Rousseau v. Burland*, xxxii., 541.

Cf. No. 5, *ante*, and No. 10, *infra*.

10. *Possession animo domini—Vendor in possession—Acquiring adverse title by prescription.*—A warrantor of title to lands cannot hold adverse possession of the lands conveyed such as is required to make title by acquisitive prescription. *Massawippi Valley Ry. Co. v. Reed*, xxxiii., 457.

Cf. Nos. 5 and 9, *ante*.

11. *Special tax—Ex post facto legislation—Warranty.*—Assessment rolls were made by the City of Montreal under 27 & 28 Vict. c. 60 and 29 & 30 Vict. c. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the Legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed by a deed with warranty containing a declaration that all taxes, both special and general, had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid. *Held*, affirming the judgment appealed from (20 R. L. 452), Gwynne, J., dissenting, that as two taxes could not both exist for the same purpose at the same time and the rolls made after the sale were therefore the only rolls in force, no taxes for local improvements had been legally imposed till after the vendor

had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequently to the sale. *Banque Ville Marie v. Morrison*, xxv., 289.

12. *Sale of timber limits—Eviction—Damages—Arts. 1515, 1518 C. C.*

See SALE, 103, and also No. 8, *ante*.

13. *Safety of ship—"At and from" a port—Concealment.*

See INSURANCE, MARINE, 36.

14. *Sale of personal rights—Eviction—Restitution—Prête nom—Arts. 1510, 1517, 1518 C. C.*

See ACTION, 134.

15. *Application for insurance—Representations—Facts material to the risk—Pleading.*

See INSURANCE, FIRE, 78.

16. *Sale of deals—Quality—Breach of contract—Place of delivery—Acceptance.*

See CONTRACT, 16.

17. *Conditional warranty—Del credere consignment—Notice—Possession of goods—Art. 1959 C. C.*

See SURETYSHIP, 10.

18. *Deed of land—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Art. 5535 R. S. Q.—Arbitration—Condition precedent—Assessment of damages.*

See RIVERS AND STREAMS, 6.

AND see INSURANCE, FIRE, 75-100—INSURANCE, LIFE, 24-27—AND INSURANCE, MARINE, 48-58.

WASTE.

Careless administration—Questionable transaction—Removal of executrix.

See EXECUTORS AND ADMINISTRATORS, 6.

WATERCOURSES.

1. *B. C. Land Ordinance, 1865—Grant of water—Exclusive use of stream—Unoccupied water—Proof of notice of application for grant—Riparian proprietors.*—The B. C. Land Ordinance, 1865, contains the following provisions:—44. "Every person lawfully occupying and *bonâ fide* cultivating lands may divert any unoccupied water from the natural channel of any stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the stipendiary magistrate of the district for the purpose, and recording the same with him, after due notice, as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such magistrate may require."—45. "Previous to such authority being given, the applicant shall post up in a conspicuous place on each person's land through which it is proposed that

the water should pass, and on the district court house, notices in writing, stating his intention to enter such land, and through and over the same to take and carry such water, specifying all particulars relating thereto, including direction, quantity, purpose and term."—In an action by a grantee of water under this ordinance for interference with the use of the same. *Held*, affirming the judgment appealed from, that the ordinance was not passed for the benefit of riparian owners only, but any cultivator of land could obtain a grant of water thereunder. *Held*, further, that the water of a stream, &c., may be unoccupied under the ordinance even though there may be a riparian proprietor upon a part of it. *Held*, also, Ritchie, C.J., and Strong, J., dissenting, that the provisions of s. 45 are merely directory, but if imperative a grantee of water under the ordinance who has used the water granted to him for several years would not be required, in an action for damages caused by interference with such user, to prove that he gave the notices required by that section as it would be presumed that the same were given before recording the grant.—*Held*, per Ritchie, C.J., and Strong, J., that the water records in evidence were imperfect and the grant to plaintiff was not proved thereby; that having failed to prove authority from the magistrate to direct the water his riparian rights either at common law or under the ordinance were not established and the action failed. *Martley v. Carson*, xx., 634.

[An appeal to the Privy Council was dismissed without consideration of the merits, the appellant having parted with his interest in the property.]

2. *Municipal corporation — Assessment — Extra cost of works—Drainage—R. S. O. (1877) c. 174—46 Vict. c. 18 (Ont.)—By-law — Repairs — Misapplication of funds — Negligence — Damages — Intermunicipal works.*—Where a sum amply sufficient to complete drainage works as designed and authorized by the by-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, and was applied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards by another by-law levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted. *Township of Sombra v. Township of Chatham*, xxviii., 1.

3. *Adjoining proprietors of land—Different levels—Injury by surface water—Watercourse — Easement.*—O. and S. were adjoining proprietors of land in the Village of Frankford, Ont., that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887 S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby. *Held*, that S. having a right to cut off the part of the culvert which projected over his land was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the

drain.—Judgment appealed from (24 Ont. App. R. 526) affirmed. *Ostrom v. Sills*, xxviii., 485.

4. *Adjoining lands—Threatened damages to one—Right of owner to guard against without reference to neighbour—Sic utere tuo ut alienum non ledas.*—Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level he has a right to protect himself against such injury by all lawful means without regard to any damage that may result to land of his neighbour from the measures he adopts.—Judgment appealed from (6 B. C. Rep. 186) reversed. *McBryan v. Canadian Pacific Ry. Co.*, xxix., 359.

5. *Rivers and streams—Floatable waters—Construction of statute—"The Sawlogs Driving Act"—R. S. O. (1887) c. 121—Arbitration—Action upon award—River improvements—Detention of logs—Damages.*—When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them the owner is entitled to an arbitration under the Sawlogs Driving Act to determine the amount of his damages for such detention, and is not restricted to the remedy provided by s. 3 of that Act, namely, removing the obstruction. Judgment of the Court of Appeal (26 Ont. App. R. 19) reversed. *Cockburn & Sons v. Imperial Lumber Co.*, xxx., 80.

6. *Rivers and streams — Driving logs—Obstruction—Dam—R. S. O. (1887) c. 120, ss. 1 and 5.*—By R. S. O. (1887) c. 120, s. 1, all persons are prohibited from preventing the passage of sawlogs and other timber down a river, creek or stream by felling trees or placing any other obstruction in or across the same. *Held*, reversing the judgment of the Queen's Bench Division (29 O. R. 206), that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs was an obstruction under this Act. *Farquharson v. Imperial Oil Co.*, xxx., 188.

7. *Appeal — Jurisdiction — Injunction — Ditches and watercourses—Title to land.*—Proceedings to restrain the owner of land from constructing a ditch thereon under the Ditches and Watercourses Act to prevent injury to adjoining property, do not involve any question of title to land nor any interest therein within the meaning of 60 & 61 Vict. c. 34, s. 1, s.-s. (a) relating to appeals to the Supreme Court of Canada in Ontario cases. The fact that the adjoining land was to be taxed for benefit by construction of the ditch would not authorize an appeal under s.-s. (d) as relating to the taking of a duty or fee, nor as affecting future rights. *Waters v. Manigault*, xxx., 304.

8. *Railways—Construction of deed—Location of permanent way—Laying out boundaries — Fencing—Riparian rights—Notice of prior title—Registry laws—Possession — Acquisitive prescription.*—In the conveyance of lands for the permanent way, the deed described lands sold to the railway company as bounded by an unnavigable stream, as "selected and laid out" for the railway. Stakes were planted to shew the side lines, but the railway fences were placed inside the stakes above the water's edge, and the vendor was allowed to remain in possession of the strip

of land between the fence and the middle of the bed of the stream. The deed was duly registered and, subsequently, the vendor sold the rest of his property including water rights, mills and dams constructed in the stream to defendant's *outeur*, described as "including that part of the river which is not included in the right of way, &c." *Held*, 1. That the description in the deed included, *ex jure naturæ*, the river *ad medium filum aquæ*, and that the company's title thereto could not be defeated by the subsequent conveyance, notwithstanding that they had not taken physical possession of all the lands described in the prior conveyance to them. 2. That the failure of the vendor to deliver the full quantity of land sold by him to the company and their abstinence from troubling him and his grantees in possession of the same could not be construed as conduct placing a construction upon the deed different from its clear and unambiguous terms or as limiting the area of the property conveyed so as to exclude the strip outside the fences or the bed of the stream as *medium filum*. 3. That such possession by the vendor and his assigns was not possession which could ripen into a title by acquisitive prescription of the property in question. *Massachusetts Valley Ry. Co. v. Reed*, xxxiii., 457.

9. *Access — Obstruction — Damages — Action.*—A riparian owner can recover damages from a railway company for injury and diminution of value to his property by reason of obstruction of access between it and a navigable river and where the company has not complied with the provisions of 43 & 44 Vict. c. 43, s. 7, s.-ss. 3-5 (Que.), the owner has a remedy by action. The judgment appealed from (4 Dor. Q. B. 258; 12 Q. L. R. 205) was reversed. *Pion v. North Shore Ry. Co.*, xiv., 677.

[This judgment was affirmed on further appeal (14 App. Cas. 612) by the Privy Council.]

10. *Pollution of stream—Tannery — Long user—Injunction.*—W. acquired a lot adjoining a small stream and finding the water polluted from noxious substances thrown into the stream brought an action in damages against C., the owner of a tannery situated fifteen *arpents* higher up the stream, and asked for an injunction. C. and his predecessors had from time immemorial carried on tanning there, using the water for tanning purposes to the knowledge of all the inhabitants without complaint on their part; it was the principal industry of the village; the stream was partly used as a drain by the other proprietors of lands adjoining the stream and manure and filth were thrown in, but every precaution was taken by C. to prevent any solid matter falling into the creek. W. had acquired the property long after C. had been using the stream for tannery purposes, and there was no evidence that the property had depreciated in value by the use C. made of the stream. *Held*, affirming the judgment appealed from (M. L. R. 4 Q. B. 197), that W., under the circumstances proved in this case, was not entitled to an injunction to restrain C. from using the stream as he did. *Weir v. Claude*, xvi., 575.

11. *Dams and improvements — Flooding lands—C. N. L. C. c. 51—Prescription—Possession.*—Where a proprietor for the purpose of improving the value of a water power, has built a dam over a watercourse running

through his property and has not constructed any mill or manufactory in connection with the dam, he cannot, in an action of damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify, under the provisions of C. S. L. C. c. 51. Nor can he acquire by prescription a right to maintain the dam in question; nor claim title by possession to the land overflowed without proving the requirements of art. 2193, C. C. *Jones v. Fisher*, xvii., 515.

12. *Easement—Sale of land—Unity of possession—Severance—Continuous user.*

See EASEMENT, 19.

13. *Navigable waters — Harvesting ice — Trespass on water lots.*

See RIVERS AND STREAMS, 5.

14. *Cattle straying on highway — Railway fencing—Protection at watercourses—Culvert—Injury by train—Negligence.*

See RAILWAYS, 45.

15. *Intermunicipal—Drainage—Removal of obstruction — Municipal Act, 1883, s. 570 (Ont.)—Municipal Amendment Act, 1886, s. 22 (Ont.)—Report of engineer.*

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2. Municipal corporation — Rescission of contract — Notice—Mise en demeure—Long user—Waiver—Art. 1067 C. C.

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WILL.

1. CAPACITY OF TESTATOR, 1-6.
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1. CAPACITY OF TESTATOR.

1. Capacity of testator—Duress — Consideration—Insanity—Legacy to supposed wife —Error—Fausse cause—Findings of fact—Inferences—Duty of appellate court.]—In an action to recover an estate and for an account by the executor of the will of R., against the curator appointed to his estate during lunacy, the appellant intervened to have the will set aside, as executed under pressure by M., in whose favour the will was made, while the testator was of unsound mind. The appellant proved that M. was not the legal wife of R., she having another husband living at the time the marriage was contracted. R. died in 1881, having made a will two years previously by which he bequeathed \$4,000 and all his household furniture and effects to "his wife, M.;" \$2,000 to a niece; \$1,000 for charitable purposes, and the remainder of his estate to his brothers, nephews and nieces in equal shares. Four days later R. made another will before the same notary, leaving \$800 to his wife M., \$400 to each of his two nieces, and \$400 to his brother, with reversion to the nieces if not claimed within a year, and the remainder to the appellant, one of said two nieces. About six weeks later R. made another will, the subject of litigation, by which he revoked his former wills and gave \$2,000 for the poor of St. Rochs, and the remainder of his property to his "beloved wife M." About two months later, R. was interdicted as a lunatic, and the curator appointed to his estate. R. remained in an asylum for a year, when he was released, and lived until his death with his niece, sister of the appellant. The trial judge upheld the will, and his decision was affirmed by the Court of Queen's Bench. Held, reversing the judgments appealed from, Ritchie, C.J., and Strong, J., dissenting, that the proper inference from all the evidence as to the mental capacity to make the last will was that the testator, at the date of making the will, was of unsound mind; that, as it appeared that the only consideration for the testator's liberality to M. was, that he supposed her to be "my beloved wife, Julie Morin," whilst at that time M. was, in fact, the lawful wife of another man, the universal bequest to M. was void, through error and false cause; that it is the duty of an appellate court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case. Judgment appealed from (2 Dor. Q. B. 245) reversed. *Russell v. Lefrancois*, viii., 335.

[Leave to appeal was refused by the Privy Council.]

2. Testamentary capacity—Art. 831 C. C.—Weakness of mind—Senile dementia—Validity of will — Undue influence.] — In 1889 an action was brought by G. H. H., in capacity of curator to Mrs. B., an interdict, against A., in order to have a certain deed of transfer made to him by Mrs. B., his mother, set aside and cancelled. Mrs. B. having died before the case was brought on to trial, the respondent, M. B., presented a petition for continuance of the suit on her behalf as one of the legatees of her mother under a will dated the 17th November, 1869. This petition was contested by A. B., who based his contestation on a will dated the 17th January, 1885

(the same date as that of the transfer attacked by the original action), whereby the late Mrs. B. bequeathed the residue of all of her property, &c., to her two sons.—Upon the merits of the contestation as to the validity of the will of the 17th January, 1885. *Held*, affirming the judgment appealed from, that art. 831 C. C., which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform. *Held*, further, that upon the facts and evidence in the case, the will of the 17th January, 1885, was obtained by A. at a time when Mrs. B. was suffering from a senile dementia and weakness of mind, and was under the undue influence of A. B., and should be set aside.—The judgment appealed from (Q. R. 1 Q. B. 447) was affirmed. *Baptist v. Baptist*, xxiii., 37.

3. *Execution of will—Testamentary capacity.*—A testator was suffering from a disease which had the effect of inducing drowsiness or stupor during the time he gave the instructions for drafting, and when he executed his will, but as the evidence shewed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take and the instrument itself when subsequently read over to him, it was held to be a valid will.—Judgment appealed from (28 N. S. Rep. 226) affirmed. *McLaughlin v. McLellan*, xxvi., 646.

4. *Capacity of testator—Undue influence.*—A codicil to a will executed shortly before the testator's death, increasing the provision made by a former codicil for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick, J.J., dissenting, that as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece even if it had been proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence. *Held*, also, following *Perera v. Perera* ([1901] A. C. 534), that even if there was ground for saying that the testator was not at the time of execution capable of making a will if he were when he gave the instructions the codicil would still have been valid. *Kaulbach v. Archbold*, xxxi., 387.

5. *Execution of will—Capacity of testator—Insane delusion.*—F. in 1890 executed a will providing generously for his wife and making his son residuary legatee. In 1897 he revoked his will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support, and the son was given half the residue, testator's daughter the other half. His wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set

aside this will for want of testamentary capacity in F.; *Held*, reversing the judgment appealed from (33 N. S. Rep. 26), Sedgewick, J., dissenting, that the provision made by the will for testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them and the will was therefore valid. *Skinner v. Farquharson*, xxxii., 58.

6. *Testamentary capacity—Evidence—Action to annul—Parties—Mis en cause.*—An action for annulment of a will, the execution of which was procured when, as alleged, the testator was not capable of making it, was dismissed, because all necessary parties had not been summoned. The Court of Queen's Bench (Q. R. 3 Q. B. 552), reversing this decision, held that the execution of the will had been procured by undue influence, and annulled it.—The Supreme Court affirmed the decision appealed from as to parties, holding that the Superior Court should itself have summoned the parties deemed necessary. It also affirmed the judgment as to the will on the ground that the onus was on the party procuring the execution to prove capacity, and that he had not only failed to do so, but the evidence was overwhelming against him. *Currie v. Currie*, 6th May, 1895, xxiv., 712.

2. CONSTRUCTION OF WILL.

7. *Construction of will—Division of estate—Tenants in common—Joint tenants—Survivorship—Costs.*—By will A. directed, "Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of \$1,600, and if any of my children shall have died leaving issue, then a like sum to and among the issue of the child so dying, such sum to be paid by half-yearly instalments to such of my children as shall be of age or be married, but if any advances shall have been made to any of them and interest shall be due thereon, such interest to be deducted from the said sum. As regards the division, appropriation, and ultimate disposition of my estate it is my will that, subject to the payment of my just debts and legacies, bequests and annuities, I have heretofore given or may hereafter give, and to the expenses of management of my estate, all the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead at the time and in the manner following, that is to say: That immediately on the expiration of four years from my death, my executors after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving children and of my children who shall before them have died, leaving lawful

issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child. And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account of or for the maintenance and education of each of my said children or issue, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits that may arise shall enure to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education and support of each of my children while under the age of twenty-one years shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from the share or shares set apart for the issue of such deceased child or children. And that my children, and such issue of deceased children being of age, that is to say, of the age of 21 years, or when respectively they shall attain the age of 21 years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled." On 26th May, 1864, M., testator's daughter, married F., the appellant. Testator died 24th December, 1870. On 25th August, 1872, M. died, leaving three children, and on 14th September, 1877, the eldest son died, and the father, the appellant, claimed that his son's share vested in him. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, that the intention of the testator was that his estate should be divided and that the will shews that there should be no survivorship, that therefore the children of testator's daughter M. took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in his father. Judgment appealed from (1 Russ. & Geld. 177) reversed. *Fisher v. Anderson*, iv., 406.

8. *Beneficiaries—Insufficient income—Powers of executors—Sale of corpus—Payment of annuities.*—A testator devised to his widow an annuity of \$10,000 for her life, to be in lieu of her dower, and chargeable on his general estate. He then devised to the executors and trustees real and personal property described in five schedules, upon these trusts, that is to say:—Upon trust during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate, during the life of the wife, the executors were to pay to each of his five daughters yearly \$1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends and profits mentioned in the schedules, and to pay

to his daughter M. M. A., the rents, &c., apportioned to her in schedule A.; to his daughter E. of those mentioned in schedule B.; to his daughter M. of those mentioned in schedule C.; to his daughter A. of those mentioned in schedule D.; and to his daughter L. of those mentioned in schedule E.; each of the said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. Directions as to insurance and administration were then given and the disposition of the share of each daughter in case of her death. In the residuary clause there were the following words: "The rest, residue, and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following. He then gave out of the residue a legacy of \$4,000 to a brother, and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters, as before declared, with respect to the estate in the schedules mentioned. The rents and profits of the whole estate proved insufficient, after paying the annuity of \$10,000 to the widow, and the rent and taxes of his house in London, to pay in full the \$1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the *corpus*, or apply the funds of the *corpus* of the property, to make up the deficiency. *Held*, reversing, in part, the judgment appealed from (4 Pugs. & Bur. 284), that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity. *Almon v. Lewin*, v., 514.

9. *Construction—Residuary personal estate—Mortmain.*—Among other bequests the testator declared:—"I bequeath to the Worn-out Preachers' and Widows' Fund in connection with the Wesleyan Conference here the sum of £1,250, to be paid out of the moneys due me by Robert Chestnut, of Fredericton. I bequeath to the Bible Society £150. I bequeath to the Wesleyan Missionary Society in connection with the Conference the sum of £1,500." The last clause of the will was, "Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund, Wesleyan Missionary Society, Bible Society." The surplus personal estate was claimed, under the will, by these charitable institutions, and by the heirs-at-law and next of kin, as residuary estate, undisposed of under the will. *Held*, affirming the Supreme Court of New Brunswick, Fournier and Henry, JJ., dissenting, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a *pro rata* addition should be made to the three above-named bequests.—*Per Strong, J.* The Statute of Mortmain, 9 Geo. II., c. 36, is not in force in New Brunswick. *Ray v. Annual Conference of New Brunswick*, etc., vi., 308.

10. *Construction of will — Legacy—Condition.*—A testator, by the third clause of his will, bequeathed the residue of his estate to his wife, four sons and two daughters, on condition that they should all unite in paying to the executors before 1st January, 1877, \$1,600, and a similar sum before 25th January, 1882, to pay the shares of two other sons Alexander and Duncan. By the 4th clause, he gave \$1,600, without condition, to each of his sons, Alexander and Duncan. By the 5th clause, he devised to his sons, Douglas and Robert, two lots; and after giving several legacies to his daughters, he proceeded: "And further, that Alexander and Duncan work on the farm until the legacies become due." Alexander left the farm in 1871 and entered into mercantile pursuits. *Held*, reversing the judgment appealed from (6 Ont. App. R. 595), Ritchie, C.J., and Henry, J., dissenting, that the construction of the paragraph bequeathing \$1,600 to Alexander must be based on a consideration of the whole will, and that the intention was that Alexander's right to receive his legacy was conditional on his working on the farm and assisting in earning it. *Oliver v. Davidson*, xi., 166.

11. *Construction — Intention of testator—Trust — Absolute devise — Subsequent restriction—Repugnancy.*—A testator directed his real estate to be sold and the proceeds, after payment of debts and certain legacies, to be divided into twelve equal parts, "five of which I give and devise to my beloved daughter C. M., four of which I give and devise to A. E. F. (daughter), and three of which, subject to the conditions and provisions hereinafter set forth, I reserve for my son, C. W. M. But in no case shall any creditor of either of my children, or any husband of either of my children, daughters, have any claim or demand upon the said executrices, &c., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually . . . during their respective lives." In an action by the daughters to have their shares paid over to them untrammelled by any trust. *Held*, affirming the judgment appealed from (20 N. S. Rep. 71), that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives. *Foot v. Foot*, xv., 699.

12. *Construction — Usufruct — Remainder—Substitution — Rights purged — Conveyance by usufructuary — Sheriff's sale—Estoppel—Art. 711 C. C. P.*—A will provided:—"Fifthly, I give, devise and bequeath unto H. M., . . . my present wife, the usufruct, use, and enjoyment during all her natural lifetime of the rest and residue of my property, moveable or immoveable, . . . which I may have any right, interest or share at the time of my death, without any exception or reserve.—To have and to hold, use and enjoy the said usufruct, use, and enjoyment of the said property unto my said wife, as and for her own property, from and after my decease and during all her natural lifetime."—"Sixthly, I give, devise and bequeath in full property unto my son, J., issue of my marriage with the said H. M., the whole of the property of whatever nature or kind, moveable, real, or personal, of which the usufruct, use, and enjoyment during her natural lifetime is hereinbefore left to my said wife, . . . out subject to the said usufruct, use and enjoyment of his mother, . . . during all

her natural lifetime as aforesaid, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever. Should, however, my said son . . . die before his said mother . . . then and in that case I give, devise and bequeath the said property so hereby bequeathed to him to the said H. M. in full property to be disposed of by last will and testament or otherwise as she may think fit, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever.—To have and to hold the said hereby bequeathed and given property to the said J., his heirs and assigns, should he survive his said mother, as and for his and their own property forever, and in the event of his predeceasing his said mother unto the said H. M., her heirs and assigns, as and for her and their property forever." *Held*, affirming the judgment appealed from (Q. R. 1 Q. B. 197), that the will did not create a substitution, but a simple bequest of usufruct to his wife and of ownership to his son upon survival. *Held*, also, that a sheriff's sale of property forming part of the estate under an execution issued against a person who was in possession under a title from the wife, such sale having taken place after testator's son became of age, was valid and purged all real rights which the son might have had under the will. *Patton v. Morin* (16 L. C. R. 267) followed. *McGregor v. Canada Investment & Agency Co.*, xxi., 499.

13. *Construction — Devise to children and their issue — Distribution — Per stirpes or per capita — Trust — Statute of Limitations—Possession.*—Under provisions of a will:—"When my beloved wife shall have departed this life and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money . . . and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto."—*Held*, reversing the Court of Appeal for Ontario, Ritchie, C.J., dissenting, that the distribution of the estate should be *per capita* and not *per stirpes*.—A son of the testator, one of the executors and trustees named in the will was a minor when his father died, and after coming of age he never applied for probate though he knew of the will and did not disclaim. With the consent of the acting trustees he went into possession of a farm belonging to the estate and remained in possession over 20 years, and until the period of distribution under the clause above set out arrived, and then claimed title under the Statute of Limitations. *Held*, affirming judgment appealed from (18 Ont. App. R. 25), that as he held under an express trust by the terms of the will, the rights of the other devisees could not be barred by the statute. *Houghton v. Bell*, xxiii., 498.

14. *Devise of life estate—Remainder to issue in fee simple—Intention of testator — Rule in Shelley's case.*—A testator by the third clause of his will devised land as follows: "To my son J., for the term of his natural life, and from and after the decease to the lawful issue of my said son J., to hold in fee simple." In default of such issue the land was to go to a daughter for life with a like remainder in favour of issue, failing which, to brothers and sisters and their heirs.

Another clause of the will was as follows: "It is my intention that upon the decease of either of my children without issue, if any other child be then dead the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will." *Held*, affirming the decision of the Court of Appeal (21 Ont. App. R. 519), that if the limitation in the third clause, instead of being to the issue to hold in fee simple had been to the heirs general of the issue, the son J., under the rule in *Shelley's Case*, would have taken an estate tail; that the word "issue" though *primâ facie* a word of limitation equivalent to "heirs of the body," is a more flexible expression than the latter and more easily diverted by a context or superadded limitations from its *primâ facie* meaning; that it will be interpreted to mean "children" when such limitations or context requires it; that "to hold in fee simple" is an expression of known legal import admitting of no secondary or alternative meaning, and must prevail over the word "issue," which is one of fluctuating meaning; and that effect must be given to the manifest intention of the testator that the issue should take a fee. *King v. Evans*, xxiv., 356.

15. *Executory devise over—Contingencies—“Dying without issue”—“Revert”—Dower—Annuity—Election by widow—Devolution of Estates Act, 49 Vict. (O.) c. 22—Conditions in restraint of marriage—Practice—Added parties—Orders 46 & 48 Ontario Judicature Act—E. S. O. (1888) c. 109, s. 30.*—A testator divided his real estate among his three sons, the portion of A. C. the eldest son being charged with the payment of \$1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." A. C. died after the testator, leaving a widow, but no issue. *Held*, reversing the judgment of the Court of Appeal, that the gift over in the last mentioned clause was intended by the testator to take effect on the death of the devisee without issue at any time and not during the lifetime of the testator only; but it was no ground for departing from this *primâ facie* meaning of the terms of the gift that very burdensome conditions were imposed upon the devisee; and that no such conditions would be imposed on the devise to A. C. by this construction, as the two sums of \$1,000 each charged in favour of his brothers were charged upon the whole fee, and if paid by him his personal representatives on his death could enforce re-payment to his estate. *Held*, also, that the widow of A. C. was entitled to the dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of \$50 per annum given her by the will, it not being inconsistent with her right to dower, and she was therefore not put to her election; that the limitation of the annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act, which applies only to the descent of inheritable lands.—The mortgagee of the reversionary interest of one of his brothers, in the

lands devised to A. C., was improperly added, in the Master's office, as a party to an administration action and could take objection at any time to the proceeding either by way of appeal from the report or on further directions; she was not limited to the time mentioned in order 48 of the Supreme Court of Judicature, which refers only to a motion to discharge or vary the decree. *Cowan v. Allen*, xxvi., 292.

[Followed in *Fraser v. Fraser* (26 Can. S. C. R. 316). See No. 16, *infra*.]

16. *Devise to two sons—Devise over of one's share—Condition—Context—Codicil.*—A testator devised property "equally" to his two sons, J. S. and T. G., with a provision that "in the event of the death of my said son T. G., unmarried or without leaving issue," his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property on a condition which was not complied with and the devise to him became of no effect. *Held*, reversing the decision of the Supreme Court of Nova Scotia, that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties, the estate of J. S. being absolute, and that of T. G. subject to an executory devise over in case of death at any time and not merely during the lifetime of the testator. *Cowan v. Allen* (26 Can. S. C. R. 292) followed. *Held*, also, that the word "equal" indicated the respective shares which the two devisees were to take in the area of the property devised and not the character of the estates given in those shares. *Fraser v. Fraser*, xxvi., 316.

See No. 15, *ante*.

17. *Death without issue—Executory devise over—Conditional fee—Life estate—Estate tail.*—A testator died in 1856 having previously made his last will, divided into numbered paragraphs, by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of 21 years—"giving the executors power to lift the rent, and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years," and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue. *Held*, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will. *Held*, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee who thus took an estate in fee subject to the executory devise over. *Crawford v. Broddy*, xxvi., 345.

18. *Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees.*—The late Joseph Rochon made his will in 1852 by

hich he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, is uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of his uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre les héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament." *Held*, Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate (subject to the usufruct), to their children, which took effect at the death of the testator. *Held*, also, that the charge of preserving the estate "conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, nor as having, by that term, given them the property subject to the charge that they should and it over to the children at their decease, nor as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct. *Held*, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*. Judgment appealed from (Q. R. 5 Q. B. 277) affirmed. *Robin v. Duguay*, xxvii., 347.

19. *Construction of statute — Abolition of estates tail — Executory devise over—Dying without issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Tutatory title—Title by will—Conveyance by grant in tail.*—The R. S. N. S., 1851 (1 ser.) c. 112, provided: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 12), the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111), the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2), when it was provided as follows: "All estates tail are abolished and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such." Z., who died in 1859, by his will made in 1857, devised lands in Nova Scotia to his son and, in default of law-

ful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant. *Held*, *per* Taschereau, Sedgewick and King, JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate, as there could not be a valid estate tail to support such remainder. *Held*, further, *per* Taschereau, Sedgewick and King, JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of the body;" and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could be conveyed by the first devisee. *Held*, *per* Gwynne and Girouard, JJ., that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed to him. *Ernst v. Zwicker*, xxvii., 594.

20. *Codicil — Testamentary succession — "Heir"—Universal legatee — Arts. 596, 597, 831, 864, 840 C. C.—14 Geo. III., c. 83, s. 10 (Imp.)—41 Geo. III., c. 4 (L.C.)*—R. A. who died in Montreal in 1896 having, by his will made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residuary estate. M. A. died in 1865 leaving a will appointing five of her children her universal legatees. R. A. subsequently took communication of the will of the deceased M. A. and made a codicil to his own will in the terms following: "With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A. . . . my will and desire is that her said share of said residue shall go to her heirs." *Held*, Gwynne and Girouard, JJ., dissenting, that under the provisions of the Civil Code of Lower Canada, the words "her heirs" in the codicil must be construed as meaning the persons to whom the succession of M. A. devolved as universal legatees under her will. *Allan v. Evans*, xxx., 416.

21. *Provisions by will — Deferred distribution — Premature action.*—Action by beneficiaries under will against the executors for an account and share of testator's estate, claiming that it was not necessary to postpone the distribution simply to permit the executors to fulfil a trust of little importance in comparison with the bulk of the estate and which could be otherwise provided for. The Supreme Court affirmed the judgment of the Court of King's Bench, affirming the judgment of the trial court, which dismissed the action on the ground that the will excused the executors from an account and distribution until the minor children, for the

education and care of whom provision was made in the will, attained the age of majority. *Gilmour v. Cory*, 22nd May, 1902.

22. *Construction of will—Survivorship—Intestacy.*—H. by his will provided for disposal of his property in case his wife survived him but not in case of her death happening first. The will also contained this provision: "In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time I request the following disposition to be made of my property" . . . H. died sixteen days after his wife but made no change in his will. *Held*, affirming the judgment appealed from (4 Ont. L. R. 666; 2 Ont. L. R. 169), that H. and his wife were not deprived of life at the same time and he therefore died intestate. *Maclean v. Henning*, xxxiii., 305.

23. *Construction of will—Opening of substitution—Legacy to substitutes—Legatees taking per stirpes or per capita.*—By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, during her lifetime and, after her death, to his surviving children and, by the sixth clause, provided as follows: "Quant à la propriété de mes dits biens meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et lègue aux enfants légitimes de mes enfants, qui seront mes petits-enfants; pour, par, mes dits petits-enfants, jouir, faire et disposer de mes dits biens en pleine propriété et par égales parts et portions entre eux, à compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituant mes légataires universels en propriété."—*Held*, reversing the judgment appealed from, that all the grandchildren participated in the legacy and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substitution created by the will, for such portion of his estate, should be divided among all the grandchildren then living in equal shares, the grandchildren taking *per capita* and not *per stirpes*. *Remillard v. Chabot*, xxxiii., 328.

24. *Providing for continuing executors—Trust—Account—Administration of minor's property—Appointment of tutor by will—Directions of testator—Minor discharging tutor—Res judicata—Acquiescence—Executor—Pro-tutor—Jurisdiction—Property in Quebec and Ontario—Negligence—Duty to administer en bon père de famille—Interest—Art. 290 et seq. C. C.—Contrainte.*—C., deceased mother of the appellant, was sole executrix of the will of her deceased husband whereby appellant and a sister (since deceased) were constituted sole residuary legatees. By her will, made at her domicile in Montreal, C. bequeathed all her property to her two children, and appointed the defendant and F. M. her executors, authorizing them to continue the execution of the will of her late husband, which had been made in Ontario where part of the lands affected were situate. She also appointed them tutors to her children, to take care of them until their marriage or attaining the age of majority. Both acted accordingly together till F. M. left the country in 1856, after which defendant continued to do so alone. On coming of age in 1868, the plaintiff, as sole surviving legatee under both wills, gave the defendant a full discharge of his administration although he did not produce vouchers and render an account under oath. In an action *en reddition de compte* and for \$41,278,

balance due on the administration (as ordered by a judgment in a preceding action to set aside the discharge and certain deeds, &c., for fraud), it was held by the Court of Queen's Bench (2 Dor. Q. B. 33; 25 L. C. Jur. 196) reversing the judgment of the Superior Court, District of Montreal, that C. had no power by her will to appoint administrators to continue the administration of her deceased husband's estate; that though defendant had not been duly appointed tutor he had acted as such and could be held to account; that the discharge was null and void as it had been given without a regular account; that defendant could not charge interest on sums advanced by him for education and maintenance of the minors, but only upon interest bearing debts paid by him in excess of his receipts, and finally adjusted the balance due by defendant on the *débats de compte* at \$590.07.—The Supreme Court reversed the judgment appealed from and held, that the quality of defendant was not only *res judicata* by the judgment condemning the defendant to render an account, but it had not been appealed from and had been acquiesced in by defendant; that the courts below were correct in holding that the action had properly been brought in Quebec; that, while agreeing with the Court of Queen's Bench as to the law respecting the liability of executors, the court was of opinion there was not sufficient evidence that F. M. had acted otherwise than as agent of defendant, who was therefore properly liable for all the rents of the Belleville property after the death of C.; that the administration of defendant, although begun before the promulgation of the Civil Code, should have been regulated by the principles contained in the Code (art. 290 *et seq.*) which, with a few exceptions introducing new law, are only a *résumé* of the old law on the obligations of a tutor. He should therefore have administered *en bon père de famille*, whereas his own evidence was sufficient to prove negligence on his part. He had allowed the tenants of the Belleville property to make only such repairs as they thought right, and moreover to deduct the cost from the rents, although the leases bound them to keep the property in repair. That the defendant should be charged interest on the price of the Belleville property (\$6,250), and also on that part of the price of the sale of the half of the Drummond street property unaccounted for (\$4,640), from the time of sale (art. 1,534, C. C.), not being entitled to the six months allowed by the Code for investing the moneys of a minor, because he had claimed to appropriate and had used the money as his own; that the charge made for board of C. and "Louisa," allowed by the Queen's Bench, should be deducted, as C. and her daughters were living with the defendant as his relatives, and there was no evidence that defendant had at any time any intention of making them pay board; that the amount of the judgment obtained against C. should be disallowed, together with the interest thereon; and that certain other items (particularly specified) should be disallowed.—The result was that the judgment of the Queen's Bench was varied by condemning defendant to pay to plaintiffs \$12,121.49, but the court did not order a *contrainte par corps*, because it had been admitted that sufficient property belonging to defendant to secure plaintiff had been seized, and because the court not being obliged to pronounce "*la contrainte par corps*" against tutors in every case, did not think it necessary to do so in the present one.—*Per*

Strong, J. The Belleville property having been devised by the plaintiff's father to her mother for life, with remainder to the plaintiff and her sister in fee, a trust was created, and upon the death of C. there was no trustee to execute this trust, and defendant, and F. M., having entered into the estate of the minors and taken the profits were accountable in equity as constructive trustees, and their liability in this respect being entirely a personal one might be enforced in a jurisdiction other than that in which the lands were situated, and the mere pendency of a suit in the Ontario Court of Chancery, in which no decree had been made, did not constitute any ground of defence. The defendant ought not to be allowed to claim the amount of the judgment against C., because it was a failure of duty on his part not to see she was protected by accepting her mother's succession under benefit of inventory, and he cannot be allowed to take advantage of his own default by making the plaintiff responsible for her mother's debt to an amount far beyond the value of the succession. Besides, the evidence of a debt was very unsatisfactory, and it was the common practice (so much so that this court might take judicial notice of it) to take judgments in this form in Ontario for the sole purpose of enabling the lands to be sold under execution against the executor or administrator (*Gardiner v. Gardiner*, 2 U. C. O. S. 520), and not with any view of binding the executor to an admission of personal assets, and such a judgment was no evidence as regarded the real representatives of the heir or devisee, but as to them was *res inter alios*, and before lands could be made liable to the satisfaction of the judgment creditor he was bound to prove his original debt as strictly as if no judgment against the executor had ever been obtained, and this the defendant had entirely failed to do. *Coleman v. Miller*, Cass. Dig. (2 ed.) 301.

25. *Powers of executors — Advancing legatees' shares — Promissory notes.*] — M., who was a merchant, by his will gave special directions for the winding up of his business and the division of his estate among a number of his children as legatees, and gave to his executors, among other powers, the power "to make, sign, and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of thirty years the whole or any part of their shares in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," &c. In an action against the executors to recover the amount of promissory notes given by the executors and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts. *Held*, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques-Cartier v. Gratton*, xxx., 317.

3. DEVISES AND LEGACIES.

26. *Construction — Devise to first great-grandson — Devise defeated by rule of law — Void for remoteness — Intestacy — Estate tail — Heir-at-law.*] — P. F., sr., by a will, dated 3rd December, 1845, devised as follows: "It pleased the Lord to give me two sons equally dear to my heart; to give them equal justice I leave all my land to the first great-grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any incumbrance, except the burying ground and the quarter of acre for a place of worship. To Duncan Ferguson, my son, I bequeath my family Bible and five shillings over and above what I have done for him. . . . To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State dues and public burdens himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it. . . . I appoint Peter McVicar, my grandson, to take charge of the whole place—farm and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age as aforesaid." The testator died in 1849, leaving two sons, D. and P., jr., three daughters and one grandson, P. McV., being a son of a daughter. When he died the property was subject to a lease, which expired in 1857. P. F., jr., went into occupation, in that year conveyed his interest to P. McV. and left the place. Subsequently, the appellant, son of D. F., and heir-at-law of P. F., sr., took a conveyance from P. McV., and thereupon the respondent, heir-at-law of P. F., jr., brought an action of ejectment, claiming that under the will his father took an estate tail which descended to him. The Court of Queen's Bench (39 U. C. Q. B. 232) decided in favour of the heir-at-law, and was reversed by the Court of Appeal for Ontario (1 Ont. App. R. 452).—On appeal to the Supreme Court, *Held*, reversing the Court of Appeal for Ontario, Strong, J., dissenting, that the devise by the testator to his first great-grandson being void for remoteness and there being no intention to give P. F. jr., any estate or interest independent of, or unconnected with, the devise to the great-grandson, there was no valid disposition to disinherit the heir-at-law, and therefore the plaintiff was not entitled to recover.—*Per Ritchie, J.* Where the rule of law, independent of and paramount to the testator's intentions, defeats the devise, the proper course is to let the property go as the law directs in cases of intestacy. *Ferguson v. Ferguson*, ii., 497.

27. *Legacy — Alienation of property bequeathed — Partition of proceeds — Estoppel.*] — By will dated 11th February, 1833, testator devised to M. his daughter by an Indian woman and to E. and M., his daughters by another woman, a defined portion of the Seigniories of Temiscouata and Madawaska, and the balance of said property to his sons W. and E. A short time after making this will the testator, who was heavily in debt, received an unexpected offer of £15,000 for the seigniories,

and sold at once, paid his most pressing debts, amounting to £5,400, and invested the balance in loans on real estate. At his death, his estate appearing to be vacant as regards the £9,600, a curator was appointed. On 27th September, 1839, the parties entitled under the will proceeded to divide and apportion their legacies, basing their calculations upon the approximate area of the seigniories devised, and received the collected part of the sums allotted to each by the partition. In an action brought by W., residuary legatee, against the curator, the court ordered the curator to account, which he did, deposited \$50,000 and other securities. On a report of distribution F. filed an opposition claiming his share under the will. Appellant contested, on the grounds: 1st. That the legacies were revoked and that in his capacity of universal legatee of his mother (the legitimate child, he alleged, of the testator and the Indian woman who was *commun en biens* with the testator) he was entitled to one-half of the proceeds of the £9,600; and 2nd. that in the event of his claim to legitimacy and revocation of the legacy being rejected, as by the will the daughters were exempt from the payment of the debts, he should, as representing one of the daughters, be entitled to her proportion of £15,000, the net proceeds of the sale.—*Held*, affirming the judgment appealed from (12 Q. L. R. 327), that as appellant did not at the death of his mother, repudiate the *partage* to which she was a party, but ratified it and acted under it, he was estopped from claiming more than what was allotted to his mother.—*Per Strong, Fournier and Taschereau, J.J.* That under the law prior to the Code the sale of the seigniories which were the subject of the legacy in question in this cause, considering the circumstances under which it was made, had not the effect of defeating the legacy. *Semble, per Henry, J.* That there was a revocation of the legacy.—The court below (12 Q. L. R. 327), held that as the testator declared that the daughters should not be liable for the payment of his debts, partition, as regards them, should be made of the sum of £15,000, the price obtained from the sale of the seigniories bequeathed, and not of the £9,600 remaining in his succession at his death. On cross-appeal the Supreme Court, *Held*, that on the pleadings no adjudication could be made as to the £5,400 paid by the curator for the debts, and that in the distribution of the moneys in court all that the appellant could claim, was the unpaid balance (if any) of his mother's share in the moneys, securities, interest, and profit of the £9,600 in accordance with the *partage* of the 27th September, 1839. *Jones v. Fraser*, xiii., 342.

28. *Particular devise—Construction—Contingent interest.*—[A testator having previously given all his estate, real and personal, to trustees in trust for his wife for life, or during her widowhood, made a devise as follows:—"I in trust also, that at the death, or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot number 1, &c., which I hereby devise to him, his heirs, and assigns to and for his and their own use for ever." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents

and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children; provided always, that in the event of any child dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:—"All other my lands, tenements, houses, hereditaments, and real estate," &c. *Held*, Ritchie, C.J., and Fournier, J., dissenting, reversing the judgment appealed from (*Keefer v. McKay*, 9 Ont. App. R. 117), that the interest devised to Thomas was contingent upon his surviving his mother. *Merchants Bank of Canada v. Keefer*, xiii., 515.

29. *Devise subject to charge—Legacy to survivor—Contingent interest—Preceding waste.*—[Plaintiff was a beneficiary under a will by which the devise was to the testator's wife with a legacy to him provided he survived her and, during her lifetime, he brought suit to protect his legacy against dissipation by the widow. *Held*, reversing the judgment appealed from, that plaintiff had more than a possibility or expectation of a future interest; he had an existing contingent interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended. *Duggan v. Duggan*, xvii., 343.

30. *Words of grant—Charge on realty—Legacy—Residuary devise—Priority—Notice.*—[A legacy to B. with residuary devise to A. of "the balance and remainder of the property and of any estate" of the testator constitutes the legacy a charge upon the testator's realty, the words "property" and "estate" being both sufficient to pass realty. *Cameron v. Harper*, xxi., 273.

31. *Construction of will—Devise to creditor—Specific lands—Unascertained chattels—Satisfaction.*—[The testator by clause "B" devised all his lands in Yorkville, and particularly described in the first schedule, to his son George, his heirs and assigns, together with their actual and reputed appurtenances, or with the same or any part thereof, held, used and occupied or enjoyed, or known, taken or considered as part or parcel thereof, together also with all and all manner of engines, fixtures, utensils and implements, and the appurtenances and stock in trade therein, or in or about the premises at his decease, he or they paying in exoneration of any other estate, any incumbrances which at the time of his decease shall affect the same; "this devise to be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease."—Clause "L" provided: "And it is my will and desire that, if at any time between the day of the date of this my will and the time of my decease, any sale or other disposition of any of the said lands and premises herein specifically devised by me shall be made by me, the consideration money received therefor in money or otherwise, to the amount thereof, or the value thereof, shall be a charge upon the whole of my real estate, and shall become due and payable to the devisee to whom the said land is herein specifically devised, or to his or her heirs, executors, administrators or assigns,

within five years after my decease, with interest after the first year of my decease, the securities (if any) received in part or whole payment of such consideration, if any being at the time of decease, to be transferred, conveyed and assigned to the said devisee, his or her executors, administrators or assigns, and to be by him, her or them received as to the amount then owing thereon in part or in whole payment of the said consideration money as the case shall be."—Between the making of the will and his death, the testator sold his properties specifically devised by clause "B," comprising a brewery and stock and plant therein, to his son George, the purchase money being \$33,987.20 and it was contended that, to the extent of this sum, \$33,987.20, the appellant (his son George), was entitled, under clause "L" to a charge upon the estate. *Held*, reversing the judgment appealed from (18 Ont. App. R. 725), Gwynne, J., dissenting, that the devise of the lands was not superseded.—But the appellant was not entitled to the value of the stock and plant in the brewery, in the event of their sale to him in the testator's lifetime, because what was given to him was not, as in the case of lands, certain specific ascertained property, but only fluctuating and unascertained property, that is, such property as should be on the premises at the time of the testator's decease. Appeal allowed with costs of all parties out of the estate. *Severn v. Archer*, Cass. Dig. (2 ed.) 875.

32. *Construction — Devise to children and their issue—Per stirpes or per capita—Statute of Limitations—Possession.*—Under the following provision of a will "When my beloved wife shall have departed this life and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money . . . and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those my said sons and daughters who may have departed this life previous thereto:"—*Held*, reversing the judgment appealed from (18 Ont. App. R. 25), Ritchie, C.J., dissenting, that the distribution of the estate should be *per capita* and not *per stirpes*.—A son of the testator and one of the executors and trustees named in the will was a minor when his father died, and after coming of age he never applied for probate though he knew of the will, and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate, and remained in possession over twenty years, and until the period of distribution under the clause set out arrived, and then claimed to have a title under the Statute of Limitations. *Held*, affirming the decision appealed from (18 Ont. App. R. 25), that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute. *Houghton v. Bell*, xxiii., 498.

[In the court below the case is reported *sub nom. Wright v. Bell*.]

33. *Devise—Death of testator caused by devisee—Felonious act — Nullum commodum potest de injuriâ suâ propriâ.*—No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one

caused by manslaughter. The judgment appealed from (21 Ont. App. R. 560, *sub nom. McKinnon v. Lundy*) reversed, Taschereau, J., dissenting. *Lundy v. Lundy*, xxiv., 650.

Cf. *Standard Life Assurance Co. v. Trudeau* (Q. R. 9 Q. B. 499, 31 Can. S. C. R. 376), *INSURANCE, LIFE*, 1, at col. 698, *supra*.

34. *Legacy — Bequest of partnership business—Acceptance by legatee—Right of legatee to an account.*—J. and his brother carried on business in partnership for over thirty years, and the brother having died, his will contained the following bequest: "I will and bequeath unto my brother J., all my interest in the business of J. & Co., in the said City of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible." *Held*, affirming the decision of the Court of Appeal, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson v. Junkin*, xxvi., 193.

35. *Words of futurity life estate — Joint lives—Time for ascertainment of class—Survivor dying without issue—"Lawful heirs."*—A devise of real estate to the testator's wife and only child for their joint lives, with estate for life to the survivor and remainder in fee to his lawful heirs, is not evidence of intention upon the part of the testator to exclude the child from the class entitled to the fee, in case such child should survive the testator. Judgment appealed from (23 Ont. App. R. 29) affirmed. *Thompson v. Smith*, xxvii., 628.

36. *"Own right heirs" — Limited testamentary power of devisee—Conditional limitations—Vesting of estate.*—Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of an intestacy unless a contrary intention appears, and where there was a devise to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator. Judgment appealed from (24 Ont. App. R. 61) *sub nom. In re Ferguson; Bennett v. Coatsworth*, affirmed, *In re Ferguson; Turner v. Bennet; Turner v. Carson*, xxviii., 38.

37. *Construction of statute—14 & 15 Vict. c. 6 (Can.)—Devise to heirs—Abolition of law of primogeniture.*—The Act 14 & 15 Vict. c. 6 (Can.) abolishing the law of primogeniture in Upper Canada, placed no legislative interpretation on the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named, such heirs were all the brothers and sisters of said person and not his eldest brother only. Judgment of the Court of Appeal (25 Ont. App. R. 326) affirmed. *Wolff v. Sparks*, xxix., 585.

38. *Condition of legacy — Religious liberty — Public policy — Restrictions as to marriage — Education — Exclusion from succession.* — In the Province of Quebec the English law rules on the subject of testamentary dispositions, and, therefore, in that province, a testator may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rights of any church recognized by the laws of the province, and that the grandchildren should be educated according to the teachings of such church and may also exclude from benefit under his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages or who may not have been educated as directed. *Renaud v. Lamothe*, xxxii., 357.

39. *Devise for life — Remainder to devisee's children — Estate tail.* — Land was devised to D. for life "and to her children if any at her death," if no children to testator's son and daughter. D. had no children when the will was made. *Held*, that the devise to D. was not of an estate in tail, but on her death her children took the fee. *Grant v. Fuller*, xxxiii., 34.

40. *Condition in will — Devise of real estate — Restraint on alienation.* — A devisee of real estate under a will was restrained from selling or encumbering it for a period of twenty-five years after the testator's death. *Held*, reversing the judgment appealed from, that as the restraint, if general, would have been void the limitation as to time did not make it valid. *Blackburn v. McCallum*, xxxiii., 65.

41. *Debt by devisee to testator — Devise of all testator's property — Chose in action.* — A devise of all "my real estate and property whatsoever and of what nature and kind soever" at a place named does not include a debt due by the devisee, who resided and carried on business at such place, to the testator; (4 Ont. L. R. 682, affirmed). *Thorne v. Thorne*, xxxiii., 309.

[In the court below the case is reported *sub nom. Thorne v. Parsons*.]

42. *Construction of devise — Joint tenants — Tenants in common — Partition — Evidence — Abolition of joint tenancies.* — A devise to testator's two sons, their heirs, &c., provided that the devisees should jointly and in equal shares pay testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of 2, 3, 4, 5, 6 and 7 years respectively. The estate vested before the statute abolishing joint tenancies in Nova Scotia came into operation. *Held*, reversing the judgment appealed from (21 N. S. Rep. 378), *Taschereau* and Gwynne, J.J., dissenting, that these provisions for payments of debts and legacies indicated an intention on the testator's part to effect a severance of the devise and the devisees took as tenants in common and not as joint tenants. *Fisher v. Anderson* (4 Can. S. C. R. 406) followed. — On the trial of a suit between persons claiming through the respective devisees for partition of the real estate so devised evidence of a conversation between the devisees, which plaintiff claimed would show that a severance was made after the estate vested, was tendered and rejected as being evidence

to assist in construing the will. *Held*, Gwynne, J., dissenting, that it was properly rejected. *Held*, per Gwynne and Patterson, J.J., that the evidence might have been received as evidence of a severance between the devisees themselves if a joint tenancy had existed. *Clark v. Clark*, xvii., 376.

43. *Devise of remainder — Survival of tenant for life — Possession — Decease of remainderman — Estate of inheritance — Owner in fee — Statute of Limitations.* — On appeal from a judgment of Rose, J., affirmed by the Divisional Court, the judgment of the Court of Appeal for Ontario recited in effect, that action was for a declaration that plaintiff had an estate in fee simple in remainder in lands subject to an estate in defendant H. for the life of defendant R. Defendants denied any title whatever in plaintiff, and relied on actual possession and title by Statute of Limitations. — That on 4th June, 1844, W. R. conveyed the whole of lot 55, . . . Spadina avenue, Toronto, to J. H. and S. H. in fee simple, as tenants in common, and the conveyance was duly registered. — On 14th August, 1846, J. H., by his will, devised to his wife, Anne, for life or widowhood all his real estate, "consisting of the N. ½ of lot 55." The will then proceeded: "The above named property left to my wife at the end of her natural life, or when she become married again, I then will and bequeath to my brother S.H. during his natural life, and then at the expiration of that time it is to go to my heir. I also will and bequeath to my heir one sterling shilling. I hereby appoint my brother Simon sole executor." — J. H. and S. H. were step-brothers without any blood relationship between them. — J. H. died in 1847 leaving his wife Anne surviving him, and there is no evidence who was his heir-at-law. It was agreed by counsel on the argument that no one has ever come forward to claim the property as heir. — On the death of J. H. his widow A. H. went into possession until her death in June, 1856. — On the 12th May, 1854, S. H. made his will as follows: "I give all my property real and personal to my wife Eliza to be enjoyed by her during her natural life, and after her death I give to my adopted son G. W. and his heirs one-half of the lot that I own on Spadina avenue together with the house erected on the said half-lot in which I now reside; and the other half of the said lot with the house erected on the last mentioned half lot I give, devise and bequeath to W. and P. H., the sons of R. H., and their heirs after the death of my said wife. In this last mentioned half lot I have an estate in remainder expectant upon the death of Anne H. who has a life estate in the same." He died in January, 1855, leaving him surviving not only his own wife Eliza, but also the widow of J. H. — Anne H. died in June, 1856, and upon her death Eliza H. took possession, and some time afterwards married again a man named A. R. — On 8th November, 1867, R. and his wife leased the land for fifteen years to P., reciting that S. H. had been seized thereof in his lifetime, and by his will had devised the same to his wife for her natural life, and on 15th December, 1870, this lease was assigned to C. — A. R., the husband, having died, his widow on 1st September, 1873, made another lease of the whole lot 55 to the same C. for the term of her natural life. In the lease the land is designated as more particularly described in the deed from W. R. to S. H. of

3rd June, 1844, and recited that the lessor's former husband, S. H., had by will devised the land to her for her life. This lease was surrendered, and on 16th October, 1882, Mrs. R. made a new lease of the whole lot for the term of her natural life to M. M., describing the land in the same manner and with the same recitals as the lease of September, 1873, to C.—In 1882 and 1884 respectively plaintiff acquired by purchase the estates in remainder of W. and P. H., named in the will of S. H. as devisees in fee after the death of Mrs. H., and in 1888 he was negotiating with Mrs. R. for a conveyance of her life estate, and a quit claim deed to plaintiff was prepared and approved of by Mrs. R.'s solicitors, but was not executed.—On 22nd September, 1888, Mrs. R. by deed, expressed to be for \$5,000, conveyed the whole lot 55 in fee to her co-defendant H., reciting that about February, 1855, she entered into adverse possession thereof, and has ever since demeaned herself as owner thereof, and continued and is now in undisputed possession and occupation of the same, whereby her title thereto has become absolute and indefeasible.—Action was brought on 22nd October, to determine the rights of the parties.—The parties signed admissions of the facts to the effect stated above, with this qualification. The first admission is: "That J. H. was in his lifetime the owner in fee of N. ½ of lot 55, plan D 10, on W. side Spadina avenue, Toronto, which is the land mentioned in plaintiff's statement of claim." The deed of the whole lot to both J. H. and S. H. as tenants in common in fee was not produced or referred to. This admission without anything further might well be taken to mean that J. H. was the sole owner of this land in his lifetime and at the time of his death, and accordingly the case was argued before the trial judge upon that footing, and upon this supposition that when S. H. made his will he had no title or interest in the land but what he derived under the will of J. H., viz., a life estate expectant on a prior life estate in Anne H., and that having predeceased her he had nothing to devise, and that nothing did or could pass to any one by his will. Under these circumstances the question was whether, although nothing could pass by her husband's will, Mrs. R. (or H.) having entered and occupied as tenant for life under the will, was not estopped as against the plaintiff from denying that her husband had title, and whether she could set up the Statutes of Limitations against the plaintiff's estate in remainder.—Rose, J., held that defendants were estopped, and gave judgment for the plaintiff, from which defendants appealed to the Divisional Court.—While the case was before the Divisional Court the conveyance of 1844 was, at the suggestion of the court, produced in evidence, and that court expressing no dissent from the grounds on which Rose, J., had disposed of the case, held that it was manifest from the deed that Mrs. R.'s possession was under the will of her husband and that she could not be allowed to set up the Statutes of Limitations against the plaintiff claiming under the same will.—On the next appeal the argument of appellant was that S. H. having no title but a life estate, expectant on a prior life estate in Anne H., and having predeceased her, had no interest whatever which he could dispose of by his will, and that when Mrs. J. H. died S. H.'s widow could get nothing, not even possession by virtue of her husband's will, that she could take possession like any stranger,

and if she did no one could turn her out but J. H.'s heir-at-law, that just as she could get nothing under the will so neither could W. and P. H., or the plaintiff claiming under them, and unless he could shew some title from J. H.'s heir-at-law, he must fail. The Court of Appeal thought the first question was whether upon the evidence, as it then was, S. H. had any title when he made his will and when he died, quite independently of J. H.'s will.—That the admissions of title to J. H. in his lifetime, read in the light of the deed of 1844, under which his title was acquired, shews that while it was the fact that J. H. had title there was also title to S. H., and that the latter had an estate in the land at the time of his death which passed by his will to his widow (now Mrs. R.), for life with remainder in fee to W. and P. H., who conveyed to plaintiff; that the judgment might well be supported on the ground on which it was rested by the trial judge, on the supposition that S. H. had no title when he made his will or when he died, but only a life estate. On that supposition this case is not distinguishable from *Board v. Board* (L. R. 9 Q. B. 48), and was not affected by *Re Stringer's Trusts* (6 Ch. D. 1), because it is distinguishable for the reasons explained by the Chancellor in *Smith v. Smith* (5 Ont. R. 695), *Clarke v. Adie* (2 App. Cas. 435).—The judgment in favour of plaintiff was affirmed. *Held*, as to the first ground taken by the Court of Appeal, that the evidence did not support it, for by the case in which the action was launched and by the admissions of counsel, as well as by the direct statement of S. H.'s will, J. H. owned the N. ½ of the lot. As to the second ground, that S. H. when he died having no estate or interest in the property which could pass by his will or any possession, his widow entered as a stranger, and adversely to the heirs of J. H.; that the statements in the leases, which were statements made to strangers, could not prevent the statute from running in her favour against the heirs of S. H., much less to give title to parties who would have taken in remainder under S. H.'s will, if S. H. had owned in fee, or had had such possession as would have raised a presumption of ownership in fee; and therefore there was no case calling for any interference of the court to make a declaration as to the title of the lot in favour of the plaintiff as against the defendants:—*Per* Patterson, J. The judgment of the Court of Appeal proceeds upon grounds which would be of force if S. H. had died seized as did the testator in *Board v. Board* (L. R. 9 Q. B. 48), or had had possession so as to give operation to the principle of *Asher v. Whitlock* (L. R. 1 Q. B. 1), or had title of any kind as in *Paine v. Jones* (L. R. 18 Eq. 320).—Appeal allowed with costs. *Hayes v. Coleman*, cf. Cass. Dig. (2 ed.) 833.

43 a. Will — Legacy — Trust — Claim on assets — Priority — Registration — Charge on realty — Notice.]—H. and his brother were partners in business; the latter died and H. became by will his executor and residuary legatee. Part of a legacy to E. H. was paid and judgment recovered against the executor for the balance. H. having incumbered both his own share and that devised to him, one of his creditors, mortgagee of the property, obtained judgment against him and the appointment of receivers to his estate. E. H. asked to have it declared that his judgment for balance of legacy was a charge upon the

moneys in the receivers' hands in priority to the personal creditors of H. Held, affirming the Supreme Court (B. C.), that the moneys held by the receivers being personal assets of the testator, or proceeds thereof, E. H. was entitled to priority of payment though his judgment was registered after those of the other creditors. Held, also, that the legacy was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and the words "property" and "estate" being both sufficient to pass realty. This charge upon realty operated against the mortgagees, who were shewn to have had notice of the will. *Cameron v. Harper*, xxi., 273.

44. Donation—Substitution — Partition—Usufruct — Alimentary allowance—Accretion between legatees.

See No. 18, ante.

45. Estates tail—Effect of abolishing Acts—Construction of will — Executory devise over—Dying without issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant — Statutory title—Title by will—Conveyance by tenant in tail.

See No. 19, ante.

46. Codicil — Testamentary succession—"Heir"—Universal legatee.

See No. 20, ante.

4. EXECUTION OF WILL.

47. Form—Holograph will executed abroad—*Locus regit actum—Lex domicilii—Lex rei sitæ—Legacy—Discretion of trustee—Vagueness or uncertainty as to beneficiaries—Poor relatives—Public Protestant charities—Charitable uses—Right of intervention — Personæ designatæ.*—In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the City of Quebec, while temporarily in the City of New York made the following will in accordance with the law relating to holograph wills in Lower Canada: "I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000, which he will send to Miss Mary Frame, Overton Farm." A. R. and others, heirs-at-law of the testator, brought action to have the will declared invalid. Held, Taschereau, J., dissenting, that the will was valid. Held, further, Fournier and Taschereau, J.J., dissenting, that the rule *locus regit actum* was not, in the Province of Quebec, before the Code, nor since under the Code itself (art. 7), imperative, but permissive only. Held, also, Taschereau, J., dissenting, that the will was valid even if the rule *locus regit actum* did apply, because it sufficiently appeared from the evidence that by the law of the State of New York the will would be considered good as to moveables wherever situated, having been executed according to the law of the testator's domicile, and good as to immoveables in the Province of Quebec, having been executed according to the law of the situation of those immoveables.

—In this action interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free, general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay Asylum, a corporate institute for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R., a first cousin of the testator, claiming as a poor relative. Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; Sedgewick, J., dissenting; but that Finlay Asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will. Held, further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. not coming within that class his intervention should be dismissed. Held, per Fournier and Taschereau, J.J., that the bequest to "poor relatives" was absolutely null for uncertainty. In the result the judgment appealed from (Q. R. 2 Q. B. 413) was affirmed, both the appeal and a cross-appeal being dismissed with costs. *Ross v. Ross*, xxv., 307.

48. Undue influence—Evidence.]—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator it is not sufficient to shew that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shewn that they are inconsistent with a contrary hypothesis. Judgment appealed from (3 B. C. Rep. 513) affirmed. *Adams v. McBeath*, xxvii., 13.

49. Testamentary capacity—Form of will—Instructions for drafting.

See No. 3, ante.

5. POWERS.

50. Prohibition to alienate—Art. 972 C. C.—Art. 559 C. C. P.—Legacies exempted from seizure.]—The wife devised all her property to her children as universal legatees, subject to very extensive powers of administration and also to power to alter the disposition in favour of the children conferred by a subsequent clause to her husband as executor who was relieved from making an inventory and rendering an account. The will also provided that the property so bequeathed should be exempt from seizure save for debts due by her estate. The husband, in his quality of testamentary executor and administrator, indorsed accommodation promissory notes signed by C. L., one of the children, and the bank, respondent, as holder for value, obtained judgment against both the maker and indorser. An execution issued against the husband as execu-

tor and certain real estate of the testatrix which he held in his said capacity, was seized and advertised for sale. The appellants, the children of the testatrix and the executor, defendant, opposed the sale on the ground that the property was *insaisissable*. *Held*, reversing the judgment appealed from (26 L. C. Jur. 271), Taschereau and Gwynne, JJ., dissenting, that the indorsement of accommodation notes was not authorized by the will, and that the clause in the will exempting the property of the testatrix from execution was valid and effectual. *Lionais v. Molsons Bank*, x., 526.

51. *Powers of executors—Promissory note—Advancing legatee's share.*—M., who was a merchant, by his will gave special directions for the winding up of his business and the division of the estate among a number of his children as legatees and gave to his executors, among other powers, the power "to make, sign and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of 30 years the whole or any part of their share in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," &c. In an action against the executors to recover the amount of promissory notes given by the executors and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts. *Held*, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques-Cartier v. Gratton*, xxx., 317.

52. *Mortgage by testator—Foreclosure—Decree for sale—Conveyance by purchaser—Assignment of mortgage—Statute confirming sale*—5 Geo. II. c. 7 (Imp.)—R. S. N. S. (4 ser.) c. 36, s. 47.]—A. M. died in 1838 and by his will left real estate to his wife, M. M., for her life, and after her death to their children. At his death there were two small mortgages on the real estate to one T. which were subsequently foreclosed, but no sale was made under the decree on foreclosure. In 1841 the mortgages and interest of the mortgage in the foreclosure suit were assigned to one U. who, in 1849, assigned and released the same to M. M. In 1841 M. M., administrator with will annexed of A. M., filed a bill under 5 Geo. II. c. 7 (Imp.), for the sale of this real estate to pay debts of the estate, she having previously applied to the Governor-in-Council, under a provincial statute, for leave to sell, which was refused. A decree was made and the lands sold, M. M. becoming purchaser. She afterwards conveyed the lands to the Commissioners of the Lunatic Asylum and the title passed, by various Acts of the Legislature, to the defendants. M. K., devisee under the will of A. M., brought ejectment for recovery of the lands, and contended that the sale under the decree was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition

to the Governor-in-Council. The validity of the mortgages and of the proceeding in the foreclosure sale were also attacked. The action was tried before a judge without a jury and a verdict was found for defendants, which the Supreme Court refused to disturb. *Held*, affirming the judgment appealed from (6 Russ. & Geld. 92), that even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee, T., or those claiming under her, the assignment of the mortgages being merely a release of the debts and not passing the real estate, and the plaintiff, therefore, could not recover in an action of ejectment.—*Semble*, that such sale was not invalid but passed a good title, the statute 5 Geo. II. c. 7, being in force in the Province. *Henry J., dubitante.*—*Held*, also, that the statute R. S. N. S. (4 ser.) c. 36, s. 47, vested the land in defendants if they had not a title to the same before. *Henry J., dubitante. Kearney v. Creelman*, xiv., 33.

[The Privy Council refused leave to appeal from this judgment.]

53. *Powers of executors—Breach of trust—Sale of wild lands—Excess of estimate—Specific performance.*—Executors were authorized by will to sell such portion of the real estate as they in their discretion should think necessary to pay off a mortgage and such debts as the personal estate would not discharge. They offered for sale at auction a lot described as "sixty acres (more or less) section 78, Loch End Farm, Victoria District," and giving the boundaries on three sides. The lot was unsurveyed and offered for sale by the acre, an upset price of \$35 being fixed. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchaser.—S. purchased the lot for \$36 per acre and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity, alleging that only some \$2,000 was required to pay the debts of the estate, and refused to execute a deed of the 117 acres tendered to S. In a suit by S. for specific performance of the contract for sale of the whole lot. *Held*, reversing the judgment appealed from and restoring that of the judge on the hearing (2 B. C. Rep. 67), Gwynne, J., dissenting, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity. *Sea v. McLean*, xiv., 632.

54. *Clause prohibiting husband interfering—Power of attorney to act for wife as executrix and legatee—Removal for waste—Fraudulent administration—Rejection of evidence.*—An action to remove executrix. Appellant is the sole surviving executrix of the will of the late J. R., and the appellant and the respondent are the remaining legatees under the will. The respondent complained:—1st. Appellant had given a power of attorney to her husband to manage the estate in violation of the terms of the will; 2nd. Fraud in charging the estate with sums not legally chargeable to the estate; in charging a commission to remunerate her husband for the management of the estate, while paying one T. a commission for the same services; in taking bonuses for certain leases granted; in making a fraudulent lease to C. at a notoriously insufficient rent to the injury of the estate; in agreeing to pay \$1,200 to H. and T. for cancella-

tion of the lease of part of the estate; 3rd. Waste in pulling down and erecting buildings on the estate.—Appellant denied waste and fraud, and maintained that she had a right to give her husband a power of attorney.—As to the first point respondent relied on these words: "And it is furthermore my will and wish, that neither of the husbands of any of said daughters nor any of my daughters' future husbands, shall have any power over, control or interference in any manner, with the foregoing devise and bequest to them, but shall be as absolutely free from such power, control or interference as if they had remained unmarried and single." — Appellant complained that the testimony of her husband had been excluded, and that it was competent to the court to allow her husband to be examined. (Art. 252 C. C. P.; 35 Vict. c. 6, s. 9.)—The Superior Court, while admitting that under the will the husband could act as his wife's attorney, removed appellant, on the grounds that the administration of the estate had been fraudulent and wasteful, that the lease to C. had been imprudent and looked fraudulent, that in the receipt of bonuses by her husband there had been fraud, for which she was liable, and there had been other irregular transactions.—The Queen's Bench held that it was competent for the appellant under the will to appoint her husband her general attorney and agent; that the trial judge not having admitted the husband's evidence, under the circumstances it would not be the duty of the court, even if it had the power, to send back the record to allow him to be examined; that removal of an executrix, daughter of the testator, herself a legatee, ought not to be ordered on evidence of small payments, which might have been avoided; that payment of a commission to her husband for appreciable services, such as collections, would not be ground for removing the executrix selected by the testator; but affirmed the judgment on account of the transaction with C. and the taking of bonuses on several occasions without accounting for them.—On appeal, *Held*, affirming the judgment appealed from (Q. R. 2 Q. B. 413), that the transaction with C. was sufficient cause for removal and that the evidence of the husband on behalf of his wife had been properly rejected. *Ross v. Ross*, Cass. Dig. (2 ed.) 306.

See also 5 Legal News 197; 7 Legal News 65; 16 Legal News 92; the judgment of the court below being varied.

55. *Donation mortis causa—Future succession—Illegal consideration—Ratification by will—Power of executor—Seizin.*

See DONATION, 3.

6. REVOCATION AND REVIVAL.

56. *Codicil—Intention to revive—Reference to date—Removal of executor—Statute of Mortmain—Will executed under mistake—Ontario Wills Act, R. S. O. (1887) c. 109—9 Geo. II., c. 36 (Imp.)*—A will which has been revoked cannot, since the passing of the Ontario Wills Act (R. S. O. [1887] c. 109), be revived by a codicil unless the intention to revive it appears on the face of the codicil either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other

intention, or by other expressions conveying to the mind of the court, with reasonable certainty, the existence of the intention in question.—A reference in the codicil to the date of the revoked will, and the removal of an executor named therein and substitution of another in his place will not revive it. *Held*, per King, J., dissenting, that a codicil referring to the revoked will by date and removing an executor named therein is sufficient indication of an intention to revive such will, more especially when the several instruments are executed under circumstances shewing such intention. *Held*, per Gwynne and Sedgewick, JJ., that the Imperial Statute, 9 Geo. II., c. 36 (the Mortmain Act), is in force in the Province of Ontario, the courts of that province having so held (*Doe d. Anderson v. Todd*, 2 U. C. Q. B. 82; *Corporation of Whitby v. Liscombe*, 23 Gr. 1), and the legislature having recognized it as in force by excluding its operation from acts authorizing corporations to hold lands. *Held*, per Gwynne, J., that a will is not invalid because it was executed in pursuance of a solicitor's opinion on a matter of law which proved to be unsound. [The appeal from the judgment of the court below (20 Ont. App. R. 536, *sub nom. Purcell v. Bergin*) was dismissed and the cross-appeal was allowed with costs.] *Macdonell v. Purcell*; *Cleary v. Purcell*, xxiii., 101.

7. OTHER CASES.

57. *Estate in fee contingent—Executory devise over—Conditional estate—Dying without issue—Revocation—Ejectment—Statute of Limitations—Acceptance of deed by person in possession—Estoppel—Interruption of statute—Question not raised at trial.*—In 1830 J. G. took possession of east half of lot 13 in the 1st concession of East Hawkesbury. He resided on the west half of the lot with his sons, and occasionally assisted in working the whole lot, until his death, which occurred in 1857. In 1847-48, while his son Adam was working the east half and in possession, J. G. devised it to him by will, and the land was known as "Our Adam's." In 1857 J. G. made a second will, in which he devised it to his son John, and in case John should die without leaving any lawful issue or children of such issue surviving him, then in such case to his son Thomas, his heirs and assigns, to have and to hold the same at the death of the said John Gray. After the father's death Adam remained in possession, and in 1862 he accepted a conveyance with full covenants for title from John. In 1868, Adam conveyed to A. McC., one of the respondents, under whom R., the other respondent, claimed title. In 1874 John died without leaving lawful issue, and in 1875, Thomas (appellant) brought ejectment against respondents. The trial judge found title by length of possession in J. G. and gave a verdict for plaintiff.—In the Common Pleas the verdict was set aside and judgment entered for defendants (1 Ont. App. R. 116), and this order was affirmed. Neither at the trial nor in term was any question raised as to the effect of John's deed to Adam. The Supreme Court in reversing the judgment of the Court of Appeal for Ontario (1 Ont. App. R. 112): *Held*, that J. G., the father, at the time of his death had acquired a title to the lot by length of possession. That, under the will, John took an estate in fee, with an executory devise over to Thomas, in the event

hat happened of John dying without leaving awful issue.—That Adam, having recognized, in 1862, John's interest in the land by purchasing from him, by deed of bargain and sale, a limited and contingent estate, its effect was to stop the running of the statute, and the respondents could not set up Adam's possession under John to defeat the contingent estate.—That the Court of Appeal could not refuse to entertain the question as to the effect of John's deed, although not raised at the trial nor in term. *Gray v. Richford*, ii., 431.

58. *Debts of succession — Hypothecated lands — Liability of universal legatee—Special legatees—Art. 889 C. C.*—A testator in his will provided that all his just debts, funeral and testamentary expenses be paid by his executors, as soon as possible after his death. By another clause he left to H. in usufruct, and to his children in property, certain real estate which had been hypothecated for a debt of \$3,000. In a suit to recover the \$3,000 and interest, *Held*, reversing the judgment appealed from (26 L. C. Jur. 79), Strong, J., dissenting, that the direction by the testator to pay all his debts included the debt of \$3,000 secured by the hypothec. *Held*, also, that when a testator does not expressly direct a particular legatee to discharge a hypothec on an immovable devised to him, art. 889 C. C., does not declare such particular legatee liable for the payment of the hypothecary debt without recourse against the heir or universal legatee. *Harrington v. Corse*, ix., 412.

59. *Substitution — Devise by institute — Transfer of interest—Sale of rights — Reversion.*—In 1871 C. Z. D., institute under a will of J. D., died without issue, and by his will made defendant his universal legatee. Plaintiff claimed a share in the estate of J. D. under assignment by defendant to him in 1862 of all right, title and interest in the estate. *Held*, that plaintiff did not acquire by the deed of 1862 defendant's title or interest in any portion of C. Z. D.'s share under the will of 1871. *Held*, further, that under the will of J. D., C. Z. D.'s share reverted either to the surviving institutes or to the substitutes, and that all defendant took under the will of C. Z. D. was accrued interest on capital of the share at the time of his death. *Dorion v. Dorion*, xx., 430.

See ACCOUNT, 4.

60. *Construction — Division of estate — Right to postpone.*—T. F. F. who, in partnership with his brother J. F., carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision:—"But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself, in co-partnership under the name and firm of Fogarty & Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years, computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the

death of either of them, then the whole to go to the survivor." T. F. F. died on the 29th April, 1889. On the 30th April, 1889, a statement of the affairs of the firm was made up by the book-keeper, and J. W. and M. W. F., having agreed upon such statement, the balance shewn was equally divided between the parties, viz., \$24,146.34 being carried to the credit of M. W. F., in trust, and \$24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memo. dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them. On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to \$24,146.34, with interest, from the date of the division and distribution, viz., 30th April, 1889. J. F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature. *Held*, affirming the judgment appealed from, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement shewing the amount due on the 30th April, 1889. *Fogarty v. Fogarty*, xxii., 103.

61. *Vendor and purchaser—Sale of lands—Waiver of objections—Lapse of time—Construction of will—Executory devise over—Defeasible title—Rescission of contract.*—An agreement for the sale and purchase of land contained the provision that the vendee should examine the title at his own expense and have ten days from the date of the agreement for that purpose and should be "deemed to have waived all objections to title not raised within that time." Upon the investigation of the title by the purchaser it appeared that the vendors derived title through one P., a purchaser from one B. S., a devisee under a will by which the land in question was devised by the testatrix to her daughter, the said B. S., and certain other land to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue. At the time of the agreement B. S. was alive and had children. An objection was taken to the title but not within the ten days from the date of the agreement.—The purchasers brought a suit for specific performance, or rescission of the contract. *Held*, reversing the judgment appealed from (21 Ont. App. R. 183), that although B. S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement. *Armstrong v. Nason; Armstrong v. Wright; Armstrong v. McClelland*, xxv., 263.

62. *Sheriff's deed — Evidence — Proof of heirship — Rejection of evidence — New trial — Champerty — Maintenance.*—A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid. *Held*, affirming

such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father had died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust, and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed. Judgment appealed from (23 Ont. App. R. 785) affirmed. *May v. Logie*, xxvii., 443.

63. *Nomination of executor—Irregular administration — Cause of removal—Arts. 282, 285, 917 C. C.*—Art. 282 C. C. does not apply to executors chosen by the testator, and in an action for the removal of one of several executors, the existence of a law suit between such executor and the estate he represents, and the evidence of irregularities in his administration, but not exhibiting any incapacity or dishonesty, are not sufficient cause for his removal. Strong, J., dissenting. *Mitchell v. Mitchell*, xvi., 722.

64. *Right of action by substitute sale of land grévée—Conversion of freehold—Restoration of property as bequeathed—Revendication — Damages—Prescription—Art. 2268 C. C.—Bad faith—Evidence.*

See No. 18, ante, and SUBSTITUTION 4.

65. *Executors and trustee — Breach of trust — Dealing with assets as executor or trustee — Presumption — Breach of trust—Notice — Inquiry.*

See TRUSTS, 12.

66. *Testamentary succession—Balance due by tutor — Executors — Account, action for —Action for provisional possession—Parties to action.*

See EXECUTORS AND ADMINISTRATORS, 8.

67. *Evidence — Nullified instruments — Judicial admission—Forged will.*

See EVIDENCE, 49.

68. *Succession duties — Exempted property —Provincial bonds—Sale under will—Taxation of proceeds of sale.*

See DUTIES.

AND see TRUSTS, 6, 9, 14, 15.

WINDING-UP ACT.

1. *Construction of statute—Conflict of laws —Foreign corporation — Winding-up — 45 Vict. c. 23 (D.)—28 & 29 Vict. c. 63 (Imp.)*—The Steel Co. of Canada, incorporated in England under the Imperial Joint Stock Companies Acts, 1862-1867, carrying on business in Nova Scotia, and having its principal place of business at Londonderry, N. S., was, on the application of the respondents and by

consent, ordered to be wound up under 45 Vict. c. 23 (D.). The appellants, creditors of the company, objected to the winding-up order on the sole ground that the Act did not apply to foreign corporations. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, Fournier, J., dissenting, that 45 Vict. c. 23 (D.) should not be construed as intended to apply to foreign corporations doing business in Canada. *Merchants Bank of Halifax v. Gillespie*, x., 312.

2. *Objection to order — Notice to creditors —45 Vict. c. 23, s. 24.*—It is a substantial objection to a winding-up order appointing a liquidator to the estate of an insolvent company under 45 Vict. c. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by s. 24 of said Act, and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew.—*Per Gwynne, J.*, dissenting, that such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this court. Judgment appealed from (13 Ont. App. R. 268) reversed. *Shoobred v. Union Fire Ins. Co.*, xiv., 624.

3. *Liquidation — Insolvent bank—45 Vict. c. 23—47 Vict. c. 39.*—Sections 2 & 3 of the Winding-up Act (47 Vict. c. 39, ss. 2, 3) do not apply to banks, but an insolvent bank whether in process of liquidation or not at the time it is sought to bring it under the Winding-up Act, must be wound up with the preliminary proceedings provided for by 45 Vict. c. 23, ss. 99-120, as amended by 47 Vict. c. 39, s. 2. Judgment appealed from (6 Russ. & Geld. 531) reversed. Strong and Gwynne, JJ., dissenting. *Mott v. Bank of Nova Scotia*, xiv., 650.

4. *Insolvent bank—Double liability — The Bank Act—Calls—Contributory — Set-off—R. S. C. cc. 120, 129.*—A contributory of an insolvent bank, who is also a creditor, cannot set-off the debt due to him by the bank against calls made in the course of winding-up proceedings in respect of the double liability imposed by the Bank Act. *Maritime Bank v. Troop*, xvi., 456.

5. *Compulsory liquidation—R. S. C. c. 129 —Provincial company — Procedure — Reference to master.*—A company incorporated by the Legislature of Ontario may be put into compulsory liquidation and wound up under the Dominion Winding-up Act, R. S. C. c. 129.—In assigning to provincial courts or judges certain functions under the Winding-up Act, Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master.—Judgment appealed from (16 Ont. App. R. 161) affirmed. *Shoobred v. Clarke; In re Union Fire Ins. Co.*, xvii., 265.

6. *R. S. C. c. 129, s. 3—Constitutional law —Foreign corporations—Liquidation — Ancillary proceedings.*—Section 3 of "The Winding-up Act," Revised Statutes of Canada c. 129, which provides that the Act applies to incorporated trading companies doing business

in Canada whosoever incorporated is *intra vires* of the Parliament of Canada.—A winding-up order by a Canadian court in the matter of a Scottish company incorporated under the Imperial Winding-up Acts doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor with the consent of the liquidator previously appointed by the court in Scotland as ancillary to the winding-up proceedings there, is a valid order under the Winding-up Act of the Dominion. *Merchants Bank of Halifax v. Gillespie* (10 Can. S. C. R. 312) distinguished. Judgment appealed from (16 Q. L. R. 79) affirmed. *Allen v. Hanson; In re Scottish Canadian Asbestos Co.*, xviii., 667.

7. R. S. C. c. 129—*Insolvent bank—Appointment of liquidators—Right to appoint another bank—Discretion of judge.*—The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to be appointed liquidators and the judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank. *Held*, affirming the judgment appealed from (22 N. S. Rep. 97) that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the judge in exercising his judgment as to the appointment such discretion was wisely exercised in this case. *Forsthe v. Bank of Nova Scotia, In re Bank of Liverpool*, xviii., 707.

8. *Possession of books by manager—Refusal to deliver up—Evidence—Findings of fact.*—G. was manager for the Ottawa district of a company whose headquarters were in Edinburgh, and head office for Canada, in Toronto. The company having gone into liquidation an order was obtained from the Court of Sessions in Edinburgh for the delivery of its books by the manager to the liquidator or to some person appointed by him. This order not having been obeyed an action was brought by the company to recover possession of the books from G. who set up the defence that he had already given them up, and also that the company had no *locus standi* to maintain the action. After proceedings in liquidation were commenced G. was dismissed as manager, whereupon he demanded an audit of the books which was commenced but never completed, and G. swore that after handing over the books to the auditors he had never had possession of them. He also swore that they had never been in his control, having been kept in a safe of which a clerk of the company and the new manager alone had the combination. Some time after the audit an agent of the liquidator went to Ottawa to get the books and saw G., who first agreed but afterwards refused to deliver them up, giving as the ground of his refusal that he was liable for rent of the office, and other debts of the company, and wished to retain what property of the company he had to protect himself. The agent, with the assistance of G.'s landlord, then obtained access to the office where he saw some books which he took to belong to the company, and a safe in which he believed there were others, but G.

coming in refused to allow him to remove them and ejected him from the office. On this evidence the trial judge made an order against G. directing him to deliver to the liquidator all the books and papers of the company in his possession or under his control. This decision was affirmed by the Divisional Court and the Court of Appeal for Ontario. *Held*, that the books having been shewn to have been in the possession of G. at the date of the visit of the liquidator's agent to Ottawa, and the defendant not having attempted to shew what became of them after that date, and his testimony that he did not know what had become of them having been discredited by the trial judge, there was no reason for interfering with the order appealed from. *Grant v. British Canadian Lumber Co.*, xviii., 708.

9. *Insolvent bank—Joint and several debtors—Distribution of assets—Privilege—R. S. C. c. 129, s. 62—Deposit with bank after suspension—Practice—Leave to appeal—Enlargement of time after hearing—Order nunc pro tunc.*—*Held*, per Ritchie, C.J., and Taschereau, J., affirming the judgment appealed from (M. L. R. 5 Q. B. 407), *Strong and Fournier, JJ. contra*, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.—*Per Gwynne and Patterson, JJ.*, that a person who has realized a portion of his debt upon the insolvent estate of his co-debtors cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his other co-debtor. *Held*, also, affirming the judgment appealed from, that a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.—No leave to appeal having been obtained under s. 76 of the "Winding-up Act," after the case had been argued, appellant, with the consent of the respondent, obtained from a judge of the court below an order to extend the time for bringing the appeal, and subsequently, before the time expired, obtained, *nunc pro tunc*, an order from the Registrar of the Supreme Court giving leave to appeal in accordance with s. 76, and the order declared that all the proceedings had upon the appeal should be considered as taken subsequently to the order granting leave to appeal. *Ontario Bank v. Chaplin; In re Exchange Bank of Canada*, xx., 152.

10. *Insolvent bank—Bank Act, R. S. C. c. 120, s. 79—Lien on assets—Priority of note-holders—53 Vict. c. 31, s. 53.*—Under s. 79 of the Bank Act, R. S. C. c. 120, the note-holders have the first lien on the assets of an insolvent bank in priority to the Crown. *Strong and Taschereau, JJ.*, dissenting. Judgment appealed from (27 N. B. Rep. 379) varied. *Liquidators Maritime Bank v. Receiver-General of New Brunswick*, xx., 695.

11. *Contributories—Proceedings of foreign tribunal—Imperial Companies Act, 1862—Order making calls against past member—*

Right of action thereon — Declaration—Demurrer.—Defendant had been holder of 100 shares in Barned's Banking Co, but had ceased to be a member before commencement of winding-up. An order for winding-up of said company was made by the Court of Chancery in England, and defendant having been placed upon the list of contributories, pursuant to the provisions of the Winding-up Act, the said court, by an order made 2nd January, 1870, made a call on defendant in respect of his shares in the company, and directed him to pay it to one of the official liquidators. — Subsequently plaintiff commenced this action in Ontario, and the declaration being demurred to by defendant, in 1875, the demurrer was disallowed. (36 U. C. Q. B. 256). Afterwards plaintiff amended the declaration as suggested in the judgment then given, by charging defendant distinctly as a past member, and, the amended declaration being again demurred to, on 4th October, 1877, the demurrer was allowed, Wilson, J., dissenting. (40 U. C. Q. B. 435.)—From this decision the company appealed and on 23rd December, 1878, judgment was delivered allowing the appeal. (3 Ont. App. R. 371.)—Defendant appealed to the Supreme Court of Canada, which decided that the liability of defendant to pay the calls was a debt which originated at the time he became a holder of the shares, and that the plaintiff was entitled to sue him here for the recovery thereof.—The declaration set out ss. 6, 7, 38, and s.-ss. 1, 2, 3 & 4 of s. 38; ss. 74, 75, 79, s.-ss. 4 & 5; s. 80 s.-s. 4; ss. 81, 83, 93, 98, 102 & 106 of the Companies' Act of 1862 (25 & 26 Vict. c. 89 Imp.), that plaintiff was a company duly incorporated and registered in England under said Act, and limited by shares, and that defendant was holder of 100 shares in the capital stock of the company, and was, in respect of said shares, a member of the company, and had not ceased to be a member for the period of a year or upwards prior to the commencement of the winding-up therein-after mentioned, and was liable, in respect of the said shares, to contribute as a past member to its assets in the event of its being wound up and the said company became unable to pay its debts, and thereupon such proceedings were had in Chancery in England, that it was proved to the satisfaction of said court that the company was unable to pay its debts, and the court was of opinion that it was just and equitable that the company should be wound up, and an order was duly made by said court for winding up the company by the said court, and all things happened and were done necessary to make the said order valid under the said Act, and by other orders of the said court H. W. Banner and J. Young were duly appointed official liquidators of the company, and by another order made as soon as might be after the making of the said order for winding up the company, the said court duly settled the list of contributories to the assets of the company, and thereby declared defendant to be, and settled him on the list as a contributory in respect of the 100 shares as a member or contributory in his own right, and as included in the list of contributories, on 6th December, 1867, and afterwards by an order on 2nd January, 1870, the said court made a call upon the defendant of £33 per share in respect of 50 of said shares for which defendant had been so settled in the list of contributories, and a call of £39 10s. per share in respect of the other 50 shares, and ordered that defendant should, on or before 9th Sep-

tember, 1870, or within 24 days after service of said order, pay said sum of £3,625 to said H. W. Banner, one of said official liquidators, such sum being by the said order declared to be the amount due from defendant in respect of said calls. And the said order was, before 9th September, duly served upon defendant, and the said Act, during all the time aforesaid, was and is still in force, and was and is the law of England; and all things happened and were done, and all times elapsed necessary to render defendant liable to pay said money, and to entitle plaintiff to maintain this action for non-payment thereof, and the said sum is equal to \$17,642, currency of Canada, yet defendant had not paid same, and plaintiff claimed \$30,000.—To this declaration defendant demurred on the grounds:—That it did not shew any facts or circumstances which, under the laws in force in Ontario, give the plaintiff any right of action against defendant; That it did not shew that under the alleged act, or under the law of England, plaintiff had any right of action against defendant: That it appeared by said declaration, that said company was being wound up by the Court of Chancery in England, and under the authority of the alleged Act in the declaration mentioned, and plaintiff was not shewn to have power under said Act to sue or bring action for any call made by said court: That it was not shewn that any calls were made on the alleged shares before said order for winding up was made, or that defendant was holder of said shares, or any of them, at the time of making any such calls or that he ever became indebted to plaintiff upon or in respect of said shares, or any of them: That it appeared by said declaration that defendant had ceased to be holder of any of said shares before the commencement of winding up of the company, and that defendant was at most only a past member: That under the law of Ontario defendant would not be liable for any call made after he ceased to be a holder of said shares, and the declaration did not shew any provision of English law that made him liable to plaintiff for any such call: That it appeared by the English law as set out in said declaration that a past member like defendant was not subject to the same liability as a present member, and said declaration did not shew that any debts or liabilities of the company existed to or in respect of which defendant was liable to contribute or in respect of which he could be placed on the list of contributories, or that he was liable to contribute anything: That as plaintiff was now suing on a law not in force in Ontario, and claiming a liability which did not exist under the laws of Ontario, it was bound to shew that the liability claimed clearly existed under the English law, which it had not done: That it appeared by said declaration that after an order had been made for winding up a company all power in regard to collecting or getting in the assets of said company was invested in the Court of Chancery, which was a specially appointed tribunal for that purpose, and had special and extraordinary powers which could not be enforced in Ontario: That it appeared that any proceedings had were not final, and that said court had power to rectify the list of contributories and could at any time remove defendant's name from such list: Also, that said court had power to restore to defendant all or any part of the moneys which he might pay under said order making said calls, and that the English law as presented by said declaration shewed that

the proceedings had were not final in their character like a judgment, and the rights of plaintiff, if any, could be enforced only by said special tribunal, and not by suit at law in Ontario. *Held, per Ritchie, C.J., and Fournier and Henry, JJ., (Strong and Gwynne, JJ., dissenting), that assuming an action at law will lie for a call, such as was claimed to be due in this case, as plaintiff could not avail itself of s. 109 of "The Companies Act, 1862," to declare generally, nor of s. 106 of said Act, making the order conclusive evidence that the money ordered to be paid was due, for the reason that neither of those sections applies to actions brought in this country; and as defendant's liability, if any, was not on the order as a final judgment, but was a purely statutory liability of a limited character, it was necessary to allege in the declaration everything required in the statute to fix the limited liability of a past member on defendant, and which allegation, if traversed, plaintiff would be bound to prove, and as the declaration on its face contained no such allegations as shew any such liability of defendant as a past member, it was therefore bad.* — *Per Henry and Taschereau, JJ.* That the declaration did not shew any right under the Act in the plaintiff to sue in its own name. — Appeal from the judgment in the court below (3 Ont. App. R. 371) allowed with costs. *Reynolds v. Barned's Banking Co.*, Cass. Dig. (2 ed.) 170.

12. *Contributory—Shares paid for by transfer of property—Adequacy of consideration—Promoter selling property to company—Trust—Fiduciary relation.*—Shares in a joint stock company may be paid for in money or money's worth and if paid for by a transfer of property they must be treated as fully paid up: in proceedings under the Winding-up Act the master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories. — If a promotor purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promotor, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of property, such shares may, in winding-up proceedings, be treated, if held by the promotor, as unpaid shares for which the promotor may be made a contributory. *In re Hess Mfg. Co.; Edgar v. Sloan*, xxiii., 644.

[*Cf. Morris v. Union Bank* (31 Can. S. C. R. 594), No. 24, *infra*.]

13. *Sale by liquidator — Purchase by director of insolvent company—Fiduciary relationship—R. S. C. c. 129, s. 34.*—Upon the appointment of a liquidator for a company being wound up under R. S. C. c. 129 (The Winding-up Act), if the powers of the directors are not continued as provided by s. 34 of the Act their fiduciary relations to the company or its shareholders are at an end and a sale to them by the liquidator of a company is valid. *Chatham National Bank v. McKee*, xxiv., 348.

14. *Moneys paid out of court — Order made by inadvertence—Jurisdiction to compel re-payment—R. S. C. c. 129, ss. 40, 41, 94—Locus standi of Receiver-General—55 & 56*

Vict. c. 28, s. 2—Construction of statute.—The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money re-paid in order to be disposed of under the provisions of the Winding-up Act. *Held*, affirming the decision of the Court of Appeal for Ontario (24 Ont. App. R. 470), that the Receiver-General was entitled to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had not expired. *Held*, also, that even if he was not so entitled to intervene, the provincial courts had jurisdiction to compel re-payment into court of the moneys improperly paid out. *Hogaboom v. Receiver-General of Canada; In re Central Bank of Canada*, xxviii., 192.

15. *Joint stock company—Irregular organization—Subscription for shares—"The Companies Act"—"The Winding-up Act"—Contributories.*—After the issue of the order for the winding up of a joint stock company incorporated under "The Companies Act," a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company; such grounds can be taken only upon direct proceedings at the instance of the Attorney-General. Judgment appealed from (Q. R. 8 Q. B. 128) reversed. *Common v. McArthur*, xxix., 239.

See COMPANY LAW, 43.

16. *B. C. Companies Amendment Act, 1898—Winding-up order—B. C. Companies Act, 1890—60 Vict. c. 44, s. 153 (B. C.)—Dominion Winding-up Act, 1889.*—The bank appealed to the full court in British Columbia from a winding-up order in respect of the British Columbia Iron Works Co. on the ground that the Dominion Winding-up Acts, under which the order had been made, did not apply to the company which was incorporated under the provincial "Companies Act, 1890." The judgment appealed from decided that the Dominion Acts applied and were authority for making the order. The judgment was reversed by the Supreme Court of Canada and the order set aside and petition dismissed with costs. *Taschereau, J.*, dissenting and adopting the reasoning of *McColl, C.J.*, in the court below. *Bank of British North America v. Warren*, 12th November, 1900.

17. *Insolvent bank—Priority of claim by the Crown—Acceptance of dividends—Waiver—45 Vict. c. 23 (D.)*—The Bank of P. E. Island became insolvent, and a winding-up order was made. The bank was indebted to Her Majesty in \$93,494.20, public moneys of Canada on deposit to the credit of the Receiver-General. The first claim filed at the request of the respondent (liquidator of the bank), did not specially notify the liquidator that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15% each were afterwards paid, and on the 28th February, 1884, there was a balance due of \$65,426.95, and respondent was notified that Her Majesty intended to insist upon the prerogative right to be paid in full. At this

time there was on hand a sum sufficient to pay the claim in full. The Supreme Court (P. E. I.) held that Her Majesty the Queen, represented by the Minister of Finance, and the Receiver-General, had no prerogative or other right to receive the whole amount, but only a right to receive dividends as an ordinary creditor of the bank. *Held*, reversing the judgment appealed from, 1. That the Crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vict. c. 23. 2. That the Crown had not waived its right to be preferred in this case by the form in which the claim was made, and by the acceptance of two dividends. *The Queen v. Bank of Nova Scotia*, xi, 1.

18. *Construction of 45 Vict. c. 23, ss. 75, 76—Contributories—Set-off—Retrospective effect of statute.*—In an action by the bank on a promissory note, defendant pleaded set-off of a draft made by the bank and indorsed to him. Replication, that the defendant was a contributory on the stock book of the bank, and knew that the bank was insolvent when the draft was purchased. Demurrer, that replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory. — *Held*, reversing the Supreme Court of P. E. I., that the replication was bad in law. — Appellant gave his note for \$6,000 which was indorsed to the Bank of P. E. I. The Union Bank held a draft, made by the Bank of P. E. I. for nearly the same amount, which appellant purchased for about \$200 less than its face value on 5th May, 1882. Being sued on the note he set off the amount of the draft and paid the difference. He admitted purchase for the purpose of set-off to the claim on his note, which he had made non-negotiable and also that, if he could succeed in his set-off, and another party could succeed in a similar transaction, the Union Bank would get in full their claim against the Bank of P. E. I., which had become insolvent. The trial judge charged that if the draft was indorsed to defendant to enable him to use it as a set-off, he could not do so, because he was a contributory within the meaning of s. 76 of the Winding-up Act, which comes into force 17th May, 1882, and was retrospective as regards indorsements before it was passed, but within 30 days before the commencement of winding-up proceedings. The jury, under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb. — *Held*, reversing the judgment appealed from, that the appellant having purchased the draft for value and in good faith prior to the commencement of winding-up proceedings, the Winding-up Act was not applicable, and, therefore, the appellant was entitled to the benefit of his set-off. — That the Winding-up Act was not retrospective as to this indorsement. — *Held*, also, that ss. 75 and 76 in respect to claims acquired by contributories within 30 days of winding-up proceedings for use as a set-off, only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory. *Ings v. Bank of P. E. I.*, xi, 265.

19. *Contributories—Subscription for stock—Payment by services.*—An Act of incorporation of a joint stock company provided "that no subscription for stock should be legal or valid until ten per cent. should have been actually and *bonâ fide* paid thereon." C. gave to the manager of the company a power of attorney to subscribe for him ten shares in the company, containing the words: "and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not, in fact, enclosed, but the amount was placed to the credit of C. in the books of the company, and a certificate of stock issued to him which he held for several years. The company having failed, proceedings were taken to have C. placed on the list of contributories. The sum to his credit was for professional services to the company as solicitor, and there had been an arrangement that his stock was to be paid for by such services. *Held*, affirming the judgment appealed from (12 Ont. App. R. 486), Henry, J. dissenting, that C. was rightly placed on the list of contributories. *Caston's Case*, xii, 644.

20. *Insolvent bank—Lien of note-holders—Prerogative—Insolvent bank—Assets—R. S. C. cc. 120, 124—Deposit by insurance company—Priority of note-holders.*—The prerogatives of the Crown exist in British colonies to the same extent as in the United Kingdom. *The Queen v. Bank of Nova Scotia* (11 Can. S. C. R. 1) followed. — The Queen is the head of the constitutional Government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government. — The Crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority of all other creditors is not interfered with by the provisions of the Bank Act (R. S. C. c. 120, s. 79), giving note-holders a first lien on such assets, the Crown not being named in such enactment. Gwynne and Patterson, JJ., *contra*. — *Held*, per Gwynne, J., that under legislation of the old Province of Canada, left unrepealed by the B. N. A. Act, no such prerogative could be claimed in the Provinces of Ontario and Quebec; the Court would not, therefore, be justified in holding that such a right attached, under the B. N. A. Act, in one Province of Canada which does not exist in them all. — An insurance company, in order to deposit \$50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R. S. C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the minister. The money in the bank drew interest which, by arrangement, was received by the company. The Bank having failed the Government claimed payment in full of this money as money deposited by the Crown. *Held*, reversing the judgment appealed from (27 N. B. Rep. 351), Strong, J., dissenting, that it was not the money of the Crown but held by the Finance Minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors. *Maritime Bank v. The Queen*, xvii, 657.

21. *Insolvent bank—Legislative jurisdiction—Upper Canada Bank Trust—Crown lands.*—In 1866 the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 Vict. c. 17, the

Dominion Parliament incorporated said trustees, giving them authority to carry on the business of the bank so far as was necessary for winding up the same. By 33 Vict. c. 40 all the property of the bank vested in the trustees was transferred to the Dominion Government which became seized of all the powers of the trustees.—*Held*, affirming the judgment appealed from (*sub nom. The Queen v. County of Wellington*, 17 Ont. App. R. 421) that these Acts were *intra vires* of the Dominion Parliament.—*Per* Ritchie, C.J., that the legislative authority of Parliament over “banking and the incorporation of banks” and over “bankruptcy and insolvency” empowered it to pass said Acts.—*Per* Strong, Taschereau, and Patterson, J.J., the authority to pass said Acts cannot be referred to the legislative jurisdiction of Parliament over “banking and incorporation of banks” but to that over “bankruptcy and insolvency” only. *Quirt v. The Queen*, xix., 510.

See CONSTITUTIONAL LAW, 21.

22. *Insolvent bank — Increased capital — Double liability — Contributories*—45 Vict. c. 23 (D.).—The Bank of P. E. I. was incorporated by 18 Vict. c. 10, capital stock fixed at £30,000 P. E. I. Cy., (\$97,333.33) in shares of £10 (\$32.44). Power to increase this capital by the issue of additional shares, of same value, was given by ss. 39, 40, 41 & 42, which prescribed the manner of effecting this increase, and the sale of the new stock by auction, s. 43 provided that “the said additional shares shall be subject to all the rules, regulations and provisions to which the original stock is subject, or may hereafter be subject, by any law of this island.” Section 19 of the Act was repealed, and re-enacted by s. 3 of 19 Vict. c. 11, as follows:—“The holders of the stock of the said bank shall be chargeable in their private and individual capacity, and shall be holden for the payment and redemption of all bills which may have been issued by the said corporation, and also for the payment of all debts at any time due from the said corporation, in proportion to the stock they respectively hold, provided, however, that in no case shall any one stockholder be liable to pay a sum exceeding twice the amount of stock actually then held by him, over and above, and in addition to the amount of stock actually by him paid into the bank, provided nevertheless that nothing in this Act, or in the said hereinbefore recited Act contained, shall be construed to exempt the joint stock of the said corporation from being also liable for, and chargeable with, the debts and engagements of the same.”—No increase to capital was made. In 1872, the bank having a balance of net profits on hand of \$27,286.41, pursuant to resolution at the general annual meeting of shareholders, on application to the legislature, 35 & 36 Vict. c. 23 was passed, enacting:—1. “It shall and may be lawful for the board of directors of the Bank of P. E. I. at any time, and from time to time, to enlarge the capital stock of the said bank by applying to each individual share of the capital a portion of the rest or surplus profits, lying at the time at the credit of the said bank.” 2. “Such mode of enlarging the capital stock of the said bank shall not prevent the enlargement of the same by the mode pointed out in the 39th, 40th, 41st, 42nd and 43rd sections of the Act of incorporation.” In 1872, the sum of \$10,666.67 was taken out of the profits and added to the capital stock, raising the value of shares by \$3.55 or to a total par value of

\$36. In 1875, \$12,000 profits was carried to credit of capital stock making the capital \$120,000, and the par value of shares \$40.—On 19th June, 1882, an order was made for winding up the bank, which had become insolvent within the meaning of the Act, 45 Vict. c. 23 (D.) Liquidators were appointed. Subsequently an order *nisi* was granted by Peters, J., calling upon all shareholders to shew cause why they should not pay calls to the amount of \$80 per share, which he made absolute after hearing counsel for contributories. This order was confirmed by the full court, two judges thinking themselves disqualified from hearing the appeal other than in a merely formal manner. — On appeal, *Held*, reversing this decision, Gwynne, J., dissenting, that the shareholders were not liable to pay more than \$64.89 per share, or twice the amount of their original stock. The Act of 1872, which authorized the alleged increase, had no provision creating any double liability, as was imposed on original stock, and new stock created under 38 Vict. c. 10, and the fair inference from the omission of any express enactment with reference to the increased stock was that the legislature did not intend to clothe it with double liability. *Morris v. Liquidators Bank of P. E. I.*, Cass. Dig. (2 ed.) 68.

23. *Appeal in winding-up proceedings — Amount in controversy — Joint or separate liability — Jurisdiction — Contributories*.—A decision of the Court of Appeal for Ontario reversed the order of the Master in Ordinary settling the respondents on the list of contributories under the Winding-up Act. Appeal lies to the Supreme Court of Canada, in proceedings under the Winding-up Act, only where the amount involved is \$2,000 or over. In this case there were six persons placed on the list by the Master; one for \$1,000, and the others for \$900 each, and all were released from liability by the decision of the Court of Appeal from which this appeal was brought. The Supreme Court held that although the aggregate amount for which the respondents were sought to be made liable exceeded \$2000, there was no jurisdiction under the Act to entertain the appeal, because the position was the same as if proceedings had been taken separately against each of the contributories. The appeal was quashed with costs. *Stephens v. Gerth; In re Ontario Express & Transportation Co.*, xxiv., 716.

24. *Joint stock company — Payment for shares — Equivalent for cash — Written agreement — Contributories*.—M. and C. each agreed to take shares in a joint stock company paying a portion of the price in cash and receiving receipts for the full amount the balance to be paid for in future services. The company afterwards failed. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396) that, as there was no agreement in writing for the payment of the difference by money's worth instead of cash under s. 27 of the Companies Act, M. & C. were liable to pay the balance of the price of the shares to the liquidator of the company. *Morris v. Union Bank of Canada; Union Bank of Canada v. Morris; Code v. Union Bank of Canada*, xxxi., 594.

See No. 12, *ante*

25. *Building society in liquidation — Administrators and trustees — Sales to — Nullity of transfer — Art. 1484 C. C. — Practice*.

See BUILDING SOCIETY, 3.

WINDOWS.

Right of air, light and view — Boundary line—Evidence—Trespass—Waiver.

See EASEMENT, 2—TITLE TO LAND, 41.

WITHDRAWAL.

See RETRAXIT.

WITNESS.

1. *Refusal to answer questions—Incrimination — Misdirection.*—When a plaintiff refused to answer questions or to state whether or not he apprehended serious consequences if he answered and the judge directed that there had not been sufficient proof made. *Held*, that the defendant was entitled to the oath of the plaintiff that he objected to answer for fear that, in doing so, his answers might tend to criminate him. Judgment appealed from (20 N. B. Rep. 40) reversed. *Power v. Ellis*, vi., 1.

2. *Expert opinions—Hearsay — Extra-judicial statement—Assessors' reports.*—Where there is a direct contradiction between equally credible witnesses, the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra-judicial statements and municipal reports. *Crawford v. City of Montreal*, xxx., 406.

3. *Agreement to charge lands — Statute of Frauds—Registry.*

See REGISTRY LAWS, 3.

4. *Husband and wife—Competency of witnesses—Criminal cases—Canada Evidence Act, 1893 — “Communications” — Privilege — Advice of legal counsel.*

See CRIMINAL LAW, 25.

AND *see EVIDENCE.*

WORDS AND TERMS.

“Additional remuneration.”

See STATUTES, 63.

“Against all casualties.”

See CARRIERS, 11.

“All necessary accommodation.”

See RAILWAYS, 89.

“Allow an appeal.”

See APPEAL, 369.

“At and from Quebec to Greenock”—
“Vessel to go out in tow.”

See INSURANCE, MARINE, 51.

“At and from a port.”

See INSURANCE, MARINE, 24.

“At or near.”

*See RAILWAYS, 152. **

“At owner's risk.”

See CARRIERS, 11.

“Baggage.”

See CARRIERS, 11.

“Benefit assessment.”

See DRAINAGE, 7.

“Bounded by the river.”

See RAILWAYS, 153.

“Buildings and erections” — “Improvements.”

See LESSOR AND LESSEE, 2.

“By practice” — “Manitoba public schools.”

See CONSTITUTIONAL LAW, 69.

“Communications.”

See CRIMINAL LAW, 25.

“Conserver le fonds.”

See WILL, 18.

“Court of last resort” — 52 Vict. c. 37
(L.)

See STATUTES, 62.

“Cost of repairs.”

See INSURANCE, MARINE, 18.

“Currency.”

See BILLS AND NOTES, 17.

“Damage” — R. S. C. c. 109, s. 27—51
Vict. c. 29 (D.)

See RAILWAYS, 69.

“Delivery.”

See STATUTES, 59.

“Disposition.”

See DEED, 22.

“Dying without issue.”

See WILL, 15, 16, 17.

“Employee” — Government Railway Act,
1881.

See CROWN, 64.

“Estate.”

See WILL, 30.

“Extra salary.”

See STATUTES, 63.

“Final closing certificate.”

See CONTRACT, 96.

“Fixtures.”

See STATUTES, 59.

“Fournier les revenus.”

See WILL, 18.

“Heir.”

See WILL, 20.

“Heirs of the body” — “Lawful heirs” —
“Valid remainder.”

See WILL, 19.

“Improvements” — “Buildings and erections.”

See LESSOR AND LESSEE, 2.

“Improvidence.”

See TITLE TO LAND, 130.

- "*Injuring liability.*"
See DRAINAGE, 7.
- "*Intent*"—*R. S. O. (1877) c. 118, s. 2.*
See FRAUDULENT CONVEYANCES, 1—INSOLVENCY, 7.
- "*Judgment.*"
See APPEAL, 171.
- "*Law of Canada.*"
See STATUTES, 24.
- "*Lawful heirs.*"
See WILL, 19.
- "*Legal holiday.*"
See ELECTION LAW, 103.
- "*Near*"—"At or near."
See RAILWAYS, 152.
- "*Nearest recurring anniversary.*"
See STATUTES, 146.
- "*Never indebted.*"
See ACTION, 21.
- "*Officers and servants of the Crown.*"
See MILITIA, 2.
- "*On advances.*"
See INSURANCE, MARINE, 20.
- "*On view.*"
See FISHERIES, 1.
- "*Or which has that effect*"—"Preference."
See FRAUDULENT CONVEYANCES, 1.
- "*Ores*"—"Stone or ores."
See INSURANCE, MARINE, 23.
- "*Other licenses.*"
See CONSTITUTIONAL LAW, 54.
- "*Outlet liability.*"
See DRAINAGE, 7.
- "*Owner for the time.*"
See MARITIME LAW, 5.
- "*Owner of land.*"
See DRAINAGE, 6.
- "*Perils of the seas.*"
See INSURANCE, MARINE, 11.
- "*Personal chattels.*"
See STATUTES, 59.
- "*Poor*"—"Poor relatives."
See WILL, 47.
- "*Preference.*"
See INSOLVENCY, 7.
- "*Preference*"—"Or which has that effect"
—*R. S. O. (1887) c. 124, s. 2.*
See FRAUDULENT CONVEYANCES, 1.
- "*Privileges.*"
See STATUTES, 144.
- "*Property.*"
See WILL, 30.

- "*Public Protestant charities.*"
See WILL, 47.
- "*Public work.*"
See MILITIA, 2.
- "*Revert.*"
See WILL, 15, 16, 17.
- "*Stone or ores.*"
See INSURANCE, MARINE, 23.
- "*Suing on behalf of themselves and other creditors.*"
See STATUTES, 143.
- "*Title to lands.*"
See APPEAL, 38.
- "*To*"—"From" and "to."
See CONTRACT, 179—RAILWAYS, 152.
- "*Trader.*"
See INSOLVENCY, 4—PLEADING, 23.
- "*Transmit.*"
See CONTRACT, 7.
- "*Until.*"
See INSURANCE, FIRE, 42.
- "*Used on railway.*"
See RAILWAYS, 19.
- "*Valid remainder.*"
See WILL, 19.
- "*Vessel to go out in tow*"—"At and from Quebec to Greenock."
See INSURANCE, MARINE, 51.
- "*Void against creditors.*"
See STATUTES, 143.

WORKMEN.

1. *Compensation for Injuries Act—Dangerous machinery — Statutory duty — Cause of accident.*
See NEGLIGENCE, 19.
 2. *Negligence—Use of dangerous materials — Proximate cause of accident — Injuries to workmen — Employer's liability — Presumptions — Findings of jury sustained by court below.*
See NEGLIGENCE, 144.
- AND see EMPLOYER AND EMPLOYEE—MASTER AND SERVANT—and NEGLIGENCE.

YUKON EXECUTIVE GOVERNMENT.

1. *Franchise granted over Crown lands—Tolls.*
See CONSTITUTIONAL LAW, 78.
 2. *Administration and government—Mining lands—Special appellate tribunal—Gold Commissioner — Legislative jurisdiction of Governor-in-Council.*
See APPEAL, 294.
- AND see MINES AND MINERALS, 13, 14, 17.

APPENDIX A.

LIST OF CASES JUDICIALLY NOTICED AND REFERRED TO IN THIS DIGEST.

A.

Abrath v. North Eastern Railway Co. (11 Q. B. D. 79, 440; 11 App. Cas. 247), considered; MALICE; MALICIOUS PROSECUTION, 2—NEW TRIAL, 34—NONSUIT, 4.

Ætna Insurance Co. v. Brodie (5 Can. S. C. R. 1), followed; APPEALS TO SUPREME COURT, 212.

Algoma Central Railway Co. v. The King (7 Ex. C. R. 239; 32 Can. S. C. R. 277), referred to; CUSTOMS DUTIES, 5.

Allen v. Merchants Marine Insurance Co. (15 Can. S. C. R. 488), followed; INSURANCE, LIFE, 31—PLEADING, 37—WAIVER, 4.

Allen v. Pratt (13 App. Cas. 780), referred to as overruling *Joyce v. Hart* (1 Can. S. C. R. 321); APPEALS TO SUPREME COURT, 18, 24.

Anderson v. Todd (2 U. C. Q. B. 82), followed; STATUTE OF MORTMAIN, 2—WILL, 56.

Angus v. Dalton (6 App. Cas. 740), referred to; EASEMENT, 4.

Archer v. Severn (12 Ont. P. R. 472), followed; APPEALS TO SUPREME COURT, 6.

Archbald v. DeLisle (25 Can. S. C. R. 1), followed; WARRANTY, 3.

Archibald v. Hubley (18 Can. S. C. R. 116), distinguished; ASSIGNMENTS, 4—CHATTEL MORTGAGE, 13—followed; CHATTEL MORTGAGE, 5.

Armstrong v. Hemstreet (22 O. R. 336), overruled in court below, judgment being affirmed on appeal: FRAUDULENT PREFERENCE, 11—INSOLVENCY, 23.

Arpin v. The Queen (14 Can. S. C. R. 736), distinguished; APPEALS TO SUPREME COURT, 231.

Asbestos and Asbestic Co. v. Durand (30 Can. S. C. R. 285), discussed and approved; APPEALS TO SUPREME COURT, 239—EVIDENCE, 83—NEGLIGENCE, 144.

Asher v. Whitlock (L.R. 1 Q. B. 1), referred to; TITLE TO LAND, 57—WILL, 43.

Association St. Jean Baptiste v. Brault (30 Can. S. C. R. 598), followed; APPEALS TO SUPREME COURT, 343—CONSTITUTIONAL LAW, 31—referred to; CONSPIRACY, 1—CONTRACT, 165—TRADE COMBINATION.

Atlas Assurance Co. v. Brownell (29 Can. S. C. R. 537), followed; INSURANCE, FIRE, 42—PRINCIPAL AND AGENT, 29.

Attorney-General v. The Queen Insurance Co. (3 App. Cas. 1090), distinguished; CONSTITUTIONAL LAW, 56—LICENSES, 1.

Attorney-General v. Sheraton (28 N. S. Rep. 492), approved and followed; LEASE, 19—MINES AND MINERALS, 5—STATUTES, 146.

Attorney-General for British Columbia v. Attorney-General of Canada (14 App. Cas. 295), commented on and distinguished; *RES JUDICATA*, 5.

Attorney-General for Canada v. Attorney-General for Ontario ([1897] A. C. 199; 25 Can. S. C. R. 434), followed; *CONSTITUTIONAL LAW*, 8—*STATUTES*, 154—*TOLLS*, 10—applied; *CONSTITUTIONAL LAW*, 9—*INDIAN AFFAIRS*—*RES JUDICATA*, 18.

Attorney-General for Canada v. Attorney-General for Ontario (23 Can. S. C. R. 458), referred to, *CONSTITUTIONAL LAW*, 64.

B.

Baker v. DeLisle (25 Can. S. C. R. 1), followed; *WARRANTY*, 3.

Ball v. McCaffery (20 Can. S. C. R. 319), approved; *ESTOPPEL*, 7.

Ballagh v. Royal Mutual Fire Insurance Co. (5 Ont. App. R. 87), approved; *INSURANCE, FIRE*, 40.

Bank of Toronto v. Lambe (12 App. Cas. 575), followed; *CONSTITUTIONAL LAW*, 56—*LICENSES*, 1—distinguished; *CONSTITUTIONAL LAW*, 54.

Bank of Toronto v. Les Curé, &c., de la Sainte Vierge (12 Can. S. C. R. 25), referred to; *APPEALS TO SUPREME COURT*, 58.

Bank of Toronto v. Perkins (8 Can. S. C. R. 603), distinguished; *DEBTOR AND CREDITOR*, 49.

Banque Jacques-Cartier v. Banque d'Epargne de la Cité et du District de Montréal (13 App. Cas. 111), followed; *BILLS AND NOTES*, 19.

Barrett v. City of Winnipeg ([1892] A. C. 445), applied, *per* Taschereau, J.; *CONSTITUTIONAL LAW*, 2.

Barter v. Smith (2 Ex. C. R. 455), overruled as to supply and manufacture; *PATENT OF INVENTION*, 15.

Barton v. London and Northwestern Railway Co. (38 Ch. D. 144; 24 Q. B. D. 77; 6 Times L. R. 70), followed; *BILLS AND NOTES*, 19.

Bate v. Canadian Pacific Railway Co. (15 Ont. App. R. 388; 18 Can. S. C. R. 697), distinguished; *RAILWAYS*, 5—*STATUTES*, 142.

Bell v. Corporation of Quebec (5 App. Cas. 84), referred to by Taschereau, J.; *APPEALS TO SUPREME COURT*, 222—*SALE*, 32.

Bell Telephone Co. v. City of Quebec (20 Can. S. C. R. 230), followed; *APPEALS TO SUPREME COURT*, 292—*MUNICIPAL CORPORATIONS*, 174.

Bellechasse Election Case (5 Can. S. C. R. 91), referred to; *APPEALS TO SUPREME COURT*, 219.

Berthier v. Denis (27 Can. S. C. R. 147), referred to; *ESTOPPEL*, 42—*RIVERS AND STREAMS*, 4—*SERVITUDE*, 7.

Bernardin v. Municipality of North Dufferin (19 Can. S. C. R. 581), distinguished; *MUNICIPAL CORPORATIONS*, 108.

Bissonette v. Laurent (15 R. L. 44), approved; *PRACTICE AND PROCEDURE*, 144.

Boale v. Dickson (13 U. C. C. P. 337), approved; *RIVERS AND STREAMS*, 1.

Board v. Board (L. R. 9 Q. B. 48), referred to; *TITLE TO LAND*, 57—*WILL*, 43.

Borden v. Berteaux (19 Can. S. C. R. 526), followed; *ELECTION LAW*, 116.

Briggs v. Grand Trunk Railway Co. (24 U. C. Q. B. 510), approved and followed; *RAILWAYS*, 11.

Brisbois v. The Queen (15 Can. S. C. R. 421), referred to; **CRIMINAL LAW**, 10.

Bristol and Exeter Railway Co. v. Collins (7 H. L. Cas. 194), followed; **RAILWAYS**, 3—**WAREHOUSEMEN**, 2a.

Brittlebank v. Gray-Jones (5 Man. L. R. 33), distinguished; **CONSTITUTIONAL LAW**, 76—**MARRIED WOMAN**, 3—**STATUTES**, 60.

Broad v. Broad (L. R. 9 Q. B. 48), referred to; **TITLE TO LAND**, 57—**WILL**, 43. See *Board v. Board*, *ante*.

Brown v. The Toronto and Nipissing Railway Co. (26 U. C. C. P. 206), overruled; **RAILWAYS**, 41.

Browne v. Pinsonault (3 Can. S. C. R. 102), noted as overruled by *Porteous v. Reynar* (13 App. Cas. 120); **LANDLORD AND TENANT**, 5—distinguished; **TRUSTS**, 5.

Burland v. Moffatt (11 Can. S. C. R. 76), noted as overruled by *Porteous v. Reynar* (13 App. Cas. 120); **ASSIGNMENTS**, 2—distinguished; **TRUSTS**, 5.

Burns v. Davidson (21 O. R. 547), approved and followed; **ACTION**, 71—**LEX REI SITÆ**, 1.

C.

Canada Southern Railway Co. v. Clouse (13 Can. S. C. R. 139), referred to; **RAILWAYS**, 42, 43.

Canadian Pacific Railway Co. v. Little Seminary of Ste. Thérèse (16 S. C. R. 606), distinguished; **APPEALS TO SUPREME COURT**, 112.

Canadian Pacific Railway Co. v. Municipality of Notre Dame de Bonsecours ([1899] A. C. 367), followed; **CONSTITUTIONAL LAW**, 57—**RAILWAYS**, 43.

Chagnon v. Normand (16 Can. S. C. R. 661), referred to; **APPEALS TO SUPREME COURT**, 58.

Chamberland v. Fortier (23 Can. S. C. R. 371), referred to; **APPEALS TO SUPREME COURT**, 72—distinguished; **APPEALS TO SUPREME COURT**, 88—**TITLE TO LAND**, 40.

Champoux v. Lapierre (Cass. Dig., 2 ed., 426), referred to; **APPEALS TO SUPREME COURT**, 49—discussed and distinguished; **APPEALS TO SUPREME COURT**, 81—**OPPOSITION**, 8.

Chaudière Machine and Foundry Co. v. Canada Atlantic Railway Co. (33 Can. S. C. R. 11), followed; **ACTION**, 139—**DAMAGES**, 15—**EXPROPRIATION OF LANDS**, 13.

Chef dit Vadebonceur v. City of Montreal (29 Can. S. C. R. 9), followed; **PRACTICE AND PROCEDURE**, 8—**SHERIFF**, 12—**TITLE TO LAND**, 67—**SUBSTITUTION**, 7.

Cimon v. The Queen (23 Can. S. C. R. 62), referred to; **APPEALS TO SUPREME COURT**, 432—**PRACTICE AND PROCEDURE**, 32.

City Discount Co. v. McLean (L. R. 9 C. P. 693), referred to; **DEBTOR AND CREDITOR**, 16.

Clark v. Adie (2 App. Cas. 423), referred to; **TITLE TO LAND**, 57—**WILL**, 43.

Clayton's Case (1 Mer. 572), referred to; **DEBTOR AND CREDITOR**, 16—**PRINCIPAL AND SURETY**, 2.

Collom v. Manley (32 Can. S. C. R. 371), followed; **MINES AND MINERALS**, 11.

Commercial Bank v. Wilson (3 E. & A. Rep. 257), followed in court below and referred to by Supreme Court of Canada in reversing judgment appealed from; **FRAUDULENT PREFERENCES**, 7.

Commercial Union Assurance Co. v. Temple (29 Can. S. C. R. 206), followed; CONTRACT, 72—INSURANCE, FIRE, 29, 30.

Commune de Berthier v. Denis (27 Can. S. C. R. 147), referred to; ESTOPPEL, 42—RIVERS AND STREAMS, 4—SERVITUDE, 7.

Confederation Life Assurance Association v. O'Donnell (10 Can. S. C. R. 92), approved; INSURANCE, LIFE, 8.

Cooke v. Millar (3 R. L. 446; 4 R. L. 240), referred to; LIMITATIONS OF ACTIONS, 13—PEREMPTION D'INSTANCE.

Coplen v. Callaghan (30 Can. S. C. R. 555), followed; MINES AND MINERALS, 10, 11.

Cornwall, Town of, v. Derochie (24 Can. S. C. R. 301), followed; MUNICIPAL CORPORATIONS, 144—NEGLIGENCE, 191.

Cossette v. Dun (18 Can. S. C. R. 222) referred to; APPEALS TO SUPREME COURT, 19.

Couture v. Bouchard (21 Can. S. C. R. 281), followed; APPEALS TO SUPREME COURT, 8—STATUTES, 53.

Cowan v. Allen (26 Can. S. C. R. 292), followed; CODICIL, 2—WILL, 16.

Cowen v. Evans (22 Can. S. C. R. 328, 331), followed; APPEALS TO SUPREME COURT, 55.

Cox v. Worrall (26 N. S. Rep. 366), questioned; DEBTOR AND CREDITOR, 27.

Craig v. Great Western Railway Co. (24 U. C. Q. B. 504), approved and followed; RAILWAYS, 11.

Cunningham v. Grand Trunk Railway Co. (9 L. C. Jur. 57; 11 L. C. Jur. 107), approved and followed; RAILWAYS, 11.

Cushing v. Dupuy (5 App. Cas. 409), followed; APPEALS TO SUPREME COURT, 281—referred to in note to PRIVY COUNCIL, at page 1166.

D.

Dalton v. Angus (6 App. Cas. 740) referred to; EASEMENT, 4.

Danjou v. Marquis (3 Can. S. C. R. 251), followed; APPEALS TO SUPREME COURT, 67, 113—referred to; APPEALS TO SUPREME COURT, 104—PRACTICE OF SUPREME COURT, 185.

Davis v. Kerr (17 Can. S. C. R. 235), followed; INSOLVENCY, 50—TRUSTS, 23.

Dawson v. MacDonald (11 Q. L. R. 181) followed; LIMITATIONS OF ACTIONS, 10.

Delorme v. Cusson (28 Can. S. C. R. 66), followed; DEMOLITION, 1—TITLE TO LAND, 41.

DesBarres v. White (1 Kerr N. B. 595), approved; PRESCRIPTION, 15.

Dickie v. Woodworth (8 Can. S. C. R. 192), followed; ELECTION LAW, 10.

Dixon v. Snetsinger (23 U. C. C. P. 235), discussed; CONSTITUTIONAL LAW, 81—NAVIGABLE WATERS, 2—RIVERS AND STREAMS, 12.

Doe d. Anderson v. Todd (2 U. C. Q. B. 82), followed by Gwynne and Sedgewick, J.J.; STATUTE OF MORTMAIN, 2—WILL, 56.

Doe d. DesBarres v. White (1 Kerr N. B. 595), approved; PRESCRIPTION, 15.

Douglas v. Ritchie (18 L. C. Jur. 274), referred to; EVIDENCE, 160.

Doyle v. Falconer (L. R. 1 P. C. 328), commented on and followed; BREACH OF PRIVILEGE; PARLIAMENTARY PRACTICE.

Drysdale v. Dugas (26 Can. S. C. R. 20), followed; NUISANCE, 6—TRAMWAY, 3.

Dubois v. Village of Ste. Rose (21 Can. S. C. R. 65), followed; APPEALS TO SUPREME COURT, 292—MUNICIPAL CORPORATIONS, 174.

Ducondu v. Dupuy (9 App. Cas. 150), followed; TITLE TO LAND, 126—WARRANTY, 8.

Dufresne v. Dixon (16 Can. S. C. R. 596), followed; APPEALS TO SUPREME COURT, 193, 287.

Dufresne v. Guévremont (26 Can. S. C. R. 216), followed; APPEALS TO SUPREME COURT, 73—STATUTES, 145.

Durkee v. Flint (19 N. S. Rep. 487), approved and followed; ASSIGNMENTS, 4—CHATTEL MORTGAGE, 13.

Duval v. Casgrain (19 L. C. Jur. 16), followed in court below and on appeal the judgment stood affirmed on an equal division of opinion; ELECTION LAW, 73.

E.

Eddy v. Eddy (Cout. Dig. 130), followed; APPEALS TO SUPREME COURT, 423; PRACTICE OF SUPREME COURT, 232.

Emmett v. Quinn (7 Ont. App. R. 306), distinguished; MORTGAGE, 65.

Employers' Liability Assurance Corporation v. Taylor (29 Can. S. C. R. 104), followed; ACTION, 26—INSURANCE, FIRE, 35.

Eureka Woollen Mills Co. v. Moss (11 Can. S. C. R. 91), distinguished; APPEALS TO SUPREME COURT, 366—approved and distinguished; INSURANCE, FIRE, 81.

European Bank, In re; Ex parte Oriental Commercial Bank (5 Ch. App. 358), followed; NEGOTIABLE SECURITY—PLEDGE, 7.

Exchange Bank of Canada v. Gilman (17 Can. S. C. R. 108), followed; PRACTICE OF SUPREME COURT, 218.

F.

Filiatrault v. Goldie (Q. R. 2 Q. B. 368), distinguished; IMMOVABLE PROPERTY, 1—MOVEABLES, 1—VENDOR AND PURCHASER, 8.

Fisher v. Anderson (4 Can. S. C. R. 406), followed; WILL, 42.

Follis v. Porter (11 Gr. 442), referred to; VENDOR AND PURCHASER, 21.

Fonseca v. The Attorney-General for Canada (17 Can. S. C. R. 612), referred to; CROWN, 93—SCIRE FACIAS, 2—VENTE A REMERE.

Footner v. Giges (2 Sim. 319), followed; PRACTICE AND PROCEDURE, 77—STATUTES, 140.

Freeborn v. Vandusen (15 Ont. P. R. 264), approved and followed; PRACTICE AND PROCEDURE, 127.

G.

Gagnon & Prince (8 App. Cas. 103), approved; PRIVY COUNCIL, 7—RAILWAYS, 3—SALE, 96 (notes).

Gardiner v. Gardiner (2 Q. B. (O. S.) 554 or 520 B.), referred to; TUTORSHIP, 2—WILL, 24.

Gardner v. Grace (1 F. & F. 359), followed; INFANT—MINORITY, 1—NEGLIGENCE, 43.

Gendron v. McDougall (Cass. Dig. 2 ed. 429), followed; APPEALS TO SUPREME COURT, 56—discussed and distinguished; APPEALS TO SUPREME COURT, 81—OPPOSITION, 8.

George Matthews Co. v. Bouchard (28 Can. S. C. R. 580), followed; APPEALS TO SUPREME COURT, 239—EVIDENCE, 83—NEGLIGENCE, 144, 217—RAILWAYS, 74.

Gibbons v. Wilson (17 Ont. App. R. 1), referred to; DEBTOR AND CREDITOR, 28—FRAUDULENT PREFERENCE, 12.

Gilbert v. Gilman (16 Can. S. C. R. 189), approved; APPEALS TO SUPREME COURT, 38—followed; APPEALS TO SUPREME COURT, 39—referred to; APPEALS TO SUPREME COURT, 58.

Gilbert v. Lionais (7 R. L. 339), referred to; PLEADING, 30—ULTRA PETITA.

Gilmour v. Wishaw (15 L. C. R. 177) approved; PRESCRIPTION, 26.

Gingras v. Desilets (Cass. Dig. 2 ed. 212), reviewed and approved; APPEALS TO SUPREME COURT, 19—followed; APPEALS TO SUPREME COURT, 32—DAMAGES, 5, 49.

Gorman v. Dixon (26 Can. S. C. R. 87) followed; PRACTICE OF SUPREME COURT, 218.

Graham v. Smith (27 U. C. C. P. 1), overruled; STOPPAGE IN TRANSIT.

Granby, Village of, v. Ménard (31 Can. S. C. R. 14), followed; ADMIRALTY LAW, 3—APPEALS TO SUPREME COURT, 250—EVIDENCE, 65—NAVIGATION, 3.

Grand Trunk Railway Co. v. Coupal (28 Can. S. C. R. 531), followed; EXPROPRIATION OF LANDS, 12—MUNICIPAL CORPORATIONS, 131.

Grand Trunk Railway Co. v. Morton (11 Can. S. C. R. 612), disapproved; see *Grand Trunk Railway Co. v. Vogel, infra*.

Grand Trunk Railway Co. v. Rosenberger (9 Can. S. C. R. 311), followed; RAILWAYS, 107.

Grand Trunk Railway Co. v. Vogel (11 Can. S. C. R. 612), distinguished; RAILWAYS, 3, 5—STATUTES, 142—WAREHOUSEMEN, 2a—disapproved; CONSTITUTIONAL LAW, 29—MASTER AND SERVANT, 37—NEGLIGENCE, 219—RAILWAYS, 1 (note) and 51—STATUTES, 155.

Gray v. Richford (2 Can. S. C. R. 431), followed; APPEALS TO SUPREME COURT, 358.

Gray v. Turnbull (L. R. 2 H. L. Sc. 53), referred to by Taschereau, J.; APPEALS TO SUPREME COURT, 222—SALE, 32.

Great Western Railway Co. v. Braid (1 Moo. P. C. (N.S.) 101), followed; APPEALS TO SUPREME COURT, 83.

Grindley v. Blakie (19 N. S. Rep. 27), approved; REGISTRY LAWS, 24.

Griffiths v. Earl of Dudley (9 Q. B. D. 357), followed; LORD CAMPBELL'S ACT, 2—MASTER AND SERVANT, 37—NEGLIGENCE, 219.

H.

Halifax, City of, v. Walker (Cass. Dig. 2 ed. 175), mentioned; NEGLIGENCE, 189—NEW TRIALS, 20.

Hamel v. Hamel (26 Can. S. C. R. 17), approved and followed; APPEALS TO SUPREME COURT, 198—PLEADING, 40.

Hay v. Gordon (L. R. 4 P. C. 337), referred to by Taschereau, J.; APPEALS TO SUPREME COURT, 222—SALE, 32.

Heinniker v. Wigg (4 Q. B. 792), referred to; DEBTOR AND CREDITOR, 16.

Hodge v. The Queen (9 App. Cas. 117), followed; LIQUOR LAWS, 3.

Hogan v. City of Montreal (31 Can. S. C. R. 1), distinguished; EXPROPRIATION OF LANDS, 12—MUNICIPAL CORPORATIONS, 131.

Holman v. Green (6 Can. S. C. R. 707), followed; HARBOURS, 2.

Hovey v. Whiting (14 Can. S. C. R. 515), followed; CHATTEL MORTGAGE, 4.

Howell v. Alport (12 U. C. C. P. 375), overruled; STOPPAGE IN TRANSIT.

Hunter v. Carrick (11 Can. S. C. R. 300), referred to; PATENT OF INVENTION, 8.

Hurtubise v. Desmarteau (19 Can. S. C. R. 562), followed; APPEALS TO SUPREME COURT, 45.

J.

Johnston v. St. Andrews Church (3 App. Cas. 159), referred to in note to PRIVY COUNCIL, page 1166.

Jonasson v. Bonhôte (2 Ch. D. 298), applied; EJECTMENT, 1.

Jones v. The Queen (7 Can. S. C. R. 570), followed; CONTRACT, 96.

Joyce v. Hart (1 Can. S. C. R. 321), overruled by *Allen v. Pratt* (13 App. Cas. 780); APPEALS TO SUPREME COURT, 18, 24—reviewed and approved; APPEALS TO SUPREME COURT, 19.

K.

Kielley v. Carson (4 Moo. P. C. 63), commented upon and followed; BREACH OF PRIVILEGE—PARLIAMENTARY PRACTICE.

Kettlewell v. Watson (21 Ch. D. 685), referred to; BILLS AND NOTES, 26—PRINCIPAL AND AGENT, 34.

King's County Election Cases (8 Can. S. C. R. 192 and 19 Can. S. C. R. 526), followed; ELECTION LAW, 10, 116.

L.

Laberge v. Equitable Life Assurance Society (24 Can. S. C. R. 59), distinguished; APPEALS TO SUPREME COURT, 83, 296—EXECUTORS AND ADMINISTRATORS, 11.

Lacroix v. Moreau (16 L. C. R. 180), referred to; APPEALS TO SUPREME COURT, 200.

Lainé v. Béland (26 Can. S. C. R. 419), distinguished—IM-MOVEABLE PROPERTY, 1—MOVEABLES, 1—VENDOR AND PURCHASER, 8.

Lambe v. Bank of Toronto (12 App. Cas. 575), distinguished; CONSTITUTIONAL LAW, 54—followed; CONSTITUTIONAL LAW, 56—LICENSES, 1.

Lambe v. Armstrong (27 Can. S. C. R. 309), followed; APPEALS TO SUPREME COURT, 395—NOTICE, 32—PRACTICE OF SUPREME COURT, 239.

Langevin v. Commissaires d'Ecole de St. Marc (18 Can. S. C. R. 599), followed; APPEALS TO SUPREME COURT, 88—TITLE TO LAND, 40.

Lenoir v. Ritchie (3 Can. S. C. R. 575), noted as reversed; QUEEN'S COUNSEL, and *see* CONSTITUTIONAL LAW, 44, 64, 80.

Levi v. Reed (6 Can. S. C. R. 482), overruled; APPEALS TO SUPREME COURT, 24—followed; APPEALS TO SUPREME COURT, 32—DAMAGES, 5, 49, 50—restored, affirmed and followed; APPEALS TO SUPREME COURT, 62.

"Levrington," *The* (11 P. D. 117), followed; ADMIRALTY LAW, 2—MARITIME LAW, 3.

Lionais v. The Molsons Bank (10 Can. S. C. R. 527), followed; APPEALS TO SUPREME COURT, 350—PRACTICE AND PROCEDURE, 66—RETRAXIT.

Lisgar Election Case, *Collins v. Ross* (20 Can. S. C. R. 1), followed; ELECTION LAW, 103, 104.

Lister v. Perryman (L. R. 4 H. L. 521), followed; MALICE AND MALICIOUS PROSECUTIONS, 2—NEW TRIALS, 34—NONSUIT, 4.

Lizotte v. Descheneau (6 Legal News, 170), followed; APPEALS TO SUPREME COURT, 78.

"Local Option Act," *In re*, (18 Ont. App. R. 572), approved; CONSTITUTIONAL LAW, 45—STATUTES, 21.

M.

MacFarlane v. Leclaire (15 Moo. P. C. 181), distinguished; ALIMENTARY ALLOWANCE, 1—APPEALS TO SUPREME COURT, 82—referred to; APPEALS TO SUPREME COURT, 49.

Maguire v. Scott (7 L. C. R. 451), distinguished; PARTNERSHIP, 35.

Major v. Corporation of Three Rivers (Cass. Dig. 2 ed. 422), followed; APPEALS TO SUPREME COURT, 111.

Martley v. Carson (13 Can. S. C. R. 439), followed; APPEALS TO SUPREME COURT, 430.

Matthews, The George, Co. v. Bouchard (28 Can. S. C. R. 580), followed; APPEALS TO SUPREME COURT, 239—EVIDENCE, 83—NEGLIGENCE, 144, 217—RAILWAYS, 74.

Matthieu v. Quebec, Montmorency and Charlevoix Railway Co. (15 Q. L. R. 300), followed; ARBITRATIONS, 13.

Megantic Election Case (8 Can. S. C. R. 169), discussed; ELECTION LAW, 92—PRACTICE AND PROCEDURE, 42.

Merchants Bank of Halifax v. Gillespie (10 Can. S. C. R. 312), distinguished; WINDING-UP ACT, 6.

Metropolitan Railway Co. v. Wright (11 App. Cas. 152), followed; APPEALS TO SUPREME COURT, 239—EVIDENCE, 83—NEGLIGENCE, 144.

Mills v. Limoges (22 Can. S. C. R. 331), followed; APPEALS TO SUPREME COURT, 55.

Mitchell v. Trenholme (22 Can. S. C. R. 331), followed; APPEALS TO SUPREME COURT, 55.

Moir v. Village of Huntingdon (19 Can. S. C. R. 363), followed; APPEALS TO SUPREME COURT, 61.

Monette v. Lefebvre (16 Can. S. C. R. 387), followed; APPEALS TO SUPREME COURT, 54—referred to; APPEALS TO SUPREME COURT, 19.

Monck Election Case (Hodgins Elec. Cas. 725), approved; ELECTION LAW, 26.

Molsons Bank v. Halter (18 Can. S. C. R. 88), approved and followed; FRAUDULENT CONVEYANCES, 2—FRAUDULENT PREFERENCE, 6—MORTGAGE, 12.

Montreal Assurance Co. v. McGillivray (11 L. C. R. 325), mentioned; PRACTICE OF SUPREME COURT, 179.

Montreal, City of, v. Brown (2 App. Cas. 168), followed; APPEALS TO SUPREME COURT, 393—referred to; DAMAGES, 6.

Montreal, City of, v. Hogan (31 Can. S. C. R. 1) distinguished; EXPROPRIATION OF LANDS, 12—MUNICIPAL CORPORATIONS, 131.

Montreal, City of, v. McGee (30 Can. S. C. R. 582), followed; ACTION, 139—DAMAGES, 15—EXPROPRIATION OF LANDS, 13.

Montreal Loan and Mortgage Co. v. Fuateux (3 Can. S. C. R. 411), followed; APPEALS TO SUPREME COURT, 350—PRACTICE AND PROCEDURE, 66—RETRAXIT.

Moore v. Jackson (22 Can. S. C. R. 210), referred to; MARRIED WOMAN, 5—STATUTES, 68.

Moreau v. Motz (7 L. C. R. 147), followed; LIMITATIONS OF ACTIONS, 7—TUTORSHIP, 4.

Mowat v. DeLisle (25 Can. S. C. R. 1), followed; WARRANTY, 3.

Murphy v. Labbé (27 Can. S. C. R. 126), approved and followed; LANDLORD AND TENANT, 18—LEASE, 4—NEGLIGENCE, 142.

Murray v. The Queen (26 Can. S. C. R. 203), discussed; CONTRACT, 101.

Mc.

McCall v. Wolff (13 Can. S. C. R. 130), approved and distinguished; ASSIGNMENTS, 21—CHATTEL MORTGAGE, 4.

McCorkill v. Knight (3 Can. S. C. R. 233), followed; APPEALS TO SUPREME COURT, 81—OPPOSITION, 8.

McDonald v. Abbott (3 Can. S. C. R. 278), followed; APPEALS TO SUPREME COURT, 67, 113.

McDonald v. Dawson (11 Q. L. R. 181), followed; LIMITATIONS OF ACTIONS, 10.

McGoëy v. Leamy (27 Can. S. C. R. 193), distinguished; APPEALS TO SUPREME COURT, 88—TITLE TO LAND, 40.

McGreevy v. Paillé (4 Legal News, 95), referred to; EVIDENCE, 160.

McGreevy v. The Queen (14 Can. S. C. R. 735), followed; APPEALS TO SUPREME COURT, 208.

McGugan v. Smith (21 Can. S. C. R. 263), followed; CONTRACT, 152.

McKay v. Crysler (3 Can. S. C. R. 436), followed; ASSESSMENTS AND TAXES, 60.

McKay v. Village of Hinchinbrooke (24 Can. S. C. R. 55), referred to; APPEALS TO SUPREME COURT, 292—MUNICIPAL CORPORATIONS, 174.

McLean v. Hannon (3 Can. S. C. R. 706), followed; SHERIFF, 7.

McQuarrie v. Municipality of St. Mary's (5 Russ. & Geld. 493), mentioned; NEGLIGENCE, 189—NEW TRIAL, 20.

N.

Nicolet Election Case (29 Can. S. C. R. 178), followed; ELECTION LAW, 103, 104.

Nissouri, Township of West, v. Township of North Dorchester (14 O. R. 294), distinguished; ASSESSMENT AND TAXES, 30; MUNICIPAL CORPORATIONS, 86.

Noel v. Chevrefils (30 Can. S. C. R. 327), followed; APPEALS TO SUPREME COURT, 296; EXECUTORS AND ADMINISTRATORS, 11.

North British and Mercantile Insurance Co. v. Tourville (25 Can. S. C. R. 177), followed; APPEALS TO SUPREME COURT, 233.

North Shore Railway Co. v. Pion (14 App. Cas. 612), followed; EXPROPRIATION OF LANDS, 21.



O.

Oakes v. Turquand (L. R. 2 H. L. 325), referred to by Strong, J.; PRACTICE AND PROCEDURE, 28—PRACTICE OF SUPREME COURT, 214.

O'Brien, *In re* (16 Can. S. C. R. 197), referred to; APPEALS TO SUPREME COURT, 189, 191; CONTEMPT OF COURT, 2.

O'Brien v. Cogswell (17 Can. S. C. R. 420), followed; ASSESSMENT AND TAXES, 60.

O'Dell v. Gregory (24 Can. S. C. R. 661), followed; APPEALS TO SUPREME COURT, 74, 78, 88, 90—TITLE TO LAND, 40.

Ontario Bank v. Wilcox (43 U. C. Q. B. 460), distinguished; SALE, 12.

Oriental Commercial Bank, *Ex parte* (5 Ch. App. 358), followed; NEGOTIABLE SECURITY—PLEDGE, 7.

Osborne v. Morgan (13 App. Cas. 227), followed; CROWN, 83—MINES AND MINERALS, 17.

Osgoode, Township of, v. York (24 Can. S. C. R. 282), followed; DRAINAGE, 6—MUNICIPAL CORPORATION, 93—STATUTES, 153.

O'Shea v. O'Shea (15 P. D. 59), followed; APPEALS TO SUPREME COURT, 189, 191; CONTEMPT OF COURT, 2.

O'Sullivan v. Harty (13 Can. S. C. R. 431), distinguished; APPEALS TO SUPREME COURT, 426—followed; APPEALS TO SUPREME COURT, 427, 430.

P.

Paine v. Jones (L. R. 18 Eq. 320), referred to; TITLE TO LAND, 57—WILL, 43.

Parent v. Corporation de St. Sauveur (2 Q. L. R. 258), approved; MUNICIPAL CORPORATIONS, 159.

Patton v. Morin (16 L. C. R. 267), followed; SHÉRIF, 8—USUFRUCT, 2—WILL, 12.

Perera v. Perera ([1901] A. C. 354), followed; DURESS, 3—WILL, 4.

Perrault v. Gauchier (28 Can. S. C. R. 241), referred to; EXPROPRIATION OF LANDS, 9—MUNICIPAL CORPORATIONS, 63, 117—SERVITUDE, 6.

Phillips v. Phillips (4 Q. B. D. 127), referred to; EJECTMENT, 1.

Piché v. City of Quebec (Cass. Dig., 2 ed., 497), followed; PRACTICE OF SUPREME COURT, 218.

Pictou, Municipality of, v. Geldert ([1893] A. C. 524), followed; MUNICIPAL CORPORATIONS, 143, 171—NUISANCE, 5.

Pion v. The North Shore Railway Co. (14 App. Cas. 612), followed; EXPROPRIATION OF LANDS, 21.

Porteous v. Reynar (13 App. Cas. 120), referred to as overruling *Burland v. Moffatt* (11 Can. S. C. R. 76), ASSIGNMENTS, 2—distinguished; TRUSTS, 5.

Porter v. Flintoff (6 U. C. C. P. 335), distinguished; CHATTEL MORTGAGE, 10.

Providence Washington Insurance Co. v. Corbett (9 Can. S. C. R. 256), approved; INSURANCE, MARINE, 43.

Prince v. Gagnon (8 App. Cas. 103), commented upon; PRIVY COUNCIL, 7—RAILWAYS, 3 (referred to in Privy Council, note); SALE, 96, note—TITLE TO LAND, 142, note—VENDOR AND PURCHASER, 34, note.

Pym v. Campbell (6 E. & B. 370), followed; BILLS AND NOTES, 26—PRINCIPAL AND AGENT, 34.

Q.

Quebec, City of, v. Leaycraft (7 Q. L. R. 56), distinguished; ASSESSMENT AND TAXES, 40.

Quebec, City of, v. The North Shore Railway Co. (27 Can. S. C. R. 102), referred to; ESTOPPEL, 42; RIVERS AND STREAMS, 4—SERVITUDE, 7.

Quebec, City of, v. The Queen (24 Can. S. C. R. 420), referred to; ACTION, 113—NEGLIGENCE, 201—PUBLIC WORK, 10.

Quebec Street Railway Co. v. The City of Quebec (13 Q. L. R. 205), referred to; CONTRACT, 62.

The Queen v. The Bank of Nova Scotia (11 Can. S. C. R. 1) followed; CONSTITUTIONAL LAW, 80; CROWN, 74, 75.

The Queen v. Farwell (14 Can. S. C. R. 392), commented upon and distinguished; RES JUDICATA, 5—referred to; PRACTICE AND PROCEDURE, 63.

The Queen v. Dillon (10 Ont. P. R. 352), overruled; BETTING, 1—CRIMINAL LAW, 14—STATUTES, 30.

The Queen v. Filion (24 Can. S. C. R. 482), approved; ACTION, 113—NEGLIGENCE, 201—followed; COMMON EMPLOYMENT, 1, 2—MASTER AND SERVANT, 17, 26, 37—NEGLIGENCE, 20, 30, 31, 82, 219—PUBLIC WORK, 10—RAILWAYS, 51.

The Queen v. Grenier (30 Can. S. C. R. 42), followed; COMMON EMPLOYMENT, 2—MASTER AND SERVANT, 26;—NEGLIGENCE, 20, 31, 82.

The Queen v. Lacombe (13 L. C. Jur. 259), overruled; CRIMINAL LAW, 10.

The Queen v. McGreevy (18 Can. S. C. R. 371), followed by majority of Court, but questioned by Strong, J.; RES JUDICATA, 9—STARE DECISIS, 2.

The Queen v. Robertson (6 Can. S. C. R. 52) followed; CONSTITUTIONAL LAW, 5—STATUTES, 22.

The Queen v. Taylor (36 U. C. Q. B. 183), overruled; CONSTITUTIONAL LAW, 42—LIQUOR LAWS, 1.

Queen's Election Case (20 Can. S. C. R. 26), followed; ELECTION LAW, 116.

R.

Raphael v. Maclaren (27 Can. S. C. R. 319), followed; APPEALS TO SUPREME COURT, 78.

Reburn v. Paroisse de Ste. Anne (15 Can. S. C. R. 92), distinguished; APPEALS TO SUPREME COURT, 43—overruled; APPEALS TO SUPREME COURT, 292—MUNICIPAL CORPORATIONS, 174.

Reg. v. Dillon (10 Ont. P. R. 352), overruled; BETTING, 1—CRIMINAL LAW, 14—STATUTES, 30.

Reg. v. Lacombe (13 L. C. Jur. 259), overruled; CRIMINAL LAW, 10.

Reg. v. Taylor (36 U. C. Q. B. 183), overruled; CONSTITUTIONAL LAW, 42—LIQUOR LAWS, 1.

Renaud, Ex parte (1 Pugs. 273), distinguished; CONSTITUTIONAL LAW, 69.

Rex v. Faderman (1 Den. C. C. 572), approved by Strong, J.; CRIMINAL LAW, 11.

Richelieu Election Case (21 Can. S. C. R. 168), followed; ELECTION LAW, 97.

Richards v. Bank of Nova Scotia (26 Can. S. C. R. 381), referred to; **BILLS AND NOTES**, 26—**PRINCIPAL AND AGENT**, 34.

Richardson v. Canada West Farmers' Mutual and Stock Insurance Co. (16 U. C. C. P. 430), distinguished; **ACTION**, 21—**CARRIERS**, 12—**CONTRACT**, 64.

Robertson v. Provincial M. & G. Insurance Co. (8 N. B. Rep. 379), followed; **INSURANCE**, **MARINE**, 15.

Robertson v. The Queen (6 Can. S. C. R. 52), followed; **CONSTITUTIONAL LAW**, 5—**STATUTES**, 22.

Robinson v. The Canadian Pacific Railway Company ([1892] A. C. 481), distinguished; **LORD CAMPBELL'S ACT**, 2—**NEGLIGENCE**, 219.

Rodier v. Lapierre (21 Can. S. C. R. 69), followed; **APPEALS TO SUPREME COURT**, 74, 78.

Rolland v. La Caisse d'Economie de Québec (24 Can. S. C. R. 405), discussed; **CONSPIRACY**, 1—**CONTRACT**, 165—**TRADE COMBINATION**.

Ross v. Hunter (7 Can. S. C. R. 289), distinguished; **MUNICIPAL CORPORATIONS**, 89; **REGISTRY LAWS**, 2.

Ross v. Torrance (2 Legal News, 186), overruled; **CONSTITUTIONAL LAW**, 68—**MUNICIPAL CORPORATIONS**, 2.

Ryan v. Ryan (5 Can. S. C. R. 387), followed; **PRESCRIPTION**, 16—**TITLE TO LAND**, 80.

S.

St. John v. Rykert (10 Can. S. C. R. 278), followed; **INTEREST**, 3.
 St. Lawrence and Chicago Forwarding Co. v. The Molsons Bank (28 L. C. Jur. 127), referred to; **BILL OF LADING**, 3—**ESTOPPEL**, 13.
 Salomon v. Salomon & Co. ([1897] A. C. 22, followed; **LEASE**, 7.
 Salvas v. Vassal (27 Can. S. C. R. 68), referred to; **TITLE TO LAND**, 6.

"Santanderino," The, v. Vanwart (23 Can. S. C. R. 145), followed; **ADMIRALTY LAW**, 3—**NAVIGATION**, 3.

Sauvageau v. Gauthier (L. R. 5 P. C. 494), referred to; **APPEALS TO SUPREME COURT**, 21, followed; **ALIMENTARY ALLOWANCE**, 1—**APPEALS TO SUPREME COURT**, 82.

Schwersenski v. Vineberg (19 Can. S. C. R. 243), distinguished; **APPEALS TO SUPREME COURT**, 231.

Scott v. Phoenix Assurance Co. (Stu. K. B. 354), followed; **APPEALS TO SUPREME COURT**, 358.

Selkirk Election Case; Young v. Smith (4 Can. S. C. R. 494), followed; **ELECTION LAW**, 37, 51.

Sénésac v. Central Vermont Railway Co. (26 Can. S. C. R. 641), followed; **NEGLIGENCE**, 217—**RAILWAYS**, 74.

Severn v. The Queen (2 Can. S. C. R. 70), distinguished; **CONSTITUTIONAL LAW**, 54.

Shaw v. St. Louis (8 Can. S. C. R. 385), distinguished; **APPEALS TO SUPREME COURT**, 170—followed; **APPEALS TO SUPREME COURT**, 181.

Shelly's Case (1 Co. 93 b) referred to; **WILL**, 14.

Sherbrooke, City of, v. McManamy (18 Can. S. C. R. 594), followed; **APPEALS TO SUPREME COURT**, 40, 292—**MUNICIPAL CORPORATION**, 174—distinguished; **APPEALS TO SUPREME COURT**, 60.

Smith v. Baker ([1891] A. C. 325), applied; **ACTION**, 86.

Smith v. Goldie (9 Can. S. C. R. 46), referred to; **PATENT OF INVENTION**, 8.

Smith v. McLean (21 Can. S. C. R. 355), distinguished; CHATTEL MORTGAGE, 5.

Smith v. St. Lawrence Tow Boat Co. (L. R. 5 P. C. 308), referred to by Taschereau, J.; APPEALS TO SUPREME COURT, 222—SALE, 32.

Smith v. Smith (5 O. R. 690), referred to; TITLE TO LAND, 57—WILL, 43.

Sovereign Insurance Co. v. Peters (12 Can. S. C. R. 33), distinguished; INSURANCE, FIRE, 25—referred to by Taschereau, J., at col. 687, under INSURANCE, FIRE, 71.

Standard Bank v. Dunham and Park (14 O.R. 67), mentioned; PARTNERSHIP, 37.

Stanstead Election Case (20 Can. S. C. R. 12), followed; ELECTION LAW, 94—EVIDENCE, 104.

Stanton v. Home Insurance Co. (2 Legal News, 314), approved; APPEALS TO SUPREME COURT, 69.

Stanton v. Canada Atlantic Railway Co. (Cass. Dig., 2 ed., 430), reviewed; APPEALS TO SUPREME COURT, 165—FRAUDULENT PREFERENCE, 4.

Stephen v. McGillivray (18 Ont. App. R. 516), distinguished; ASSESSMENT AND TAXES, 30—MUNICIPAL CORPORATIONS, 86.

Stephens v. McArthur (19 Can. S. C. R. 446), followed; FRAUDULENT PREFERENCES, 6—MORTGAGE, 12.

Stepney Election Case (4 O'M. & H. 34), referred to; ELECTION LAW, 27.

Stringer's Trusts, Re, (6 Ch. D. 1), referred to; TITLE TO LAND, 57—WILL, 43.

Summers v. The Commercial Union Assurance Co. (6 Can. S. C. R. 19), followed; PRINCIPAL AND AGENT, 33.

Sweeny v. Bank of Montreal (12 Can. S. C. R. 661; 12 App. Cas. 617), followed; PLEDGE, 5—TRUSTS, 7.

Sydney, Town of, v. Bourke ([1895] A. C. 433), followed; MUNICIPAL CORPORATIONS, 143, 171—NUISANCE, 5.

T.

Toronto Railway Co. v. The Queen (4 Ex.C.R. 262; 25 Can. S. C. R. 24; [1896] A. C. 551), discussed; CUSTOMS DUTIES, 5.

Trust and Loan Co. v. Quintal (2 Dor. Q. B. 190), followed; ACTION, 13—PRACTICE AND PROCEDURE, 8—SHERIFF, 12.

Turcotte v. Dansereau (26 Can. S. C. R. 578), followed; APPEALS TO SUPREME COURT, 81—OPPOSITION, 8.

Two Mountains Election Case (31 Can. S. C. R. 437), applied; ELECTION LAW, 67.

U.

Underwood v. Maguire (Q. R. 6 Q. B. 237), overruled; CONTRACT, 134—DOMICILE, 3.

V.

Vadeboncoeur v. City of Montreal (29 Can. S. C. R. 9), followed; PRACTICE AND PROCEDURE, 8—SHERIFF, 12—TITLE TO LAND, 67—SUBSTITUTION, 7.

Valin v. Langlois (3 Can. S. C. R. 1; 5 App. Cas. 115), discussed and followed; CONSTITUTIONAL LAW, 18.

Venner v. The Sun Life Insurance Co. (17 Can. S. C. R. 394), followed; CONDITIONS, 1—CONTRACT, 67—INSURANCE, LIFE, 27.

Verchères, County of, v. Village of Varennes (19 Can. S. C. R. 365), followed; APPEALS TO SUPREME COURT, 40, 43, 292—MUNICIPAL CORPORATIONS, 174—distinguished; APPEALS TO SUPREME COURT, 60.

Virtue v. Hayes (16 Can. S. C. R. 721), distinguished; APPEALS TO SUPREME COURT, 112.

Vogel v. Grand Trunk Railway Co. (11 Can. S. C. R. 612), distinguished; RAILWAYS, 3, 5—STATUTES, 42—WAREHOUSEMEN, 2*a*—disapproved; CONSTITUTIONAL LAW, 29—MASTER AND SERVANT, 37—NEGLIGENCE, 219—RAILWAYS, 1 (note) and 51.

W.

Walker v. City of Halifax (Cass. Dig., 2 ed., 175), mentioned; NEGLIGENCE, 189—NEW TRIALS, 20.

Walker v. The London and Northwestern Railway Co. (L. R. 1 C. P. D. 518), referred to; CONTRACT, 21.

Walker v. McMillan (6 Can. S. C. R. 241), followed; CONTRACT, 159.

Walker v. Sweet (21 L. C. Jur. 29), approved and followed by Taschereau, J.; CONTRACT, 11.

Wallbridge v. Farwell (18 Can. S. C. R. 1), followed; CONTRACT, 66.

Walmsley v. Griffith (13 Can. S. C. R. 434), followed; APPEALS TO SUPREME COURT, 430.

Webster v. City of Sherbrooke (24 Can. S. C. R. 52), distinguished; APPEALS TO SUPREME COURT, 61—referred to; APPEALS TO SUPREME COURT, 292; MUNICIPAL CORPORATIONS, 174.

West Nissouri, Township of, v. Township of North Dorchester (14 O. R. 294), distinguished; ASSESSMENT AND TAXES, 30—MUNICIPAL CORPORATIONS, 86.

Wheeler v. Black (14 Can. S. C. R. 242), referred to; APPEALS TO SUPREME COURT, 38.

Whishaw v. Gilmour (15 L. C. R. 177), approved; PRESCRIPTION, 26.

Whitby, Corporation of, v. Liscombe (23 Gr. 1), followed by Gwynne and Sedgewick, J.J.; STATUTE OF MORTMAIN, 2—WILL, 56.

Williams v. Irving (22 Can. S. C. R. 108), followed; APPEALS TO SUPREME COURT, 54—STATUTES, 55.

Wilmot v. Vanwart (1 Pugs. & Bur. 456), mentioned; NEW TRIALS, 35.

Wilson v. City of Montreal (24 L. C. Jur. 222), approved, Strong, J., *dubitante*; CUSTOMS DUTIES, 5.

Wineberg v. Hampson (19 Can. S. C. R. 369), distinguished; APPEALS TO SUPREME COURT, 57.

Winnipeg, City of, v. Barrett ([1892] A. C. 445) applied *per* Taschereau, J., CONSTITUTIONAL LAW, 2.

Wyke v. Rogers (1 DeG. M. & G. 408), followed; DEBTOR AND CREDITOR, 51—PRINCIPAL AND SURETY, 3.

Y.

Yarmouth, Corporation of, v. Simmonds (L. R. 10 Ch. D. 518), followed; STATUTES, 83—TITLE TO LAND, 32.

Young v. Smith (Selkirk Election Case), (4 Can. S. C. R. 494), followed; ELECTION LAW, 37, 51.

APPENDIX B.

LIST OF CASES CARRIED IN APPEAL FROM THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

From the time of the organization of the Court in 1875,
to 2nd December, 1903.

A.

Adams & Burns v. The Bank of Montreal (32 Can. S. C. R. 719), leave to appeal refused (8 B. C. Rep. 337, note).

Adamson v. Rogers (26 Can. S. C. R. 159), leave to appeal refused.

Alexander v. Vye (16 Can. S. C. R. 501), leave to appeal refused.

Allan v. City of Montreal (23 Can. S. C. R. 390), leave to appeal refused.

Arpin v. The Queen (14 Can. S. C. R. 736), leave to appeal refused, 10 Can. Gaz. 275.

Association Pharmaceutique de Québec v. Livernois (31 Can. S. C. R. 43), leave to appeal refused, August, 1901.

Attorney-General for British Columbia v. Attorney-General for Canada (14 Can. S. C. R. 345), judgment reversed (14 App. Cas. 295, 58 L. J. P. C. 88; 60 L. T. 712; 5 Times L. R. 385).

Attorney-General for Canada v. The Provinces of Ontario, Quebec and Nova Scotia (26 Can. S. C. R. 444), judgment varied ([1898] A. C. 700).

Attorney-General for Canada v. City of Toronto (23 Can. S. C. R. 514), leave to appeal refused, 21 Can. Gaz. 414.

Attorney-General for Nova Scotia v. Gregory. *See* Halifax and Cape Breton Railway Co. v. Gregory, *infra*.

B.

Barrett v. City of Winnipeg (19 Can. S. C. R. 374), judgment reversed ([1892] A. C. 445; 61 L. J. P. C. 58; 67 L. T. 429).

Beatty v. North-West Transportation Co. (12 Can. S. C. R. 598), judgment reversed (12 App. Cas. 589; 56 L. J. P. C. 102; 57 L. T. 426; 36 W. R. 647).

Beaudet v. North Shore Railway Co. (15 Can. S. C. R. 44), leave to appeal refused (10 Can. Gaz. 463).

Belcher v. McDonald (33 Can. S. C. R. 321), leave to appeal granted, August, 1903.

Bickford v. Corporation of Chatham (16 Can. S. C. R. 235), leave to appeal refused on the ground that no question of public importance was involved (14 Can. Gaz. 153).

Boulton v. Shea (22 Can. S. C. R. 742), leave to appeal refused (23 Can. Gaz. 298).

Brophy v. Attorney-General for Manitoba (22 Can. S. C. R. 577), judgment varied ([1895] A. C. 202).

C.

Cadieux v. Montreal Gas Co. (28 Can. S. C. R. 382), leave to appeal granted on special terms as to costs [1898] A. C. 718; judgment reversed ([1899] A. C. 589).

Calgary and Edmonton Railway Co. v. The King; Calgary and Edmonton Land Co. v. The King (33 Can. S. C. R. 673), leave to appeal granted, July, 1903 (41 Can. Gaz. 400).

Canada Atlantic Railway Co. v. City of Ottawa (12 Can. S. C. R. 365), leave to appeal granted but not prosecuted (11 Can. Gaz. 394).

Canada Atlantic Railway Co. v. Township of Cambridge (15 Can. S. C. R. 219), leave to appeal granted but not prosecuted (11 Can. Gaz. 394).

Canada Central Railway Co. v. Murray (8 Can. S. C. R. 313), leave to appeal refused (8 App. Cas. 574).

Canada Sugar Refining Co. v. The Queen (27 Can. S. C. R. 395), judgment affirmed ([1898] A. C. 735).

Canadian Pacific Railway Co. v. Township of Chatham (25 Can. S. C. R. 608), leave to appeal refused.

Canadian Pacific Railway Co. v. Robinson (19 Can. S. C. R. 292), judgment reversed ([1892] A. C. 481; 61 L. J. P. C. 79; 67 L. T. 505).

Carroll v. The Erie County Natural Gas and Fuel Co. (29 Can. S. C. R. 591), leave to appeal refused (34 Can. Gaz. 272).

Central Vermont Railway Co. v. Town of St. Johns (14 Can. S. C. R. 288), judgment affirmed (14 App. Cas. 590; 59 L. J. P. C. 15; 61 L. T. 441).

Charlebois v. Delap (26 Can. S. C. R. 221), consent judgment reversed (31 Can. Gaz. 11). See [1899] A. C. 114.

Chevrier v. The Queen (4 Can. S. C. R. 1), leave to appeal refused.

Citizens' Insurance Co. v. Parsons (4 Can. S. C. R. 215), judgment affirmed as to the validity of the Ontario Insurance Act, and, otherwise, reversed (7 App. Cas. 96; 51 L. J. P. C. 11; 45 L. T. 721).

Clergue v. Murray (32 Can. S. C. R. 450), leave to appeal refused. In refusing leave to appeal their Lordships of the Judicial Committee followed Prince v. Gagnon (8 App. Cas. 103). See ([1903] A. C. 521).

Common School Fund, In re, Province of Quebec v. Province of Ontario and the Dominion of Canada (31 Can. S. C. R. 516), judgment reversed ([1903] A. C. 39).

Consumers' Cordage Co. v. Connolly (31 Can. S. C. R. 244), judgment discharged and new trial granted on special terms as to deposit of sum in dispute, and as to costs, otherwise, the judgment of the Court of Review of 13th February, 1900, affirming the trial court judgment of 31st May, 1899, to stand and defendants to pay all costs in the trial court; each party to bear their own costs on the appeal to the Privy Council (41 Can. Gaz. 440).

Cooper v. Molsons Bank (26 Can. S. C. R. 611), judgment affirmed (30 Can. Gaz. 561).

D.

Davies v. McMillan (Cout. Dig. 662), appeal dismissed for want of prosecution.

Dominion Cartridge Co. v. Cairns (28 Can. S. C. R. 361), leave to appeal refused.

Dominion Cartridge Co. v. McArthur (31 Can. S. C. R. 392), leave to appeal *in forma pauperis* granted, August, 1902.

Duggan v. London and Canadian Loan and Agency Co. (20 Can. S. C. R. 481), judgment reversed ([1893] A. C. 506; 63 L. J. P. C. 14).

Domoulin v. Langtry (13 Can. S. C. R. 258), leave to appeal refused (57 L. T. 317).

Dupuy v. Ducondu (6 Can. S. C. R. 425), judgment reversed (9 App. Cas. 150; 53 L. J. P. C. 12; 50 L. T. 129).

E.

Ecclesiastiques de St. Sulpice v. City of Montreal (16 Can. S. C. R. 399), leave to appeal refused (14 App. Cas. 660; 59 L. J. P. C. 20; 61 L. T. 653).

Educational Statutes in Manitoba, *In re* (22 Can. S. C. R. 577), judgment varied ([1895] A. C. 202).

Exchange Bank of Canada v. La Banque du Peuple (Cass. Dig., 2 ed., 79; 23 C. L. J. 391), leave to appeal refused (9 Can. Gaz. 394).

F.

Ferguson v. Troop (17 Can. S. C. R. 527), leave to appeal refused.

Fisheries Case (26 Can. S. C. R. 444), judgment varied ([1898] A. C. 700).

Forsyth v. Bury (15 Can. S. C. R. 543), leave to appeal refused (11 Can. Gaz. 418).

Fredericton, City of, v. The Queen (3 Can. S. C. R. 505). In a case from New Brunswick (*Russell v. The Queen*) in which the same questions were in issue, the judgment was affirmed (7 App. Cas. 829).

G.

Gagnon v. Prince (7 Can. S. C. R. 386), leave to appeal was refused (8 App. Cas. 103). Followed in *Clergue v. Murray*, ([1903] A. C. 521), *ante*.

General Engineering Co. v. Dominion Cotton Mills Co. (31 Can. S. C. R. 75), judgment reversed ([1902] A. C. 570).

Gerow v. British American Assurance Co. (16 Can. S. C. R. 524), leave to appeal refused.

Glengarry Election Case; *Purcell v. Kennedy* (14 Can. S. C. R. 453), leave to appeal refused (59 L. T. 279; 4 Times L. R. 664).

Grand Trunk Railway Co. v. Beaver (22 Can. S. C. R. 498), leave to appeal refused (23 Can. Gaz. 320).

Grand Trunk Railway Co. v. Beckett (16 Can. S. C. R. 713), leave to appeal refused (9 Can. Gaz. 394).

Grand Trunk Railway Co. v. McMillan (16 Can. S. C. R. 543), leave to appeal refused (*Wheeler P. C. Law* 982).

Grand Trunk Railway Co. v. Washington (28 Can. S. C. R. 184), judgment affirmed ([1899] A. C. 275). See 30 Can. Gaz. 543; 31 Can. Gaz. 343, 415; 32 Can. Gaz. 514.

Great Western Insurance Co. v. Jordan (14 Can. S. C. R. 734), leave to appeal was granted, but the appeal was never prosecuted. See 8 Can. Gaz. 464.

H.

Halifax and Cape Breton Coal and Railway Co. v. Gregory (Cass. Dig., 2 ed., 727), leave to appeal refused. See 11 App. Cas. 229; 55 L. J. P. C. 40; 55 L. T. 270; *sub nom.* Attorney-General for Nova Scotia v. Gregory.

Hamel v. Leduc; Nicolet Election Case (29 Can. S. C. R. 178), leave to appeal refused.

Hanson v. Village of Grand 'Mère (33 Can. S. C. R. 50), leave for an appeal was granted in May, 1903.

Hayes v. Elmsley (23 Can. S. C. R. 623), leave to appeal refused.

Hobbs v. Esquimaux and Nanaimo Railway Co. (29 Can. S. C. R. 450), appeal dismissed by consent upon settlement between the parties, February, 1900.

Hoggan v. Esquimaux and Nanaimo Railway Co. (20 Can. S. C. R. 235), judgment affirmed, ([1894] A. C. 429).

House of Commons of Canada, *In re* Representation of Prince Edward Island (33 Can. S. C. R. 594), leave to appeal granted 11th November, 1903.

Huson v. Township of South Norwich (24 Can. S. C. R. 145), judgment affirmed. *Sub nom.* Attorney-General for Ontario v. Attorney-General for Canada *et al.* See "Prohibitory Liquor Acts," *infra*, and (1896) A. C. 348.

I.

Imperial Bank of Canada v. The Bank of Hamilton (31 Can. S. C. R. 344), judgment affirmed ([1903] A. C. 49).

Indian Claims Case (25 Can. S. C. R. 434), judgment affirmed (28 Can. Gaz. 272).

J.

Johnston v. Trustees of St. Andrews Church, (1 Can. S. C. R. 235), leave to appeal refused (3 App. Cas. 159; 37 L. T. 556; 26 W. R. 359).

K.

Kearney v. Creelman (14 Can. S. C. R. 33), leave to appeal refused (8 Can. Gaz. 154).

King, The, v. Algoma Central Railway Co. (32 Can. S. C. R. 277), judgment affirmed ([1903] A. C. 478).

King, The, v. Carmack (32 Can. S. C. R. 586), on 4th March, 1903, leave was granted for an appeal and a cross-appeal; on 2nd December, 1903, the appeal was dismissed (40 Can. Gaz. 569; 42 Can. Gaz. 256).

King, The, v. Chapelle (32 Can. S. C. R. 586), on 4th March, 1903, leave was granted for an appeal and a cross-appeal; on 2nd December, 1903, the appeal was dismissed (40 Can. Gaz. 569; 42 Can. Gaz. 256).

King, The, v. Tweed and Woog (32 Can. S. C. R. 586), on 4th March, 1903, leave was granted for an appeal and a cross-appeal; on 2nd December, 1903, the appeal was dismissed (40 Can. Gaz. 569; 42 Can. Gaz. 256).

L.

Lamoureux v. Molleur (Cass. Dig., 2 ed., 71), leave to appeal refused (8 Can. Gaz. 154).

Lawless v. Sullivan (3 Can. S. C. R. 117), judgment reversed (6 App. Cas. 373; 50 L. J. P. C. 33; 44 L. T. 897; 29 W. R. 917).

Lemoine v. City of Montreal (23 Can. S. C. R. 390), leave to appeal refused.

Lewin v. Wilson (9 Can. S. C. R. 637), judgment reversed (11 App. Cas. 639; 55 L. J. P. C. 75; 55 L. T. 410; 2 Times L. R. 741).

Liquor License Act, 1883, In re (Cass. Dig., 2 ed., 509), judgment holding Act valid as to wholesale licenses reversed (6 Can. Gaz. 152, 264).

London Assurance Corporation v. Great Northern Transit Co. (29 Can. S. C. R. 577), leave to appeal refused, July, 1899.

London and Canadian Loan and Agency Co. v. Duggan (20 Can. S. C. R. 481), judgment reversed ([1893] A. C. 506; 63 L. J. P. C. 14).

Mc.

McAllister v. Forsythe (12 Can. S. C. R. 1), leave to appeal refused.

McKelvey v. The Le Roi Mining Co. (32 Can. S. C. R. 664), leave to appeal refused, February, 1903.

McLaren v. Caldwell (8 Can. S. C. R. 435), judgment reversed (9 App. Cas. 392; 53 L. J. P. C. 33; 51 L. T. 370).

McLean v. Stewart (25 Can. S. C. R. 225), judgment varied.

McQueen v. The Queen (16 Can. S. C. R. 1), leave to appeal refused (11 Can. Gaz. 368).

M.

Mackenzie v. The Building and Loan Association (28 Can. S. C. R. 407), leave to appeal refused.

Manitoba Educational Statutes, In re (22 Can. S. C. R. 577), judgment varied ([1895] A. C. 202).

Manufacturers' Life Insurance Co. v. Anctil (28 Can. S. C. R. 103), judgment affirmed (33 Can. Gaz. 419, 442).

Maritime Bank v. Receiver-General of New Brunswick (20 Can. S. C. R. 695), judgment affirmed ([1892] A. C. 437; 61 L. J. P. C. 75; 67 L. T. 126).

Maritime Bank v. The Queen (17 Can. S. C. R. 657), leave to appeal refused (15 Can. Gaz. 394).

Martley v. Carson (20 Can. S. C. R. 634), appeal dismissed on preliminary objections without deciding on the merits (14 Can. Gaz. 270, *sub nom.* Clark v. Carson).

Meloche v. Simpson (29 Can. S. C. R. 375), leave to appeal refused, May, 1899.

Mercer v. The Attorney-General for Ontario (5 Can. S. C. R. 538), judgment reversed (8 App. Cas. 767; 52 L. J. P. C. 84; 49 L. T. 312).

Moffatt v. The Merchants Bank of Canada (11 Can. S. C. R. 46), leave to appeal refused (6 Can. Gaz. 153).

Montmorency Election Case; Valin v. Langlois (3 Can. S. C. R. 1), leave to appeal refused (5 App. Cas. 115; 49 L. J. P. C. 37; 41 L. T. 662).

Montreal, City of, v. Bélanger (30 Can. S. C. R. 574), leave to appeal refused, March, 1901.

Montreal, City of, v. Cadieux (29 S. C. R. 616), appeal dismissed for want of prosecution, March, 1901.

Montreal, City of, v. Ste. Cunégonde (32 Can. S. C. R. 135). An application by the Town of Westmount, called into the case as warrantor of the City of Ste. Cunégonde, for leave to appeal from the judgment of the Supreme Court of Canada was refused, July, 1902.

Moore v. The Connecticut Mutual Insurance Co. (6 Can. S. C. R. 634), judgment affirmed (6 App. Cas. 644).

N.

Nasmith v. Manning (5 Can. S. C. R. 417), leave to appeal was granted but the appeal was not prosecuted.

Nicolet Election Case (29 Can. S. C. R. 178), leave to appeal refused.

North Shore Railway Co. v. The City of Quebec (27 Can. S. C. R. 102), judgment affirmed (31 Can. Gaz. 11).

North-West Electric Co. v. Walsh (29 Can. S. C. R. 33), leave to appeal refused.

Nova Scotia, Attorney-General for the Province of, v. The Attorney-General for the Dominion of Canada (26 Can. S. C. R. 444), judgment varied ([1898] A. C. 700).

O.

O'Gara v. Union Bank of Canada (22 Can. S. C. R. 404), appeal dismissed for want of prosecution (24 Can. Gaz. 224).

Ontario Mining Co. v. Seybold (32 Can. S. C. R. 1), judgment affirmed ([1903] A. C. 73).

Ontario, Attorneys-General for the Province of, and the Province of Quebec v. The Attorney-General for the Dominion of Canada (26 Can. S. C. R. 444), judgment varied ([1898] A. C. 700).

See Common School Fund (31 Can. S. C. R. 516; [1903] A. C. 39), and Indian Claims (25 Can. S. C. R. 434) *ubi supra*.

P.

Parker v. Montreal City Passenger Railway Co. (Cass. Dig., 2 ed., 731; 7 Legal News 194), leave to appeal refused (6 Can. Gaz. 174).

Petrolea, Town of, v. Johnston (not reported, judgment of Supreme Court of Canada delivered, 22nd February, 1899), leave to appeal refused (30 Can. Gaz. 585).

Pion v. North Shore Railway Co. (14 Can. S. C. R. 677), judgment affirmed (14 App. Cas. 612; 59 L. J. P. C. 25; 61 L. T. 525).

Pontiac, County of, v. Ross (17 Can. S. C. R. 406), leave to appeal refused.

Prince Edward Island, In re, Representation in the House of Commons (33 Can. S. C. R. 594), leave to appeal granted, 11th November, 1903.

Prohibitory Liquor Laws, *In re* (24 Can. S. C. R. 145), judgment reversed ([1896] A. C. 348).

Purcell v. Kennedy; Glengarry Election Case (14 Can. S. C. R. 453), leave to appeal refused (59 L. T. 279; 4 Times L. R. 664).

Q.

Quebec, City of, v. North Shore Railway Co. (27 Can. S. C. R. 102); judgment affirmed (31 Can. Gaz. 11).

Quebec, City of, v. The Quebec Central Railway Co. (10 Can. S. C. R. 563), leave to appeal granted, but the appeal was not prosecuted.

Quebec, Attorneys-General for the Province of, and the Province of Ontario v. The Attorney-General for the Dominion of Canada (26 Can. S. C. R. 444), judgment varied ([1898] A. C. 700).

Quebec, Province of, v. The Province of Ontario and Dominion of Canada; *In re* Common School Fund (31 Can. S. C. R. 516), judgment reversed ([1903] A. C. 39).

See Common School Fund (31 Can. S. C. R. 516; [1903] A. C. 39) and Indian Claims (25 Can. S. C. R. 434) *ubi supra*.

Queen, The, v. Belleau (7 Can. S. C. R. 53), judgment reversed (7 App. Cas. 473.)

Queen, The, v. Doutre (6 Can. S. C. R. 342), judgment affirmed (9 App. Cas. 745; 53 L. J. P. C. 85; 51 L. T. 669).

Queen, The, v. Yule (30 Can. S. C. R. 24), leave to appeal refused (34 Can. Gaz. 272).

Queen Insurance Co. v. Parsons (4 Can. S. C. R. 215), judgment affirmed as to the validity of the Ontario Insurance Act, otherwise reversed (7 App. Cas. 96; 51 L. J. P. C. 11; 45 L. T. 721).

R.

Raleigh, Township of, v. Williams (21 Can. S. C. R. 103), judgment reversed ([1893] A. C. 540; 63 L. J. P. C. 1; 69 L. T. 506).

Reed v. Attorney-General for Quebec (Mousseau) (8 Can. S. C. R. 408), judgment affirmed (10 App. Cas. 141; 54 L. J. P. C. 12; 52 L. T. 393; 33 W. R. 618).

Representation in the House of Commons of Canada, *In re*, Prince Edward Island (33 Can. S. C. R. 594), leave to appeal granted, 11th November, 1903.

Ross v. Hurteau (18 Can. S. C. R. 713), leave to appeal refused.

Ross v. The Queen (25 Can. S. C. R. 564), judgment affirmed.

Russell v. Lefrancois (18 Can. S. C. R. 335), leave to appeal refused.

S.

St. Catharines Milling Co. v. The Queen (13 Can. S. C. R. 577), judgment affirmed (14 App. Cas. 46; 58 L. J. P. C. 54; 60 L. T. 197; 5 Times L. R. 125).

St. Lawrence and Ottawa Railway Co. v. Lett (11 Can. S. C. R. 422), leave to appeal refused (6 Can. Gaz. 583).

Saint Louis v. The Queen (25 Can. S. C. R. 649), leave to appeal refused.

School Fund and Lands, Province of Quebec v. Province of Ontario and Dominion of Canada (31 Can. S. C. R. 516), judgment reversed ([1903] A. C. 39).

Sewell v. British Columbia Towing Co. (9 Can. S. C. R. 527), leave to appeal was granted, but the appeal was never prosecuted.

Shields v. Leacock (Cass. Dig., 2 ed., 604), leave to appeal was granted, but the appeal was never prosecuted.

Sinclair v. Preston (31 Can. S. C. R. 408), leave to appeal refused.

Smith v. Goldie (9 Can. S. C. R. 46), leave to appeal refused.

Sweeny v. Bank of Montreal (12 Can. S. C. R. 661), judgment affirmed (12 App. Cas. 617; 56 L. J. P. C. 79; 56 L. T. 897).

T.

"Thrasher," The, Sewell v. British Columbia Towing Co. (9 Can. S. C. R. 527), leave to appeal was granted, but the appeal was never prosecuted.

Toronto, City of, v. Toronto Railway Co. (27 Can. S. C. R. 640), leave to appeal refused.

Toronto, City of, v. Virgo (22 Can. S. C. R. 447), judgment affirmed ([1896] A. C. 88).

Toronto Street Railway Co. v. The Queen (25 Can. S. C. R. 24), judgment reversed ([1896] A. C. 551).

U.

Union Bank of Canada v. O'Gara (22 Can. S. C. R. 404), appeal dismissed for want of prosecution (24 Can. Gaz. 224).

V.

Valin v. Langlois; Montmorency Election Case (3 Can. S. C. R. 1), leave to appeal refused (5 App. Cas. 115; 49 L. J. P. C. 37; 41 L. T. 662).

Vancouver, City of, v. Canadian Pacific Railway Co. (23 Can. S. C. R. 1), leave to appeal refused (23 Can. Gaz. 360).

W.

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West v. Corporation of Parkdale (12 Can. S. C. R. 250), judgment affirmed (12 App. Cas. 602; 56 L. J. P. C. 66; 57 L. T. 602).

White v. City of Montreal (29 Can. S. C. R. 677), leave to appeal refused, May, 1900.

Williams v. Township of Raleigh (21 Can. S. C. R. 103), judgment reversed ([1893] A. C. 540; 63 L. J. P. C. 1; 69 L. T. 506).

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